Apprehended Violence Orders

Costs

Mario Licha - Barrister
Clarence Chambers
Level 11, 65 York Street
Sydney NSW 2000
Telephone: **0402 968 997**
Email: **info@guiltynotguilty.com.au**

Introduction

In New South Wales all applications for Apprehended Violence orders are made under the Crimes (Domestic and Personal Violence) Act 2007 and the Local Court Practice Note No 2 of 2012.

Statutory provisions about AVO's

The courts power to award costs in AVO proceedings is found in section 99 Crimes (Domestic and Personal Violence) Act 2007 and the Criminal Procedure Act 1986, Chapter 4, part 2, Division 4.

Crimes (Domestic and Personal Violence) Act 2007

Section 99

> (1) A court may, in apprehended violence order proceedings, award costs to the applicant for the order or decision concerned or the defendant in accordance with this section.
>
> (2) Costs are to be determined in accordance with Division 4 of Part 2 of Chapter 4 of the Criminal Procedure Act 1986.
>
> (3) A court is not to award costs against an applicant who is the person for whose protection an apprehended domestic violence order is sought unless satisfied that the application was frivolous or vexatious.
>
> (4) A court is not to award costs against a police officer who makes an application unless satisfied that the police officer made the application knowing it contained matter that was false or misleading in a material particular.
>
> (5) Subsections (3) and (4) have effect despite any other Act or law.

Criminal Procedure Act 1986

Section 212 When costs may be awarded

> (1) A court may award costs in criminal proceedings only in accordance with this Act.
>
> (2) This Act does not affect the payment of costs under the *Costs in Criminal Cases Act 1967*. The *Costs in Criminal Cases Act 1967* contains procedures by which an accused person may obtain payment of costs from Government funds after acquittal or discharge or the quashing of a conviction.

Section 213 When professional costs may be awarded to accused persons

(1) A court may at the end of summary proceedings order that the prosecutor pay professional costs to the registrar of the court, for payment to the accused person, if the matter is dismissed or withdrawn.

(2) The amount of professional costs is to be the amount that the Magistrate considers to be just and reasonable.

(3) Without limiting the operation of subsection (1), a court may order that the prosecutor in summary proceedings pay professional costs if the matter is dismissed because:

(a) the prosecutor fails to appear or both the prosecutor and the accused person fail to appear, or

(b) the matter is withdrawn or the proceedings are for any reason invalid.

(4) (Repealed)

(5) The order must specify the amount of professional costs payable.

Section 214 Limit on award of professional costs to accused person against prosecutor acting in public capacity

(1) Professional costs are not to be awarded in favour of an accused person in summary proceedings unless the court is satisfied as to any one or more of the following:

(a) that the investigation into the alleged offence was conducted in an unreasonable or improper manner,

(b) that the proceedings were initiated without reasonable cause or in bad faith or were conducted by the prosecutor in an improper manner,

(c) that the prosecutor unreasonably failed to investigate (or to investigate properly) any relevant matter of which it was aware or ought reasonably to have been aware and which suggested either that the accused person might not be guilty or that, for any other reason, the proceedings should not have been brought,

(d) that, because of other exceptional circumstances relating to the conduct of the proceedings by the prosecutor, it is just and reasonable to award professional costs.

(2) This section does not apply to the awarding of costs against a prosecutor acting in a private capacity.

…

Section 215 When costs may be awarded to prosecutor

(1) A court may at the end of summary proceedings order that the accused person pay the following costs to the registrar of the court, for payment to the prosecutor, if the accused person is convicted or an order is made against the accused person:

(a) such professional costs as the court considers just and reasonable,

(b) court costs, to be paid to the registrar for payment to the prosecutor if the costs have been paid by the prosecutor or, if they have not been so paid, to be paid to the registrar of the court.

…

(2) The amount that may be awarded under subsection (1) (b) for court costs is:

(a) the filing fee for a court attendance notice, or

(b) such other amount as the court considers to be just and reasonable in the circumstances of the case.

(3) The order must specify the amount of costs payable.

(4) For the purposes of this section, an accused person is taken to have been convicted if an order is made under section 10 of the *Crimes (Sentencing Procedure) Act 1999*. The order for costs may be in the order under that section.

(5) This section applies to all summary proceedings, including orders made in proceedings conducted in the absence of the accused person.

Section 216 Costs on adjournment

(1) A court may in any summary proceedings, at its discretion or on the application of a party, order that one party pay costs if the matter is adjourned.

(2) An order may be made only if the court is satisfied that the other party has incurred additional costs because of the unreasonable conduct or delays of the party against whom the order is made.

(3) The order must specify the amount of costs payable or may provide for the determination of the amount at the end of the proceedings.

(4) An order may be made whatever the result of the proceedings.

Cases

1. **Constable Redman v Willcocks [2010] NSWSC 1268;**
2. **Cunningham v Cunningham [2012] NSWSC 849;**
3. **Cunningham v Cunningham (No 2) [2012] NSWSC 954;**
4. **Mahmoud v Sutherland [2012] NSWCA 306;**
5. **Mahmoud v Sutherland [2013] NSWDC 140 (7 June 2013);**
6. **Ogden Industries Pty Ltd v Lucas (1968) 118 CLR 32; and**
7. **Babaniaris v Lutony Fashions Pty Ltd [1987] HCA 19.**

Constable Redman v Willcocks [2010] NSWSC 1268

The factual matrix of this case are stated at para [2] and [3] per Davies J;

[2] The hearing of the matter commenced before her Honour Magistrate Ellis in the Local Court at Parramatta on 16 September 2009. It was adjourned part heard after the person in need of protection (PINOP) gave some evidence.

[3] The PINOP was due to continue her evidence on 27 January 2010. On that day the police officer in charge advised the Magistrate that the PINOP would not be attending and it was sought to withdraw the matter. The Defendant sought costs on the basis that he had made enquiries of the Prosecutor from early December to ascertain if the matter was continuing. This was because the Defendant had been told by the PINOP (his wife or former wife) that she did not intend to proceed. The Defendant was told he would be contacted with information about whether the matter was proceeding. The first time the Defendant ascertained that it was not proceeding was when the Police Prosecutor sought to withdraw the complaint on 27 January 2010.

…

On the issue of costs Davies J held;

[21] In my opinion, the proper operation of s 99 in harmony with Division 4 is as follows:

> (a) The Court may not award costs against a police officer making an application in relation to the application generally and its determination unless the Court is satisfied that the police officer made the application knowing that it contained matter that was false and misleading in a material particular.
>
> (b) That restriction does not prevent the Court being able to
> make a costs order against a police officer in relation to procedural misconduct such as occurred in the present case, such power being found in s 214(3)(b) and s 214(1)(d).

…

[36] The sub-section was never intended to provide an immunity, and does not provide an immunity, to a police officer except for the bringing of the proceedings. It was not intended to protect, nor does it protect, the police officer from his conduct of the proceedings. If that was so, for example, inexcusable breaches of case management orders would not be able to be visited with costs orders despite the clear words of s 214(1)(b) or (d).

[37] Fifthly, s 99(4) twice refers to the making of the application by the police officer in the context of trying to harmonise somewhat inconsistent legislative provisions. This is a further small indication that the restriction in that sub-section is directed to the bringing of the application and not the way it is subsequently conducted.

It should be noted that Button J agreed with Davies J reasoning, Cunningham v Cunningham [2012] NSWSC 849 at [51]

Cunningham v Cunningham [2012] NSWSC 849

47 Section 99(3) is an unusual provision that, on its face, displaces the general principle of costs following the result in non-criminal matters.

48 In accordance with that subsection, it is only in cases in which a magistrate is affirmatively satisfied that the application was frivolous or vexatious that costs can be ordered against an applicant who, as here, is the person whose protection is sought pursuant to the application. That is a high hurdle for any defendant to an ADVO to clear. It is apparent that there will be very many cases in which an application for an ADVO is dismissed but no costs ordered in favour of a successful defendant, as a result of the operation of the subsection.

52 However, in contrast to this case, that case was to do with the question of available costs when the applicant is a police officer (who had mishandled the conduct of the application in court), not a person seeking protection as here. In other words, that case dealt with the interaction between s 99(2) and s 99(4), not s 99(2) and s 99(3).

53 Furthermore, at [37] Davies J noted the fact that s 99(4) focuses twice upon the making of the application by the police officer. His Honour regarded that as a *"small indication that the restriction in that sub-section is directed to the bringing of the application and not the way it is subsequently conducted."* And yet it is noteworthy that s 99(3) is not expressed in the same terms, and speaks only of "the application". That provides some support for the proposition that that distinction between the bringing of an application and the conduct of the application drawn by Davies J is not able to be drawn in a situation such as this.

58 One approach is to interpret s 99(3) as applying only to the original application made by a person in need of protection, and not to the application as a whole, thereby permitting s 99(2), and the provisions that apply to costs in summary criminal matters generally, to apply to the course of any such application in court. The alternative approach is to regard s 99(3) as being

the dominant provision over s 99(2), thereby shielding persons in need of protection who are applicants from costs orders, unless the high hurdle in s 99(3) is cleared by a defendant. It seems to me that the latter interpretation is more consistent with the underlying purpose of the Act, and the context in which s 99 appears.

59 In this Court, neither party submitted to me that the Magistrate was in error in confining his Honour's consideration to s 99(3), and not considering the possible application of s 99(2). Nor was any such submission made to the Magistrate by the solicitor then appearing for the plaintiff. In light of the factual differences between this case and *Constable Redman v Willcocks*, the differences in wording between s 99(3) and s 99(4), general principles of statutory construction, and the position of the parties, I proceed on the basis that s 99(2) does not apply in the circumstances of this case.

62 In this matter, there was no evidence before me of any procedural mishandling on the part of the defendant of the kind that the applicant police officer committed in *Constable Redman v Willcocks*. I certainly do not regard the continuation of the matter after the "without prejudice" letter was sent as falling into that category. As a result, it is seriously open to doubt whether, even if the Magistrate had applied the Division under consideration, his Honour would or should have made a costs order of the kind made in *Constable Redman v Willcocks,* or indeed any costs order in favour of the plaintiff. - 21 -

63 Separately, I do not consider that I need to engage in lengthy analysis of the meaning of the phrase *"frivolous or vexatious"*. Those words are well known to the law and import a high degree of inappropriateness in a cause of action, approaching an abuse of process. I am content to proceed on the basis of definitions derived from *Bullen & Leake & Jacob's Precedents of Pleadings*, 12th ed (1975) Sweet and Maxwell at p 145, and provided in Peter Taylor et al, *Ritchie's Uniform Civil Procedure* NSW (2005) LexisNexis Butterworths at [4.15.10] - [4.15.15]: *"A matter is frivolous when it is without substance or groundless or fanciful ... A matter is vexatious when it lacks bona fides and is hopeless and tends to cause the opponent unnecessary anxiety, trouble and expense"*.

65 It is noteworthy that the test contained in s 99(3) confines itself to *"the application"*. The plaintiff sought to rely on earlier applications for ADVOs said to have been made by the defendant, and indeed the whole history of the matter. But it seems to me that the legislation confines a magistrate to making a judgment about the application that has been determined, not other matters.

67 In light of the findings of fact of the Magistrate at the end of the hearing, I do not consider that it was erroneous for the Magistrate not to find that the application was frivolous or vexatious. It is true that an important part of the original allegation was ultimately accepted to be unfounded. But the Magistrate found that the plaintiff had indeed pushed the defendant on one occasion, recounted the evidence of the defendant that she continued to have fears, and referred negatively more than once to the behaviour of the plaintiff. The "without prejudice" letter did not demonstrate that the application should not have proceeded at all. It merely showed a readiness to settle. In all of the circumstances, I do not consider that the Magistrate was somehow bound to find that the application was frivolous or vexatious. Nor, on the facts as found at the end of the hearing, do I come to that affirmative conclusion.

74 However, it seems to me that, in light of the absence from Part 5 of the *Crimes (Appeal and Review) Act* of any analogue of s 28(3) or s 49(4) of that Act, the better view is that I do

not have the power to make such an order with regard to this appeal, in which leave was not required to impugn the order on a question of law, and leave was granted with regard to any question of fact. I say that having considered s 52 and s 72(b) of the *Crimes (Appeal and Review) Act*, and r 14 of Part 51B of the Supreme Court Rules. Furthermore, because I have discussed prerogative relief only for abundant caution, and not due to any submission of the plaintiff, I do not consider that any costs order should be made against him in that regard.

Cunningham v Cunningham (No 2) [2012] NSWSC 954

[13] However, counsel for the defendant has invited my attention to s 23 of the *Supreme Court Act* 1970. That section reads *"[t]he Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales."* He also invited my attention to two recent decisions of single judges of this Court: *ASIC v Sigalla (No. 6)* [2012] NSWSC 83 and *Ronowska v Kus (No 2)* [2012] NSWSC 817. In particular, in *ASIC v Sigalla (No. 6),* White J said at [31]:

> "[i]t is necessary for the administration of justice that the court have power to make orders for costs in cases such as the present where, possibly because of legislative inadvertence, there is a lacuna. In my view, s 23 provides the necessary power to order costs by analogy to the Court of Chancery's inherent jurisdiction to order costs, including in contempt cases, in matters within that court's jurisdiction."
>
> Pembroke J followed that decision in *Ronowska v Kus (No 2).* At [88], his Honour said: "nonetheless, as White J held in *ASIC v Sigalla (No 6)* at [31] a power to order costs exists under the Supreme Court's inherent jurisdiction, preserved by Section 23 of the *Supreme Court Act* 1970."

[14]The question arises whether the reasoning of White J, to the extent that it is founded to some degree on the history of
the inherent power of the Court of Chancery to order costs, is applicable to this appeal pursuant to the Act.

[15] At [32], his Honour said:

> "As noted at para [23] above, I should correct what I said in *ASIC v Sigalla (No. 4)* at [48]. On further consideration I would accept that in *Sexton*, the court had inherent jurisdiction pursuant to s 23 of the *Supreme Court Act* to make the order for costs that was made in that case, notwithstanding that it was not a jurisdiction that would have been exercisable in the Court of Chancery and notwithstanding that the courts of common law did not have such inherent jurisdiction. (The allegation in *Sexton* was contempt of court by interfering in the administration of justice by publicity that might tend to prejudice the conduct of a criminal trial.)".

[16] I interpret that paragraph as indicating that the approach of his Honour to s 23 is not limited to proceedings that were traditionally dealt with in that Court.

[17] It is true that the two decisions to which I have referred were with regard to contempt proceedings in the Equity Division of this Court. However, contrary to the submission of the

plaintiff, that distinction seems to me to be immaterial to this question. I consider that the general principle enunciated in those proceedings with regard to the breadth of the operation of s 23 applies in these proceedings.

[18] In short, I respectfully adopt the reasoning of White J and Pembroke J. Accordingly, I determine that I have power to order costs with regard to the proceedings brought by the plaintiff with regard to Part 5 of the Act, even despite the lacuna in the Act.

[19] In accordance with the usual rule of costs following the event, I order

(1) that the plaintiff pay the costs of the defendant in this Court.

Mahmoud V Sutherland [2012] NSWCA 306

1 Mr Sutherland's solicitor then sought costs in the sum of $4,547.95. Mr Mahmoud also asked for costs. The decision of the magistrate on the question of costs was as follows:

> "There are two applications for costs in this matter. The application for costs is made by the applicant and there is an application for costs made by the defendant. As a general rule in proceedings of this type, costs ought follow the cause. That is, in this case, because the applicant refused to give his name and address when directed to do so, he said he had had enough, that he was going to appeal the decision.
>
> I indicated to him that because he was not answering the questions, his application was dismissed. That means that the defendant has, for all intents and purpose, won today's proceedings and costs ought follow the cause in that way. It appears to me that in terms of the legislation, costs in these matters must be for a costs order to be made in an apprehended personal violence order then it is simply a question of assessing at what cause in and whether there is any rule of reason to vary the order that would ordinarily flow. That is, costs follow the cause.
>
> In this case, clearly, the fact that Mr Mahmoud is not prepared to give his date of birth and was, to say the least, unhelpful in giving his middle name so that he could even be identified properly, indicates to me that there is no reason to vary the ordinary course of events which is the costs would follow the cause. Given that the matter was listed for hearing and the time now is ten past 3; that there was two witnesses for the defence here; that there has been previous argument about the subpoenas; and that the matter has been listed for hearing, in my view preparation for a hearing of a matter of this type, the costs that are being sought are fair and reasonable.
>
> In those circumstances I am making a costs order in the sum of $4,547.95 by the applicant to the defendant within twenty-one days. The papers are marked "The

> application is dismissed". The subpoenaed documents I am now going to reseal and they may be sent back to the police service by the registry."
>
> the appeal."

Finally, the judge dealt with the matter of costs:

> "I also consider that the Magistrate made appropriate costs orders in the circumstances and for the reasonable brief reasons he outlined, including the conduct of the Appellant during the proceedings.
>
> In the circumstances of the nature of the complaint, the evidence led and the conduct of the proceedings by the Appellant, the Magistrate was justified in making the orders he did. Costs may be awarded against an unsuccessful applicant under s 99(3) of the *Crimes (Domestic and Personal Violence) Act* (NSW) 2007 on the basis that the complaint was made either frivolously or vexatiously. It is a clear inference that that is the basis on which the costs orders were made by Magistrate Heilpern.
>
> Further, the amount ordered seems to have been a proper quantification of the legal costs involved and are reasonable in the circumstances given what is apparent from the court file as to the history and nature of proceedings and the period of time Mr Mahmoud's application was in court as well as the desirability of Mr Sutherland having legal representation to answer the charges against him.
>
> Mr Mahmoud has sought costs for himself based on his own time spent in pursuing the matter. Given the outcome of the primary proceedings, the appeal and the amount ordered, I do not regard the application as having any merit."

The statutory provisions about apprehended violence orders

Central to the Local Court's power in apprehended violence order matters are s 19(1), s 20(1) and s 20(2) of the *Crimes (Domestic and Personal Violence) Act*. These provisions are as follows:

> "19(1) A court may, on application, make an apprehended personal violence order if it is satisfied on the balance of probabilities that a person has reasonable grounds to fear and in fact fears:
> (a) the commission by the other person of a personal violence offence against the person, or
> (b) the engagement of the other person in conduct in which the other person:
> (i) intimidates the person, or
> (ii) stalks the person,
> being conduct that, in the opinion of the court, is sufficient to warrant the making of the order."

> "20(1) In deciding whether or not to make an apprehended personal violence order, the court must consider the safety and protection of the person seeking the order and any child directly or indirectly affected by the conduct of the defendant alleged in the application for the order.
>
> (2) Without limiting subsection (1), in deciding whether or not to make an apprehended personal violence order, the court is to consider:
> (a) in the case of an order that would prohibit or restrict access to the defendant's residence-the effects and consequences on the safety and protection of the protected person and any children living or ordinarily living at the residence if an order prohibiting or restricting access to the residence is not made, and
> (b) any hardship that may be caused by making or not making the order, particularly to the protected person and any children, and
> (c) the accommodation needs of all relevant parties, in particular the protected person and any children, and
> (d) any other relevant matter."

The power of a Local Court to award costs in such a proceeding is created and regulated by s 99:

> "(1) A court may, in apprehended violence order proceedings, award costs to the applicant for the order or decision concerned or the defendant in accordance with this section.
>
> (2) Costs are to be determined in accordance with Division 4 of Part 2 of Chapter 4 of the Criminal Procedure Act 1986.
>
> (3) A court is not to award costs against an applicant who is the person for whose protection an apprehended domestic violence order is sought unless satisfied that the application was frivolous or vexatious.
>
> (4) A court is not to award costs against a police officer who makes an application unless satisfied that the police officer made the application knowing it contained matter that was false or misleading in a material particular.
>
> (5) Subsections (3) and (4) have effect despite any other Act or law."

The power to make an apprehended violence order is enlivened if the court is, on the balance of probabilities, "satisfied" in the way described in s 19(1). If (and only if) that state of satisfaction is reached, the question becomes whether the power should be exercised and the duty to consider the matters in s 20(1) and s 20(2) arises. The first and indispensable task of a magistrate, therefore, is to address the questions regarding reasonable grounds for fear by the applicant and whether fear in fact exists.

Section 99, dealing with costs, compels rejection of a claim for costs against the applicant for the apprehended violence order unless the court is satisfied in the way stated in s 99(3). A corollary is that a costs order can be made against that person only if the relevant state of

satisfaction as to the "frivolous or vexatious" criterion has been realised.

In each case (that is, under s 19(1) and under s 99(3)), therefore, the positive power to make an order is enlivened and available to be exercised only if the court has reached the specified state of satisfaction.

In the light of both the nature of the appeal and the statutory provisions set out at [21] above, it was the duty of the District Court to make an assessment of the Local Court's treatment of the pre-condition to which s 19(1) of the *Crimes (Domestic and Personal Violence) Act* directs the central attention of the court and, as to costs, to come to a conclusion on the "frivolous or vexatious" pre-condition imposed by s 99(3).

Uppermost in the District Court's approach to these matters should have been the question whether the Local Court had adequately identified and dealt with the several matters with which it was required to deal and what the correct outcome was in relation to those matters.

The reason concerning "the nature of the original complaint" no doubt refers to the complaint contained in Mr Mahmoud's written application (dated 24 December 2009) and referred to in his exchanges with the magistrate. The written grounds of complaint were as follows:

> "The Applicant and the Defendant are residents in a large Department of Housing Unit complex located at [address], Surry Hills.
>
> The Defendant is the Chairperson of a group calling itself the [address] Tenant Group. The Group purports to represent all of the tenants of the complex at [address], Surry Hills although only a minority of residents participate in the group. The Applicant has complained to the Department of Housing that the Group does not represent the majority of the tenants and the Defendant is hostile to the Applicant as a result of the Applicant's opposition to the group.
>
> On 18th December, 2009 at 1.40pm the Applicant entered an elevator on the 15th floor. The elevator descended to Level 14 where the Defendant entered the elevator. As the elevator descended the Defendant became agitated, stepped close to the Applicant, raised his right hand appeared to be about to hit the Applicant. The Defendant took objection to the Applicant standing on a piece of newspaper in the elevator, shouting repeatedly at the Applicant 'this is filthy vandal'. The Defendant appeared furious at the Applicant for no apparent reason. The Defendant hit the wall of the elevator several times with his fist in a violent and

> threatening manner towards the Applicant. The Defendant kicked the Applicant's trolley, shouted at the Applicant and said 'move that shit out of there'.
>
> The elevator arrived at the entry level of the building and the Applicant exited the elevator. The Defendant exited the elevator after the Applicant. The Applicant walked through a hallway towards the building exit/entry doors to the street. The Defendant followed behind, yelling at the Applicant all the way to the street.
>
> The Defendant's behaviour was threatening and intimating and the Applicant held genuine fears for his safety."

In the course of the hearing, the magistrate summarised this written complaint and obtained Mr Mahmoud's agreement with the accuracy of the summary. The magistrate then obtained from Mr Mahmoud brief particulars of subsequent events:

> (a) on 31 December 2009, when Mr Sutherland allegedly placed a bundle of newspapers outside the front door of Mr Mahmoud's flat and banged loudly on the door which, Mr Mahmoud said, caused him to be frightened;
>
> (b) on 18 March 2010, when Mr Sutherland again allegedly deposited a bundle of newspapers outside Mr Mahmoud's front door;
>
> (c) on 26 March 2010, when Mr Sutherland allegedly encountered Mr Mahmoud in the street, made a gesture with his fingers and nose suggesting a bad smell, said either "another smelly bastard" or "a bloody smelly bastard" and spat.

Taken in context, the brief statement of the magistrate as to his reasons shows, with sufficient certainty and clarity, in my view, that the central reason was that Mr Mahmoud's evidence in chief (which had concluded, in circumstances where he did not seek to call any other witness), particularly regarding the first incident - the one outlined in his original complaint – did not satisfy the magistrate that Mr Mahmoud had reasonable grounds to fear (and in fact feared) conduct involving physical violence on the part of Mr Sutherland of the kind described in s 19(1) of the *Crimes (Domestic and Personal Violence) Act*. The emphasis of the statutory provisions is upon conduct grounding physical fear or fear of physical violence going beyond rude, offensive and boorish behaviour. That being so and having regard to the evidence Mr Mahmoud gave (as well as the content of his written

application), the finding must be taken to have been that the necessary statutory pre-condition for the making of an order had not been satisfied, so that the need to consider the s 20(1) and s 20(2) matters did not arise.

In relation to the matter of costs, the magistrate gave a much fuller statement of reasons. Those reasons show that he applied a general principle that costs should follow the event and considered whether there was any reason to depart from that principle; but that the specific matter essential to the power to award costs against an applicant (that is, the matter of the "frivolous or vexatious" quality of the application) was not addressed at all.

The decision of the District Court - the substantive question

As to the s 19(1) pre-condition, the District Court summarised the content of Mr Mahmoud's original complaint and the evidence he gave in the Local Court about the three later incidents. The judge then referred to various other matters of complaint ventilated by Mr Mahmoud. None of these went to the questions of fact material to the s 19(1) pre-condition concerning fear of physical violence. They were all concerned with what Mr Mahmoud saw as bias, corruption, mistakes and mis-recordings none of which was in any way relevant to the eliciting and evaluation of facts going to the s 19(1) matter. Reference was made to the burden that lay on Mr Mahmoud to bring evidence to prove his case. The finding that Mr Mahmoud had not established the matters necessary to proof of his case was then announced.

The decision of Knox DCJ was, in these respects, unexceptionable, so far as possibility of jurisdictional error is concerned. His Honour obviously recognised the questions germane to the task he was to perform upon an appeal by way of rehearing. He addressed those questions by reference to the Local Court transcript that he had before him and gave his decision. There was no error within any of the possible categories of jurisdictional error.

The decision of the District Court - the costs question

In relation to costs, the District Court judge appreciated the point of which the magistrate was unaware or overlooked, that is, that, having regard to s 99, the power under s 99(1) to award costs was constrained by the section as a whole and that there was no power to award costs

against the applicant and in favour of the respondent except where the court was, in terms of s 99(3), satisfied that the application was frivolous or vexatious.

Knox DCJ drew "a clear inference" that a finding as to the frivolous or vexatious nature of Mr Mahmoud's application was the basis for the magistrate's decision on costs.

I am unable, with respect, to agree that any such inference was warranted when one has regard to the fairly comprehensive reasons the magistrate gave in relation to costs. He based himself wholly on the proposition that costs should follow the event unless, for some good reason, the court sees fit to depart from that rule. There was reference to factors concerning Mr Mahmoud's conduct in relation to the proceedings that were seen as material to any decision to depart from the general rule. But none of these touched upon aspects that could characterise the application as frivolous or vexatious. The Local Court simply did not turn its mind to the pre-condition imposed by s 99(3). Nor, of course, did it articulate any finding on that matter.

But it is the decision of the District Court that is now under review, not the decision of the Local Court.

Upon the appeal by way of rehearing, it was for the District Court judge to approach the costs question on the basis of the evidence that had been elicited in the Local Court. As I have said, the judge referred to the requirement of s 99(3). In order for him to allow the magistrate's costs order to stand, it was necessary for the judge to be satisfied that Mr Mahmoud's substantive application was frivolous or vexatious. In terms of the section, that state of satisfaction was essential to the existence of any power to order that Mr Mahmoud pay costs. The judge recognised that the magistrate had not expressed any finding on that essential threshold matter. He took the view (which, as I have said, I consider to be unwarranted and erroneous) that it should be inferred that the magistrate had reached the necessary state of satisfaction. What the judge did not do was to make any finding of his own on the frivolous or vexatious question.

The statutory pre-condition was that an assessment of the quality of the substantive application be made and that the application be found to be frivolous or vexatious. There was no power to make (or, as here, confirm) the costs order unless that finding had been made.

There is nothing in the judge's reasons to indicate that the finding was made. The judge exceeded his jurisdiction by acting, in the absence of the necessary finding, to dismiss the appeal against the costs order.

Has the Court of Appeal fallen into error?

On reading the Judgment of Mahmoud v Sutherland [2012] NSWCA 306 a clear error in Interpreting how section 99 Crimes (Domestic and Personal Violence) Act 1999 was to be applied.

Cogswell J addressed this error in Mahmoud v Sutherland [2013] NSWDC 140 (7 June 2013 at [25];

> [25] … referred to the decision of the Moffitt P in *Proctor v Jetway Aviation Pty Ltd* [1984] 1 NSWLR 166, particularly at 177. His Honour said at that page the following –
>
> > "The obligation of every court loyally to follow decisions of any court superior to it has been often stated. At times it may appear to a judge or to an appeal court that the reasoning or absence of it in a binding decision renders that decision unsatisfactory. However, the law concerning precedent, based as it is on the need for certainty in the law, absolutely binds him to follow the precedent. He is as much bound by the law of precedent and the law so pronounced as he is by any other law. The law provides its own rules to admit of flexibility."
>
> [26] I do not regard myself as being in a position to depart from or rather to apply the law differently to that announced by the Court of Appeal…

Cogswell J held that he was bound by the decision of the Court of Appeal.

ALTERNATIVE VIEW

It is the writer's view that the decision in Mahmoud v Sutherland [2012] NSWCA 306 is one of statutory interpretation.

Ogden Industries Pty Ltd v Lucas (1968) 118 CLR 32 (Privy Council (AUS))

Held (by Reid, Hodson, Upjohn, Donovan and Pearson)

> "…It is quite clear that judicial statements as to the construction and intention of an Act must never be allowed to supplant or supersede its proper construction and courts must beware of falling into the error of treating the law to be that laid down by the judge in construing the Act rather than found in the words of the Act itself…
>
> …No doubt a decision on particular words binds inferior courts on the construction of those words on similar facts, but beyond that the observations of judges on the construction of statutes may be of the greatest help and guidance but are entitled to no more than respect and cannot absolve the court from its duty of exercising an independent judgment…"

Babaniaris v Lutony Fashions Pty Ltd [1987] HCA 19

Held (by Mason, Wilson and Dawson JJ (Brennan and Deane JJ dissenting));

> "…that, while reluctant to depart from long standing decisions of State courts upon the construction of State statutes of doubtful meaning, the High Court could not accept any invitation to perpetuate the obvious misconstruction of a statute and to disregard the legislature's obvious intention. No line of authority, however long standing, could justify such a course. Where an ultimate appellate court was convinced that a previous interpretation was plainly wrong, it could not allow earlier error to stand in the way of declaring the true intent of the statute in question…"

The writer suggests that as a result the previous 2 cases the following can be said;

1. The decision is a <u>persuasive and not a binding authority</u>;
2. Each Court has an independent obligation to independently form it's own view on the proper interpretation of the statute; and
3. It the previous statutory interpretation is plainly wrong it could not allow that error in declaring the true intent of the statute.

Mario Licha
Barrister