[2018] WASC 209

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
CITATION	**:**	CHOWN -v- HIGGINS [2018] WASC 209
CORAM	**:**	TOTTLE J
HEARD	**:**	25 JUNE 2018
DELIVERED	**:**	25 JUNE 2018
FILE NO/S	**:**	CIV 1720 of 2018
BETWEEN	**:**	SANDRA LEANNE CHOWN Applicant AND DALE CHRISTOPHER HIGGINS Respondent

---

Catchwords:

Judicial review - Jurisdictional error - Application for review order - Where Magistrate did not make final restraining order - Whether failure to make final restraining order constitutes jurisdictional error

Legislation:

Magistrates Court Act 2004 (WA), s 36
Restraining Orders Act 1997 (WA), s 3, s 9, s 10A, s 24A, s 26, s 29, s 31, s 33, s 40, s 42

Result:

Application granted

Category: B

Representation:

Counsel:

Applicant	:	Ms M Major
Respondent	:	No appearance

Solicitors:

Applicant	:	Gosnells Community Legal Centre
Respondent	:	No appearance

Case(s) referred to in decision(s):

Abbott v Magistrate Malley [2012] WASC 420
Craig v The State of South Australia [1995] HCA 58; (1995) 184 CLR 163
Rayney v AW [2009] WASCA 203
Re Magistrate D Temby; Ex Parte Stanton [2015] WASC 357
Stewart v City of Belmont [2013] WASC 366

TOTTLE J:

(These reasons were delivered extemporaneously on 25 June 2018 and have been edited from the transcript)

Introduction

1 On 11 May 2018, I made a review order under s 36 of the *Magistrates Court Act 2004* (WA) in respect of a decision by a Magistrate made on 4 December 2017 to adjourn an application for a final order under the *Restraining Orders Act 1997* (WA) (Act). The decision was made in proceedings then before the Magistrates Court of Western Australia sitting at Armadale. On 11 May I also ordered that the review order operate as a stay of the Magistrates Court proceedings, in which a hearing was listed to take place on 16 May 2018.

2 At a directions hearing held on 8 June 2018 the respondent in the Magistrates Court proceedings appeared by counsel and was made a respondent to the present application. At a later date, the respondent's counsel notified the court that she was no longer instructed by him and the respondent did not appear at this hearing.

Relevant provisions of the Act

3 The long title of the Act states it is:

> An Act to provide for orders to restrain people from committing family violence or personal violence by imposing restraints on their behaviour and activities, and for related purposes.

4 Section 3 of the Act contains a number of definitions. Those relevant to this application are as follows:

> ***family violence restraining order*** means an order made under this Act imposing restraints of the kind referred to in section 10G;
>
> ***final order*** means any of the following -
>
> (a) in relation to an FVRO, a conduct agreement order;
>
> (b) in relation to a VRO or MRO, a consent order;
>
> (c) a restraining order that becomes a final order under section 32;
>
> (d) a restraining order made under section 40(3);
>
> (e) a restraining order made at a final order hearing;

(f) a restraining order made under section 49(1)(b) to vary a final order, being a replacement or additional final order made under that section;

(g) a restraining order that is a final order under section 63(4a) or 63A(3);

final order hearing means a hearing fixed under section 33(1), 40(3), 41(4) or 43A(7)(b);

fix a hearing has the meaning given in section 9;

mention hearing means a hearing fixed under section 23(2), 26(3), 29(2) or 39;

respondent means the person against whom a restraining order is sought;

restraining order means an FVRO, MRO or VRO.

5 The definition of 'mention hearing' is to be contrasted with the definition of 'final order hearing'. The former does not include 'a hearing fixed under section 33(1)' of the Act.

6 Section 9 of the Act contains a provision which regulates the fixing of a hearing by a Registrar of the Magistrates Court and is as follows:

9. Fixing a hearing

(1) If a registrar is to fix a hearing and summons a person to the hearing, the registrar is to -

(a) fix a day, time and place for the hearing; and

(b) prepare a summons in the prescribed form; and

(c) cause the summons to be served on the person; and

(d) notify all other parties of the hearing.

(2) If the registrar is to fix a hearing that is to be held in the absence of one party, the registrar is to -

(a) fix a day, time and place for the hearing; and

(b) notify the party who is to be present of the hearing.

7 Section 10A of the Act sets out the objects of pt 1B. Part 1B governs family violence restraining orders. Section 10B sets out the principles to be observed in performing functions in relation to family violence restraining orders. Section 10B(1)(i) requires a person, court or other body performing a function under the Act to have regard to:

> the need to recognise that perpetrators of family violence might seek to misuse the protections available under this Act to further their violence, and the need to prevent that misuse.

8 Section 24A of the Act stipulates the manner in which an application for a family violence restraining order may be made. These include the making of an application in person if the applicant is 16 years of age or older.

9 Section 26 of the Act provides that an applicant may choose whether to have a hearing in the absence of a respondent or not.

10 Section 29 provides that if there is a hearing in the absence of the respondent, the court may make a family violence restraining order or a violence restraining order.

11 Division 4 of the Act regulates the procedure to be followed when an interim order is made. Section 31 provides that:

> Within 21 days of being served with an interim order a respondent must complete the respondent's endorsement copy of the order in accordance with the instructions on it, and return it to the registrar.

12 Section 33 governs what is to occur if a respondent objects to a final order being made. Subsection (1) provides that:

> (1) If a respondent -
>
> (a) returns the respondent's endorsement copy of an interim order in accordance with section 31; and
>
> (b) indicates on it that the respondent objects to the interim order becoming final,
>
> the registrar is to fix a hearing and notify all parties of the hearing.

13 I interpolate that the reference to a hearing appearing in s 33(1) is to a final order hearing. That is clear from the definition of final order hearing in s 3 to which I have referred.

14 Section 40 of the Act provides for what is to occur at a mention hearing. It reads:

> **40. Attendance at hearing**
>
> (1) If an applicant does not attend a mention hearing, the court -
>
> (a) if it is satisfied the applicant was notified of the hearing, is to dismiss the application; or
>
> (b) otherwise, is to adjourn the hearing.
>
> (2) If a respondent does not attend a mention hearing and the applicant does attend, the court -
>
> (a) if it is satisfied the respondent was served with the summons requiring the respondent to attend the hearing, is to hear the matter in the absence of the respondent; or
>
> (b) otherwise, is to adjourn the hearing.
>
> (3) When hearing a matter in the absence of the respondent, the court is to -
>
> (a) make a restraining order; or
>
> (b) dismiss the application; or
>
> (c) direct the registrar to fix a hearing and summons the respondent to attend the hearing; or
>
> (d) adjourn the mention hearing.
>
> (4) The registrar is to prepare and serve an order made under subsection (3)(a).

15 Section 42(2) and s 42(3) govern what is to occur at a final order hearing. They state:

> **42. Attendance at final order hearing**
>
> …
>
> (2) If a respondent does not attend a final order hearing and the applicant does attend, the court -
>
> (a) if it is satisfied that the respondent was -

(i) in the case of a hearing fixed under section 33, notified of the hearing; or

(ii) in the case of a hearing fixed under section 40(3)(c), 41(4) or 43A(7)(b), served with a summons requiring the respondent to attend the hearing,

is, subject to subsection (3), to hear the matter in the absence of the respondent; or

(b) otherwise, is to adjourn the hearing.

(3) If -

(a) a respondent does not attend a final order hearing; and

(b) the applicant does attend; and

(c) the court is satisfied in accordance with subsection (2)(a); and

(d) an earlier restraining order is in force in respect of the matter,

the court is to make a final order in the same terms as the earlier order unless any new ground or matter is raised by the applicant at the final order hearing.

Factual background

16 The background is as follows.

17 On 16 October 2017, the applicant made an application in the Armadale Magistrates Court for a family violence restraining order pursuant to s 24A of the Act against her former partner, the respondent in this matter.

18 On 18 October 2017, the application was heard in the absence of the respondent, pursuant to s 26(2) and s 27(1) of the Act. The court made an interim family violence restraining order (the interim restraining order) for the applicant's protection, pursuant to s 29(1)(a) of the Act.

19 The interim family violence restraining order was served and the respondent objected to the order being made final. He was entitled to do so pursuant to s 31 and s 33(1)(a) and s 33(1)(b) of the Act.

20 The Registrar of the Magistrates Court fixed a hearing to be held at 9.00 am on 4 December 2017. Notice was given to both the applicant and to the respondent, pursuant to s 33(1)(a) of the Act. The notice advised the parties that the matter had been listed on 4 December 2017 for what was described as a 'Restraining Order Final Order Directions Hearing'. The notice which was sent to the respondent also contained the following statement:[1]

> If you do not attend the court hearing, a final restraining order may be made in your absence.

21 As is apparent from the review of its provisions, the Act does not provide for a 'Restraining Order Final Order Directions Hearing'. On 4 December 2017, the applicant attended the hearing. There was no appearance by the respondent. The Magistrate informed the applicant that:[2]

> You made an application for an interim family violence restraining order which was granted on 18 October 2017. The matter has been directed by the Registrar to be listed today for what's called a restraining order final order hearing direction, and obviously you've responded to that notification.

22 After some exchanges with the applicant, the Magistrate said:[3]

> It appears that a notice was sent to the respondent by ordinary prepaid post. You may or may not have had any information, but do you know why he may not have attended court today?

I infer from this observation that the Magistrate was satisfied that the respondent was notified of the hearing.

23 The Magistrate continued:[4]

> All right. Now, procedurally, I can't make the order final today, although he hasn't attended. What has to happen procedurally is that the matter has to be listed for a final order hearing on a date in the future that suits you. You will get notification of that hearing, although you will hear me tell you today what that date is. And there will be a notification of the hearing sent again to [the respondent]. You, of course, will continue in the meantime to have the protection of the interim family violence restraining order.

---

[1] Affidavit of Sandra Leanne Chown filed 24 April 2018, Attachment 'SLC-6'.
[2] ts of hearing AR RO 863 of 2017 held at Armadale Magistrates Court on 4 December 2017, page 2.
[3] ts of hearing AR RO 863 of 2017 held at Armadale Magistrates Court on 4 December 2017, page 2.
[4] ts of hearing AR RO 863 of 2017 held at Armadale Magistrates Court on 4 December 2017, page 2.

24 Following some exchanges about dates and what would take place at the further hearing, his Honour adjourned the hearing to 16 May 2018. The learned Magistrate explained to the applicant that at the next hearing she would need to be prepared for a final hearing.

Section 36 of the Magistrates Courts Act

25 The relevant provisions of s 36 of the Magistrates Court Act are as follows:

> (1) If a person is or would be aggrieved by one or more of the following -
>
> (a) the failure of a Court officer to do any act or make any order or direction -
>
> (i) on the ground that the officer is under a duty to do the act or make the order or direction; or
>
> (ii) on any ground that might have justified an order of mandamus;
>
> (b) an act, order or direction that a Court officer proposes to do or make -
>
> (i) on the ground that it would be without jurisdiction or power or would be an abuse of process; or
>
> (ii) on any ground that might have justified an order of prohibition;
>
> (c) an act, order or direction done or made by a Court officer -
>
> (i) on the ground that it was done or made without jurisdiction or power or is an abuse of process; or
>
> (ii) on any ground that might have justified an order of certiorari,
>
> the person may apply to the Supreme Court for an order (a review order) that requires the Court officer and any person who will be affected by the act, order or direction to satisfy the Supreme Court at a hearing that the act, order or direction should or should not be done or made or set aside, as the case requires.

26 The task that I must deal with today is that set out in s 36(4) of the Magistrates Court Act which provides that:

> (4) If at the hearing required by a review order the Supreme Court is not satisfied in accordance with the review order, or if it is just to do so, it may -
>
> (a) order that the act, order or direction be or not be done or made or set aside, as the case requires;
>
> (b) grant any relief or remedy that could have been granted by way of a writ of mandamus, prohibition or certiorari;
>
> (c) make any necessary consequential orders.

27 The proper construction and operation of s 36 of the *Magistrates Court Act* was explained by McLure JA (Buss & Newnes JJA agreeing) in ***Rayney v AW***.[5] The power in s 36 of the *Magistrates Court Act* is a judicial review power.[6] The power in s 36(4) to grant relief is only enlivened if one or more of the grounds listed in s 36(1)(a), (b) or (c) has been established.[7] A review order can only be made if the threshold for an error of a type identified in s 36(1)(a), (b) or (c) is satisfied.[8]

28 As Beech J observed in ***Re Magistrate D Temby; Ex Parte Stanton***, a demonstration of an error of law is not sufficient to make out an error of a type identified in s 36(1)(a), (b) or (c), unless the error of law is on the face of the record. Generally, the record does not include reasons for decision.[9]

29 His Honour went on to state:[10]

> Section 36(1)(a) refers to the failure of a court to do an act or make an order or direction on the ground that the officer is under a duty to do the act or make the order or direction, or on any ground that might have justified a writ of mandamus.
>
> …
>
> In essence, s 36(1)(a) is addressed to a situation where the court fails to perform a duty. If the magistrate had refused to entertain the application, s 36(1)(a) may well have come into play. It does not come

[5] ***Rayney v AW*** [2009] WASCA 203.
[6] ***Rayney v AW*** [27].
[7] ***Rayney v AW*** [28], [32], [34]
[8] ***Rayney v AW*** [31].
[9] ***Re Magistrate D Temby; Ex Parte Stanton*** [2015] WASC 357 [39].
[10] ***Re Magistrate D Temby; Ex Parte Stanton*** [40] - [45].

into play in circumstances where a magistrate makes a discretionary decision about which an applicant is aggrieved.

In the context of s 36(1)(a)(i) a magistrate cannot be said to be under a duty to decide each matter according to law.

…

As McLure JA observed in ***Rayney v AW***,[11] at common law there are narrow grounds for the judicial review of decisions of inferior courts. The following passage from ***Craig v The State of South Australia*** explains the position:[12]

> 'In contrast, the ordinary jurisdiction of a court of law encompasses authority to decide questions of law, as well as questions of fact, involved in matters which it has jurisdiction to determine. The identification of relevant issues, the formulation of relevant questions and the determination of what is and what is not relevant evidence are all routine steps in the discharge of that ordinary jurisdiction. Demonstrable mistake in the identification of such issues or the formulation of such questions will commonly involve error of law which may, if an appeal is available and is pursued, be corrected by an appellate court and, depending on the circumstances, found an order setting aside the order or decision of the inferior court. Such a mistake on the part of an inferior court entrusted with authority to identify, formulate and determine such issues and questions will not, however, ordinarily constitute jurisdictional error. Similarly, a failure by an inferior court to take into account some matter which it was, as a matter of law, required to take into account in determining a question within jurisdiction or reliance by such a court upon some irrelevant matter upon which it was, as a matter of law, not entitled to rely in determining such a question will not ordinarily involve jurisdictional error.'

The purpose of s 35 and s 36 of the Magistrates Court Act was to replace the common law prerogative writs with a statutory alternative applying in those situations in which the specified prerogative writs would have been available, but free of the technical requirements of prerogative writs.[13]

The nature of the error sufficient to give rise to the availability of judicial review is no mere technical requirement. Section 36 is not intended to effect a radical expansion of the grounds of review of a decision of a magistrate. Errors of law not evident on the face of the

---

[11] ***Rayney v AW*** [26].
[12] ***Craig v The State of South Australia*** [1995] HCA 58; (1995) 184 CLR 163, 179 - 180 (Brennan, Deane, Toohey, Gaudron & McHugh JJ).
[13] ***Rayney v AW*** [27].

> record can only be addressed through the normal appellate process.[14] (footnotes in original)

The review grounds

30 The grounds of review set out in the application are as follows:

> 1. The learned Magistrate failed to make a final family violence restraining order in the same terms as the Interim Order when he was under a duty to make the order pursuant to section 42(3) of the ROA in the circumstances that:
>
> 1.1 The hearing on 4 December 2017 was a final order hearing
>
> 1.2 The hearing was fixed under section 33 of the ROA
>
> 1.3 The learned magistrate was satisfied that the respondent was notified of the hearing
>
> 1.4 The respondent did not attend the final order hearing
>
> 1.5 The applicant did attend the final order hearing
>
> 1.6 There was an earlier restraining order in force in respect of the matter.
>
> 2. The order of the learned Magistrate to adjourn the proceedings to a final order hearing was made without jurisdiction in the circumstances set out in 1.2 to 1.6.

Disposition

31 The applicant argues that the hearing held on 4 December 2017 was a final order hearing. The applicant points to the definition of final order hearing contained in s 3 of the Act and says that the hearing fixed by the Registrar for 4 December 2017 was fixed under s 33(1) of the Act and was therefore a final order hearing. Because the hearing was fixed under s 33(1) the hearing did not fall within the definition of a 'mention hearing'. In my judgment the applicant's submission accords with the statutory scheme. As I have mentioned, the scheme established by the Act does not make provision for a 'Restraining Order Final Order Directions Hearing'.

32 The essence of the error said to have been made by the learned Magistrate is that his Honour did not recognise that he was obliged by

[14] ***Abbott v Magistrate Malley*** [2012] WASC 420 [13] (E M Heenan J); ***Stewart v City of Belmont*** [2013] WASC 366 [31] (Martin CJ).

reason of s 42(2) and s 42(3) to make a final order at the hearing on 4 December 2017.

33 The applicant's case that there was such an error involves the following propositions.

34 First, that the hearing listed for 4 December 2017 was a final order hearing and not some other form of hearing and, in particular, not a mention hearing. As stated above I am satisfied that by reason of the operation of s 33(1) read in the context of the definition of final order hearing contained in s 3 the hearing listed for 4 December 2017 was a final order hearing and not a mention hearing.

35 The second proposition is that the conditions set out in s 42(2)(a) were satisfied. That is, that the court was satisfied the respondent had been given notice of the hearing fixed under s 33, and that the respondent had not attended but the applicant had attended the hearing.

36 On the satisfaction of those conditions in my judgment there was no discretion on the part of the Magistrate to adjourn the application for a final order. An adjournment was not a course open on the correct construction of s 42(2). Section 42(2)(ii) obliged the court to hear the matter 'subject to subsection (3)'; the obligation to hear the matter arises from the language used in s 42(2)(ii) - 'the court … is to hear the matter in the absence of the respondent'. By reason of s 42(3) the court was, in the circumstances with which it was presented on 4 December 2017, under a duty to make a final order in accordance with or in the same terms as the interim order.

37 These conclusions arise on the basis of the construction of both the text of s 42(2) and s 42(3) read in the context of the objects of the Act and, in particular, the principle stated in s 10B to which I have referred.

38 I am satisfied that the error made by the Magistrate is an error which involved his Honour misapprehending the limits of the court's functions or powers, and therefore the error constituted a jurisdictional error as defined by the High Court in the case of ***Craig v the State of South Australia***.[15]

39 I was informed by counsel for the applicant that the procedure followed by the Magistrate in this case is one followed routinely by

[15] ***Craig v the State of South Australia***, 177.

Magistrates Courts in the outer metropolitan region as a method of coping with the large volume of applications for family violence restraining orders and that the practice of fixing a 'final order directions hearing' has been successful in bringing about negotiated outcomes in difficult matters. Whilst the good sense in such a pragmatic approach is readily apparent, in my judgment, it is not a course open under the Act.

40 I will make an order that the matter be remitted to the Magistrates Court for determination in accordance with the law as set out in this judgment.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

JB
ASSOCIATE TO THE HONOURABLE JUSTICE TOTTLE

11 JULY 2018