DISTRICT COURT OF QUEENSLAND

CITATION:	*Soldner & Anor v Smith & Anor* [2011] QDC 319
PARTIES:	**SIEGFRIED KARL SOLDNER and EVA RUTH SOLDNER** (Appellants) **v** **MARYKE JOANNE SMITH and RODNEY SMITH** (Respondents)
FILE NO:	D132/11
DIVISION:	Appeal
PROCEEDING:	Appeal s 223 of the *Justices Act 1886*
ORIGINATING COURT:	Maroochydore
DELIVERED ON:	22/12/11
DELIVERED AT:	BRISBANE
HEARING DATE:	28 October 2011
JUDGE:	Searles DCJ
ORDER:	**APPEAL DISMISSED**
CATCHWORDS:	Section 223 *Justices Act* – Appeal - *Peace and Good Behaviour Act* 1982 – Magistrates Court Discretion to Grant Order
COUNSEL:	Appellant: R. Morton Respondent: G. Smart
SOLICITORS:	Appellant: Mumfords Lawyers Respondent: The Kent Law Firm

Nature of Appeal

[1] This is an appeal against the dismissal of applications by the appellants under the *Peace and Good Behaviour Act* 1982 (Act) seeking orders that the respondents keep the peace and be of good behaviour for such times specified in the order as the court thinks fit.

[2] In fact there were four complaints issued, two by each appellant against each respondent but they are all in identical terms and they preceded in the Magistrates Court as one complaint.

[3] The appeal is by way of rehearing under s 223 of the *Justices Act* so that I am required to make my own determination on the issues on the evidence giving due deference and attaching a good deal of weight to the Magistrate's view.[1]

Background

[4] This matter concerns a dispute between two elderly retired couples residing in adjoining houses at Twin Waters, Sunshine Coast. The appellants complain of systematic abusive conduct by the respondents.

***Peace and Good Behaviour Act* 1982**

[5] The relevant sections of the Act are:

> "**4. Complaint in respect of breach of the peace**
>
> (1) A person (the ***complainant*)** may make a complaint to a justice of the peace that a person has threatened
>
> (a) to assault or to do any bodily injury to the complainant; or
>
> (b) to procure any other person to assault or to do any bodily injury to the complainant or to any person under the care or charge of the complainant; or
>
> (c) to destroy or damage any property of the complainant.

[1] *Dufficy v Berry* [2007] QDC 227, para 6.

(2) A person (also the ***complainant*)** may make a complaint to a justice of the peace that the intentional conduct of a person (also the ***defendant*)** directed at the complainant has caused the complainant to fear that the defendant will destroy or damage any property of the complainant.

(2A) If the matter of a complaint under subsection (1) or (2) is substantiated to the justice's satisfaction, and the justice considers it is reasonable in the circumstances for the complainant to have the fear mentioned in the subsection, the justice may issue –

(a) a summons directed to the defendant requiring the defendant to appear at a stated time and place before a Magistrates Court; or

(b) a warrant to apprehend the defendant and to cause the defendant to be brought before a Magistrates Court;

to answer the complaint and to be further dealt with according to law.

6. Magistrates Court may make order

(1) The Magistrates Court before which the defendant appears in obedience to the summons or is brought pursuant to the warrant, as the case may be, shall hear and determine the matter of the complaint.

(2) Without limiting any other evidence given by or on behalf of the defendant, the defendant may produce evidence that the complaint is made from malice or for vexation only.

(3) Upon a consideration of the evidence, the Court may—

(a) dismiss the complaint; or

(b) make an order that the defendant shall keep the peace and be of good behaviour for such time, specified in the order, as the Court thinks fit.

(4) The order made by the Court may contain such other stipulations or conditions as the Court thinks fit."

[6] It will be seen that the initiation of proceedings under the Act involves the applicant first making a complaint to a Justice of the Peace (Justice) (s 4(1) and (2)) and if the complaint is substantiated to the Justice's satisfaction and the Justice considers it as reasonable in the circumstances for the complainant to have the relevant fear, the Justice may issue a summons directed to the defendant requiring that person to attend before the Magistrates Court to answer the complaint.

[7] Under s 4(1), relevantly the appellants were required to satisfy the Justice of the following elements:

(a) the defendants threatened to assault them or to do them bodily injury or to destroy or damage any of their property; and

(b) that the complainants were in fear of the respondents.

[8] Under s 4(2), in the alternative complaint made by the appellants, they were to establish to the satisfaction of the Justice of the Peace that:

(a) there was intentional conduct of the respondents;

(b) that conduct was directed at the appellants; and

(c) that the conduct caused the appellants to fear that the respondents would destroy or damage property of theirs.

The Justice, being satisfied, issued a summons under s 1(2A).

Nature of Magistrates Court Proceeding

[9] In *Laidlaw v Hulett*[2] McPherson JA looked at the history of the proceedings of this type concluding that the Act was a modern restatement of a part of the very ancient power of Justices of the Peace in England to bind persons over to keep the peace.[3] His Honour said:[4]

> "Binding over to keep the peace was, as Blackburn J described in *ex-parte Davis* (1871) 35 J.P. 551, 'a precautionary measure to prevent a future crime, and is not by way of punishment for something past.' Consistently with this approach to the jurisdiction, evidence of past events, although admissible, was relevant only as suggesting reasons why a breach of the peace was apprehended in the future."

The majority of the court (Fitzgerald P, McPherson JA) in that case held the proceedings were civil in nature rather than criminal.[5]

Standard of Proof

[10] The standard of proof was stated by Fitzgerald P[6] with whom McPherson JA[7] and Shepherdson J[8] agreed, in these terms:

> "Even if proof beyond reasonable doubt of 'the matter of the complaint' is not required (as is my tentative opinion notwithstanding *Percy v DPP* [1995] 3 All E.R. 124) before an order can be made under s 6(3)(b) of the *Peace and Good Behaviour Act*, it is plain that the strength of the evidence necessary to establish the basis for an order under s 6 must take into account the seriousness of the allegation made against the person against whom the complaint is made: see for example *Briginshaw v Briginshaw* (1938) 60 CLR 336; *Helton v Allen* (1940) 63 CLR 691; *Rejfek v McElroy* (1965) 112 CLR 517; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170."

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2 [1998] 2 Qd R 45.
3 Ibid, p 50, l 14.
4 Ibid, p 50, l 33.
5 Ibid, p 49, l 6 (Fitzgerald P); p 51, l 20 (McPherson JA).
6 Ibid, p 49, l 15.
7 Ibid, p 52, l 40.
8 Ibid, p 55, l 32.

[11] Whereas under s 4(2A) the Justice requires to be satisfied that any fear entertained by the complainant must be reasonable in all the circumstances, that objective test does not apply to the consideration by the Magistrates Court of whether or not the complainant entertains the relevant fear.[9] That is to say whilst the question of whether or not the relevant threat has been made is an objective one having regard to all relevant circumstances, the question of whether or not the complainant entertains a relevant fear is subjective. As Mr Morton, counsel for the appellants aptly submitted, "the Act protects the timorous as well as the valiant."

Magistrates Court Discretion to grant Order

[12] Under s 4(6) the Magistrates Court has a wide discretion as to whether or not to make an order. In that regard further comments by Fitzgerald P in *Laidlaw v Hulett*[10] are pertinent. His Honour said:

> "The 'matter of the complainant' is the threat and that the complainant is in fear of the person complained against; s 6(1) does not expressly require the Magistrates Court to be satisfied that it is reasonable in the circumstances for the complainant to be in fear of the person complained against, and it is unnecessary for the present purposes to determine whether such a requirement need always be met; however, it would ordinarily be inappropriate to make an order against a person complained against unless the complainant had a reasonable fear of that person. Some support for that view is to be found in part (iii) of the Act, under which a person who contravenes an order commits an offence rendering him or her liable to a substantial penalty."[11]

[13] Both the appellants and respondents put in affidavit evidence although there is an issue as to the reliance by the Magistrate on the respondents' evidence which I shall deal with when considering the grounds of appeal. The appellants' affidavit's evidence, the

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9 *Laidlaw v Hulett* [1998] 2 Qd R 45 at 51, l 1, per McPherson JA; *Castle v Wright* (unreported judgment Howell DCJ 18.10.96).

10 [1998] 2 Qd R 45 at 47, l 25.

11 See also *Scheumack v Duncan* unreported judgment Wall DCJ, 28.4.37, p 4.

respondents levelling abuse against the male appellant in such terms as "dumb Kraut", "Hitler lover", "arshloch" and "bloody stupid German arsehole". Apart from the generality of the appellants' allegations the hearing focused on various discrete events namely:

A. 2008 – Three Incidents

(i) On 12 January 2008 the male respondent was spraying chemicals through a high pressure gurney and directed the spray towards the appellants' house and the chemical spray went all over the male appellant and his plants resulting in the death of five orchids.[12]

(ii) On 2 October 2008 at 7.49 am the appellants left the house in their car and were driving into the street. The male respondent lent over the fence and made a rude hand gesture with his finger, came out of his property and started hitting and kicking the appellants' car which at this stage was on the street.[13]

(iii) On 7 November 2008 the male respondent poked his chest and head over the 1.7 m high fence between the properties and according to the male appellant "profanely abused me calling me offensive names". The male appellant told the male respondent to go back to his property and when the latter did so he shook the boundary fence so hard that pot plants on the appellants' side of the fence were knocked over.[14]

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12 Male appellant's affidavit dated 24 January 2011, para 60(c).
13 Ibid, para 61(d).
14 Ibid, para 61(g).

B. 2009 – Three Incidents

(i) On 24 September 2009 the male appellant heard a scream outside his door and saw the female respondent standing on his driveway with a broom.[15]

(ii) On 9 December 2009 the male respondent was spraying strong poison in his garden which spread on to the appellants' garden causing plants to die and a few days later caused the male appellant skin irritation.[16]

(iii) On 30 December 2009 the male appellant heard a scream and saw the head and chest of the female respondent leaning over the fence. The male respondent then also leaned over the fence and shook it aggressively. Both respondents then started taking large pot plants and throwing them directly at the male appellant. They threw about six pot plants which hit the male appellant on the head and shoulder.[17]

C. 2010 – Two Incidents

(i) Overnight on 7 February 2010 someone cut the thick cord of the appellants' glockenspiel hanging on their front patio.[18]

(ii) On 22 February 2010 the appellants heard a noise and a terrible stink of rotten eggs in their patio area.[19]

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15 Ibid, para 62(g).
16 Ibid, para 62(l).
17 Ibid, para 62(r).
18 Ibid, para 62(h).

D. 2011 – Two incidents

(i) On 7 January 2011 after the male appellant reversed his vehicle onto the street he noticed the respondent standing on the road. As he drove towards them, rather than moving off the road, they moved further onto the middle of the road to make it harder for the appellant to drive past them. As the appellants drove past, the male respondent made an arm movement, which to the male appellant looked like a "Heil Hitler" salute.[20]

(ii) The following day, 8 January 2011, at about 9.20 am when the appellants were returning from shopping the male respondent was walking down the road towards them. He made no attempt to get off the road but rather moved closer to the appellants and laughed, gesticulated and clapped his hands and lunged towards the car window as the appellants' car drove past. The male appellant then saw in his rear vision mirror that the male respondent made a rude arm/hand gesture.[21]

Both of the above 2011 incidents were captured on video by the female appellant which video was played in the Magistrates Court hearing.

Magistrates Court Findings

[14] Relevantly, His Honour made the following findings:

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19 Ibid, para 62(j).
20 Ibid para 55(a).
21 Ibid para 55(b).

(a) no threat was made by the respondents to the appellants to assault them or to do them any bodily injury;[22]

(b) no threats were made by the respondents to the appellants to damage their property;[23]

(c) evidence did not support a finding that the conduct of the respondents had any specific intent than to reflect their frustration and annoyance. In other words there was no specific intent established as is required by Act s 4(2);[24]

(d) the appellants' interpretation of the two incidents in 2011 captured on video was not accurate which leads to a questioning of the appellants' approach to the situation;[25] and

(e) the fear of the appellants was not reasonable in the circumstances.[26]

Based on the above findings His Honour dismissed the application.

Grounds of Appeal

[15] The appellants' appeal on 17 grounds. The grounds they rely on are as follows:

> "The Magistrate erred in
>
> 1. Refusing to admit the evidence of Mr Chapman.

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22 Reasons para 28.
23 Ibid para 29.
24 Ibid para 29.
25 Ibid para 31.
26 Ibid para 31.

2. Failing to allow the Appellants to adduce the evidence of Mr Chapman comprising of transcripts of audio and video evidence of the Respondent's behaviour.

3. Requiring the Appellants to play the entire recordings of audio and video evidence of the Appellants in order to have the evidence admitted.

4. Limiting the hearing to one day when doing so precluded the Appellants from being able to have the evidence of Mr Chapman admitted.

5. By reason of the foregoing failing to hear and determine the complaint.

6. Misdirecting himself that
   (a) in the absence of an oral threat no order can be made even though presence of intentional conduct causing fear is sufficient grounds for an order pursuant to the express language of s 4 of the *Peace and Good Behaviour Act* 1982;
   (b) a threat may not be constituted by actual physical violence towards the Appellants.

7. Finding that there was no threat to assault or injure the Appellants where there was unchallenged evidence of:

   (a) actual violence to the Appellants and their property;

   (b) oral threats to assault or injure the Appellants and their property.

8. Failed to direct himself that in circumstances where the Respondents had not been called to give evidence he should draw the inference that their evidence would not have assisted their case.

9. Relied on affidavit material filed by the Respondents when they had elected not to call evidence.

10. In the circumstances referred to in Grounds 8and 9, finding that:

    (a) when Mr Soldner is in his fernery he can easily be heard by the Respondents in their outside area;

    (b) the playing of music by the Soldners impacts on the Smith's living area;

    (c) when Mr Smith has talked to Mr Soldner, the latter responds by laughing at Mr Smith;

(d) The "the Smiths complain that on occasions Mr Soldner has elected to work in his garden at times when the Smiths are in their outside area";

(e) Respondents have constantly complained about the loud music emanating from the Appellants' property;

(f) the Respondents say their abuse came about due to the Appellants' actions in installing a CCTV camera;

(g) there was a triggering event such as loud music that cause the second Respondent to hit and kick the Appellants' car in 2008;

(h) bad behaviour had occurred on both sides of the fence;

(i) that the incident on 30 December 2009 when the Respondents threw pot plants at Mr Soldner was "occasioned by the use of a bamboo stick by Mr Soldner";

(j) that the conduct of the Respondents reflected their frustration and annoyance at the position "they had reached" since the Soldners became neighbours";

(k) the conduct of the Appellants had raised the level of hostility between the parties

where there was no evidence to support such findings and where such findings were irrelevant to the task the Magistrate had to discharge.

11. By reason of those matters misconceived his fact finding function and made irrelevant findings of fact in relation to the conduct of the Appellants and thereby misled himself as to the relevant facts.

12. Failing to give due consideration to the Appellants' unchallenged evidence that on various occasions from 2008 onwards the Respondents

(a) aggressively shook the boundary fence adjacent to the Appellants' property to intimidate the Appellants;

(b) frequently and regularly verbally abused the Appellants for no apparent reason; and

(c) frequently and regularly threatened the Appellants and the Appellants' property with violence;

(d) had thrown pot plants at Mr Soldner.

13. Finding that no threats were made by the Respondents to assault the Appellants or to damage the property of the Appellants.

14. Considering isolated instances of the Respondents' behaviour towards the Appellants and failing to consider the totality of that behaviour viewed as a whole.

15. Failing to consider whether having regard to all of the conduct of the Respondents an order should be made.

16. Failed to fulfil his fact finding function by failing to find that the Respondents conduct had caused the Appellants to be in fear.

17. Failed to express any proper reasons for dismissing the Complaint."

Grounds 1-5 – evidentiary dispute

Chapman Evidence

Audio Tapes

[16] The appellants sought to rely upon an affidavit by one Colin John Chapman a private investigator commissioned by the appellants to assist them in gathering evidence of the respondents' conduct. He swore an affidavit annexing transcripts of audio and video recordings. The appellants sought to introduce the transcripts into evidence.[27] The respondents' counsel Ms Smith objected to this. His Honour accepted the submission of the respondents' counsel that the transcripts were not best evidence given that the tapes were available.

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27 Transcript 1.16.50.

[17] The respondents' counsel Mr Morton informed the court that the tapes were of some hours' duration.[28] In that context His Honour said that he was not going to give the matter more than one day for hearing.[29] Then the following exchange took place:[30]

> "BENCH: And you don't confine your case to reasonable perimeters, I think you've got a problem. You see that's – that's what I spoke strongly to – Miss Smith was present – I spoke strongly to your solicitor at the callover when I called this matter over.
>
> What we are presented with here is a very wide span of a case.
>
> MR MORTON: Understand that.
>
> BENCH: And it hasn't been narrowed down. I would have thought that, if you narrowed it down to the specific threats, or to injure – and property, then that's enough to run your case. But what seems to have occurred is that it hasn't been compacted and the expectation is the court to sit here for hours. It's not going to happen.
>
> MR MORTON: I'm terribly sympathetic to what your Honour's saying, and …
>
> BENCH: You need to be more than sympathetic.
>
> MR MORTON: Yes I'm …
>
> BENCH: I'm just giving a very clear message.
>
> MR MORTON: Oh, of course you are. I accept that.
>
> BENCH: It's unrealistic to expect that court time would be involved in sitting in more than one day on a peace and good behaviour matter.
>
> MR MORTON: Oh I'm not arguing that point with your Honour.
>
> BENCH: Umm, good. Thank you.
>
> MR MORTON: I'm not going to argue.
>
> BENCH: Appreciated.

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28 Transcript 1.18.51.
29 Transcript 1.18.51.
30 Transcript 1.18-19.

> MR MORTON: Would your Honour just grant me five minutes to take some instructions? I think I can solve this.
>
> BENCH: Alright I would be grateful for that. Is there anything you want to say at this point, Ms Smith?
>
> MS SMITH: No, thank you, your Honour. I'll wait till what my friend can say."

[18] When the appellants' counsel returned after the adjournment, having taken instructions, no further mention was made of the playing of the tapes and the appellants' case proceeded on the basis of their affidavit evidence. The transcripts of Mr Chapman and the tapes were not admitted into evidence.

Exclusion of Transcripts

[19] The appellants argue that His Honour made an error in refusing to admit the evidence of the transcript. I disagree with that. The tapes being the primary evidence and best evidence of their content were available to be used and His Honour, in my view, correctly excluded the transcripts.

Tapes

[20] The appellants next argue that the magistrate erred in requiring all the tapes to be played and limiting the hearing to a day which effectively precluded the appellants from playing the tapes because of their length. In other words, His Honour cut the appellants short and denied them the opportunity of properly presenting their case.

[21] The appellants' submissions involve a serious suggestion that His Honour intentionally denied them the opportunity of presenting their case because he had decided that only one day would ever be set aside for the hearing. I do not consider that is what His

Honour was saying. In my view, what His Honour was indicating to the appellants was that the matter had been set down for one day and that he was not going to allow it to run over one day or further days in that sittings. The options then available to the appellants during their discussion with Mr Morton, following their requested adjournment, were at least three-fold:

(a) to seek to adjourn the matter to narrow the issues as His Honour had intimated would be desirable;

(b) continue and play all the tapes and at the end of the court day seek another day or days at sometime in the future for the hearing to continue; or

(c) or proceed with the hearing without reliance upon the tapes which in the result the appellants did.

[22] It is clear to me that the appellants, after advice from Mr Morton during the adjournment, made a decision to conduct their case in a particular manner and to abandon the course which would have involved playing the tapes in their entirety. I do not accept that their decision not to rely on the tapes could reasonably have been founded on a belief that, to do otherwise, would have meant they would be denied the opportunity of fully presenting their case. That imputation to the Magistrate is unfounded. The appellants made their decision as to the conduct of their case and cannot now seek to revisit that decision on appeal. As was said by Keane JA in *Smith v Woodward*:[31]

> "It is to be emphasised that trials are not dress rehearsals. An appeal to this Court under s 118(3) of the *District Court Act* is not

[31] [2009] QCA 119 at [17].

> available simply to facilitate a retrial of a case upon evidence which could have been adduced at the original trial."

In my view there is nothing in Grounds 1-5.

Grounds of Appeal 9-11 – relying on evidence of respondents when not in evidence

[23] The appellants set out, in Ground 10, matters found by His Honour in his reasons which the appellants say could only come from the affidavits filed by the respondents. It is plain from reading His Honour's decision that he did rely upon the affidavits of the respondents.

[24] I note that at the beginning of the hearing no affidavits were read by either party. An affidavit filed in a proceeding does not become evidence until it is read by a party or there is some indication that the party relies upon it.[32] It is the usual custom at the outset of all proceedings for parties to read material upon which they intend to rely.

[25] In this case, whilst the appellants' affidavits were not read, it was clear they were relied upon because both appellants gave evidence by reference to them and were both cross-examined on them.

[26] As to the respondents however, that was not the case. As I have said, the affidavits were not read. At the conclusion of the appellants' case[33] this exchange took place:

> "MR MORTON: And that's our case, again.
>
> BENCH: Yes, thank you.

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32 *Margetson v Jones* (1897) 2 Ch. 314 at 317, *Manson v Ponninghaus* (1911) VLR 239; (1911) 17 ALR 238; *Leaders Shoes (Aust) Pty Ltd v National Insurance Co of NZ Ltd* (1968) 1 NSWR 344; (1967) (86 WN Pt. 1) (NSW) 388.

33 Transcript 1.38.20.

> MS SMITH: Your Honour, the defendants don't intend to call evidence.
>
> BENCH: Alright.
>
> MR MORTON: It's taken me a little bit on the hop, I'll just gather something up.
>
> BENCH: Well, they filed affidavits, yes?
>
> MR MORTON: Well, they can't rely on them.
>
> MS SMITH: They can't rely on them, Your Honour.
>
> BENCH: No. Ok. And that's right.
>
> MR MORTON: So you now have effectively unchallenged, except in so far as a concession may have been made in cross-examination, the evidence of the Soldners.
>
> BENCH: Yes."

[27] It is clear to me that the respondents' counsel accepted that the respondents' affidavits were not to be relied upon. That is consistent with the fact that they were not read at the outset of the proceedings and there was no contrary indication **of intended reliance.**

Effect of His Honour's reliance on respondents' affidavits

[28] The question now arises as to whether His Honour's reliance upon the respondents' affidavits could be said to have effected his decision so as to risk a miscarriage of the trial. In my view it has not. The matters identified by the appellants as relied upon by His Honour do not go to the essential elements to be proved by the appellants before an order under the Act could be made. As to the submission by the appellants that the reliance upon the evidence may have affected His Honour's assessment of all the evidence, much of the evidence of the respondents subject of the appellants' concern goes to the evidence by which the respondents seek to justify their behaviour by

reference to the appellants' behaviour. But as McPherson JA said in *Laidlaw v Hewitt*:[34]

> "Another consideration is that although, although some of the acts specified in paragraphs a-d of s4 might also constitute offences under Chapter 38 of the *Criminal Code* if accompanied by the requisite intent, s 4 of the Act is concerned not with the criminality of the acts in question, but simply with their tendency to promote breaches of the peace. **The Act of 1982 sets out to restrain or deter such conduct independently of any legal justification there might be for it.** Criminality is not necessarily the obviate, or the only obviate, to which the legislation is directed." (Emphasis added).

In other words it is irrelevant whether or not the respondents may have had a legal justification for any conduct on their part in the event their conduct is sufficient to found an order. I am unpersuaded that His Honour's reasoning, in arriving at the essential findings, was affected by his reliance upon the respondents' evidence.

[29] In this ground the appellants say His Honour fell into error by failing to find that the appellants were in fear of the respondents. This ground is unsupportable. It is clear from paragraph 31 of His Honour's decision that he found that the appellants entertained a fear but that, in the exercise of his discretion under s 6(3) and consistent with the statement of Fitzgerald P in *Laidlaw v Hewitt*[35] as to the inappropriateness of making an order unless the appellants entertained a reasonable fear, His Honour found that the fear was not reasonable in the circumstances. His Honour's earlier reference to *Scheumack v Duncan*[36] supports the conclusion that he was exercising that discretion.

Grounds 6, 7, 12, 13, 14, 15

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[34] 1998 2 Qd R 45 at 52 lines 17-25.
[35] Ibid page 47 line 25.
[36] *Scheumack v Duncan* unreported judgment Wall DCJ, 28.4.37.

[30] These grounds essentially attack His Honour's findings that no threat was made by the appellants. Mr Morton helpfully set out in Schedule 2 of his submissions extracts from the appellants' affidavit material which support the appellants' argument that His Honour should have found that relevant threats were made. The Schedule is **Annexure A** to this judgment.

[31] In Grounds 6 and 7 the appellants say His Honour misdirected himself in proceeding on the basis that in the absence of an oral threat, no order could be made notwithstanding that the Act specifically contemplates intentional conduct as a sufficient ground. I take that to be a reference to s 4(2) which is in these terms:

> "(2) A person (also the **complainant**) may make a complaint to a Justice of the Peace that the intentional conduct of a person (also the **defendant**) directed at the complainant has caused the complainant to fear that the defendant will destroy or damage any property of the complainant."

[32] The appellants further say that His Honour misdirected himself in proceeding on the basis that a threat may not be constituted by actual physical violence towards the appellants and that that misdirection continued when His Honour found that there was no threat notwithstanding what the appellants say was unchallenged evidence of actual violence by the respondents to the appellants and their property and oral threats by the respondents to assault or injure the appellants and their property.

[33] In my opinion this submission is misconceived and misunderstands the nature of the Act under consideration. As I have already referred to, McPherson JA in *Laidlaw v Hulett*,[37] in discussing the history of proceedings the subject of this Act said that the Act was a modern restatement of the very ancient power of Justices of the Peace in England to bind persons over to keep the peace. He adopted the categorisation of that

power from an earlier case as "a precautionary measure to prevent a future crime, and is not by way of punishment for something past". The Act is not designed to deal with acts of violence to person or property which have already occurred. That is the province of the criminal law which will assist the appellants if warranted.

[34] As to s 4(2), it was argued by the appellants that His Honour failed to deal with that ground in his reasons. It is true that he did not specifically mention it, but it is clear that he dealt with it and dealt with it specifically[38]when he found that the conduct of the respondents did not lead to a finding that they had any specific intent other than to reflect their frustration and annoyance at the position reached with the appellants. Whilst s 4(2) is not expressly referred to in his reasons, that finding could not stand with a finding under that section that the appellants were guilty of intentional conduct. I say that, mindful of the fact that His Honour must have relied on the respondents' affidavits to form a view as to their frustration and annoyance.

[35] I have carefully considered all of the passages referred to but I am unable to conclude that any of the incidents referred to, individually or collectively, constitute a relevant threat. It is a litany of vile abuse, unacceptable in any civilised community but does not constitute a relevant threat. Some of the conduct relates to actual assaults but, as I have said, this legislation is not dealing with actual assaults but, rather, threatened assaults on persons or property.

[36] In all the circumstances I consider His Honour was correct in finding the absence of a relevant threat.

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37 [1998] 2 Qd R 45 at 50, ll 15 and 33.

38 Reasons para 30.

Ground 8

[37] This is a *Jones v Dunkel* [39] argument to the effect that, as His Honour should not have taken into account any of the respondents' affidavit evidence, he should have drawn the inference that any evidence from the respondents would not have assisted their case. As I have already found, the evidence of the respondents relied upon by His Honour did not go to the essential elements to be proven by the appellant and it is clear His Honour considered all the evidence of the appellants in arriving at his decision. I do not see that a statement consistent with *Jones v Dunkel* would have taken the matter any further in favour of the appellants. Further if that principle is to be applied it would have equal force in favour of the respondents given the appellants' decision not to rely on the tapes.

Ground 17

[38] Finally the appellants say that His Honour failed to express any proper reasons for dismissing the complaint. The ground is unparticularised but, in any event, I am unable to accept that submission. It is clear to me that His Honour carefully considered all the relevant evidence before him[40] and his reasons adequately set out the basis of his decision. The fact that he did not descend to a detailed analysis of every piece of evidence does not detract from that view.

[39] In all the circumstances, I find that none of the grounds of appeal have been made out. I accordingly dismiss the appeal.

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[39] (1959) 101 CLR 298.
[40] Reasons paras 21,30.

ANNEXURE A

Date	Peace and Good Behaviour Act	Circumstances	Source
From 10 November 2007 to the present	S.4(1) (a) S. 4(1) (c)	The behaviour of the Defendants for this period of time as set out in the Affidavits amounts to conduct which constitutes a threat to assault or do bodily injury to Mr and Mrs Soldner. The Defendants threatened Mr and Mrs Soldner by their repeated offensive, obscene, racist and threatening verbal abuse in combination with actual or threatened acts of violence. The verbal abuse included the Defendants saying words to Mr and Mrs Soldner to the effect of: • You dumb Kraut. • You wanker. • Go and take your medication. • You dickhead. Paranoid schizophrenia is a problem. Go and get it fixed.	Affidavit of Siegfried Soldner In particular, paragraphs 14, 15, 20, 31, 44-52, 55, 58, 60 – 63, 78, 81, 83, 85, (61). Affidavit of Eva Soldner In particular, paragraphs 11, 12, 41, 42, 44 – 48, 50 – 57, 59 – 84, 86 – 93.

The other matters particularised in the rows below are also relevant acts for this allegation			
12 January 2008	S. 4(1)(a) S. 4(1)(c)	Rodney Smith deliberately or recklessly sprayed chemicals at Mr Soldner and over his plants, causing five of the pot plants to die. This amounts to assault.	Affidavit of Siegfried Soldner Para 69(c). Affidavit of Eva Soldner Para 62.
2 October		Rodney Smith made a rude	Affidavit of Siegfried Soldner

2008	S.4(1)(a)	hand gesture to Mr and Mrs Soldner as they were leaving their property in their car. While their car was on the street, Rodney Smith went over to the car and hit and kicked it for a couple of minutes. Eva Soldner was terrified. This amounts to, at least, a threatened, if not actual, assault.	Para 61(d). Affidavit of Eva Soldner Para 68.
7 November 2008	S. 4(1) (a) S. 4(1) (b)	At about 4 pm, Rodney Smith projected his head and chest over the boundary fence of the adjoining properties. He abused Mr Soldner using profane and abusive language. Rodney Smith shook the boundary fence so hard that pot plants were knocked over. The fence itself was damaged or weakened.	Affidavit of Siegfried Soldner Para 61(g). Affidavit of Eva Soldner Para 71
11 May 2009	S. 4(1)(a) S. 4(1)(c)	At about 8 am, as Mr and Mrs Soldner were driving away from their house (and on a public road), Maryke Smith came across the street and made a rude gesture with her finger and stuck out her tongue at Mr and Mrs Soldner.	Affidavit of Siegfried Soldner Para 62(b). Affidavit of Eva Soldner Para 73
24 September 2009	S. 4(1)(a) S. 4(1)(c)	Maryke Smith entered the yard of the Soldner's dwelling. She screamed and stood on the Soldner's driveway with a broom in her hand.	Affidavit of Siegfried Soldner Para 62(g)
9 December 2009	s.4(1) (a) S.4(1) (c)	At 5 pm. Rodney Smith sprayed strong poison from his premises across to Mr and Mrs Soldner's residence. Mr and Mrs Soldner each struggled to breathe thereafter and Mr Soldner suffered skin rashes and irritation, particularly on his scalp and forearms. The poison killed Mr and Mrs	Affidavit of Siegfried Soldner Para 62(l)

		Soldner's plants. Again, this amounts to assault.	
30 December 2009	S.4(1) (a) S.4(1) (c)	Maryke Smith screamed and looked over the fence at Mr Soldner while he was in the patio area of his home. Rodney Smith leaned over the fence and shook it aggressively. He grabbed several of Mr Soldner's pot plants and threw them at Mr Soldner. Mr Soldner was hit and suffered bodily harm. His wife witnessed this assault and became very upset. She was in fear - for herself and for her husband - and she was ill afterwards. This amounts to assault occasioning bodily harm.	Affidavit of Siegfried Soldner Para 62(4). Affidavit of Eva Soldner Para 80(b).
18 January 2010	S. 4(1)(a)	At about 5:00pm Mr Soldner went outside to water plants and immediately was called names, threatened and abused by Rodney Smith	Affidavit of Siegfried Soldner Para 63(d)
2 February 2010	S. 4(1)(a)	The Smiths had visitors and the noise and abusive language from their house was so loud that the Soldner's could not open their kitchen window.	Affidavit of Siegfried Soldner Para 63(f) Affidavit of Eva Soldner Para 82
4 February 2010	S. 4(1)(a)	Mrs Soldner went to her letterbox and Rodney Smith said words like "With your funny face you should be in a museum".	Affidavit of Eva Soldner Para 83
7 February 2010	S. 4(1)(a)	The Smiths and visitors to their property verbally abused the Soldners by shouting profane comments and threats.	Affidavit of Siegfried Soldner Para 63(h) Affidavit of Eva Soldner Para 84
7 February	S. 4(1)(c)	The cord to the Glockenspiel	Affidavit of Siegfried Soldner

2010		hanging in the front of the Soldners patio was cleanly sliced.	Para 63(h) Affidavit of Eva Soldner Para 85
12 February 2010	S. 4(1)(a)	At about 4:00pm Mr Soldner was watering at a time when the Smiths had visitors to their property. Rodney Smith called out "Arshloch". There was then a very loud bang against the fence as though someone had smashed into the fence with a large hammer.	Affidavit of Siegfried Soldner Para 63(i)
12 February 2010	S. 4(1)(a)	At 6:30pm Mrs Smith went to the dune area located directly to the rear of the property and stood there making rude gestures.	Affidavit of Siegfried Soldner Para 63(i) Affidavit of Eva Soldner Para 86
22 February 2010	S. 4(1)(a)	At about 5:45pm Mrs Smith was again in the area near the rear of the Soldner's property, looking in saying "I can see you, I can see you". A short while later there was a terrible stink of rotting eggs.	Affidavit of Siegfried Soldner Para 63(j) Affidavit of Eva Soldner Para 87
8 May 2010	S. 4(1)(a)	Rodney Smith abused Mr and Mrs Soldner.	Affidavit of Siegfried Soldner Para 63(k) Affidavit of Eva Soldner Para 88
21 August 2010	S. 4(1)(a)	Mrs Smith shouted abuse at the Soldners until the latter retreated inside the house. Mrs Smith used profane abuse and racial slurs.	Affidavit of Siegfried Soldner Para 63(l) Affidavit of Eva Soldner Para 89
24 August 2010	S. 4(1)(a)	Mr Smith shouted a tirade of profane abuse at Mrs Soldner.	Affidavit of Siegfried Soldner Para 63(n) Affidavit of Eva Soldner Para 90

October 2010	S. 4(1)(a)	The Smiths were hitting the boundary fence and Rodney Smith said words to the effect "Hey, Soldner, you know how to stop all this nonsense, just go inside and leave us alone, stop being a menace. That's how you stop it. Just grow up and act your goddamn age for a change. You're stalking, stalking, stalking, that's all you're doing. I can hear you in there all the time. I know when you come in, when you go out. Just leave us alone. The police know all about you. You don't have to ... I can smell you. I can hear you too now. Go away and leave us alone. Leave us alone."	Affidavit of Siegfried Soldner Para 63(p) Affidavit of Eva Soldner Para 91
6 October 2010	S. 4(1)(a)	One or both of the Defendants shook the boundary fence very hard.	Affidavit of Siegfried Soldner Para 63(q)
8 November 2010	S. 4(1)(a)	At around 5:00pm Rodney Smith called out loudly "dummkopf".	Affidavit of Siegfried Soldner Para 63(s) Affidavit of Eva Soldner Para 93
20 January 2011	S. 4(1)(a)	Mr Soldner was clipping the hedge when Rodney Smith appeared directly in front of him through the bushes pulling a face and pointing at his temple.	Affidavit of Siegfried Soldner Para 63(t)