

***HBY v WBI and Anor* [2020] QDC 81 (14 May 2020) – Queensland District Court**

‘Application to set aside interlocutory order’ – ‘Availability of documents at trial’ – ‘Judicial discretion’ – ‘Order that appeal be heard afresh in whole’ – ‘Protection order’ – ‘Unjust order’

Proceedings: Second respondent’s application to set aside interlocutory order that the appellant’s appeal be heard afresh in whole.

Facts: The male appellant and female first respondent (LAP) were in a domestic relationship. The second respondent (WBI), a police officer, issued a protection notice to the appellant in favour of LAP and a protection order was subsequently issued by a Magistrate. The appellant filed a notice of appeal and also applied for an order that the appeal be heard afresh in whole, contending that certain documents were not available at trial that showed that statements made by LAP regarding her financial position were not true (a matter going to her credit). The appellate judge allowed the application. WBI subsequently applied to the Court of Appeal for leave to appeal that order, contending that the documents were in the possession of the appellant at the time of the trial, could have been obtained with reasonable diligence or would not have had an important influence on the rest of the case. The Court of Appeal struck out the application for want of jurisdiction (*WBI v HB Y and Anor* [2020] QCA 24). WBI then made an application for an order that the order that the appeal be heard afresh in whole be discharged and in substitution thereof it be ordered that the appeal be decided on the evidence and proceedings before the court that made the decision being appealed.

Held: Moynihan QC DCJ allowed the application, setting aside the interlocutory order that the appellant’s appeal be heard afresh in whole with the result that the appeal has to be decided on the evidence and proceedings before the court that made the decision. His Honour held that he had jurisdiction to review and set aside an interlocutory order concerning a procedural matter where there was a mistake or irregularity and it would be unjust not to set it aside [12]. In this case, the exercise of the Judge’s discretion (to issue the interlocutory order) miscarried because he took into account facts which were in part erroneous (that is, the Judge was mistaken as to the availability of the documents at trial and the appellant’s opportunity to obtain disclosure of them) [12]. It would be unjust not to set aside the order where the mistake was material and led to such an extraordinary order [12].

His Honour further held that there was "no good reason" (see *R v A2* (2019) 373 ALR 214) to order that the appeal be heard afresh in part [21]. The documents would have been available to the appellant at the time of the trial with reasonable diligence, or he was in fact in possession of the documents at the time of the trial [22]-[23].