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IN THE FAMILY COURT
AT HAMILTON

I TE KŌTI WHĀNAU
KI KIRIKIRIROA

FAM-2021-019-000424
[2021] NZFC 9249

IN THE MATTER OF	THE FAMILY VIOLENCE ACT 2018
BETWEEN	[SANDRA BIRCH] Applicant
AND	[LEO BIRCH] Respondent

Hearing:	8 August 2021
Appearances:	J W Donald for the Applicant R Sutton for the Respondent
Judgment:	23 September 2021

RESERVED JUDGMENT OF JUDGE A J TWADDLE

Introduction

[1] [Sandra Birch] obtained a temporary protection order against [Leo Birch] on 31 May this year. She wants the Court to proceed and hear her application for a final protection order. Mr [Birch] does not agree; he wants the application to be stayed pending the outcome of criminal proceedings against him.

Background

[2] After living together in a de facto relationship for just under two years, Mr and Ms [Birch] married on [date 1] 2021. They separated not long after, on [date 2 – some three months after date 1] 2021.

[3] Ms [Birch] has a [under five]-year old child from a previous relationship, who lived with the family. The temporary protection order applies for the protection of the child.

[4] The temporary protection order was made without notice to Mr [Birch]. He was directed to attend a programme.

[5] In her affidavit in support of her application for a protection order, Ms [Birch] said:

(a) Throughout their relationship, Mr [Birch] drank excessively, emotionally bullied her and put her down, saying she was not good enough, lazy and useless;

(b) Mr [Birch] emotionally abused her in the presence of her family and friends at a family birthday party;

(c) At the start of 2020, Mr [Birch] accused her of cheating and meeting up with other men;

(d) In [month deleted] 2021 when drunk, Mr [Birch] verbally abused her at, and following, a wedding and swore at her when she was concerned he did not leave the bathroom for about an hour;

(e) In April or May 2021 Mr [Birch] threw a phone at her, hitting her in her crotch;

(f) On [date 2] 2021, after drinking, Mr [Birch] verbally abused and belittled her. He then kicked her, bent her legs causing intense pain and

pressed his forearm into her neck, preventing her from breathing. She called the police. Mr [Birch] was arrested and charged with assaulting a person in a family relationship and impeding breathing or blood circulation. He has denied the charges.

[6] On 9 June 2021, Mr [Birch] filed an objection to attend the programme, and the direction that he attend the programme was suspended on 11 June, pending the outcome of the substantive proceedings

[7] On the same date, Ms [Birch] obtained temporary occupation and furniture orders without notice to Mr [Birch].

[8] Mr [Birch] filed a notice of intention to appear, an application for a rehearing in respect of the occupation and furniture orders, and an affidavit in support on 26 June.

[9] Mr [Birch]'s affidavit evidence was:

(a) He is [occupation deleted];

(b) The application for a protection order was based largely on unsubstantiated allegations he had assaulted Ms [Birch] on [date 2] 2021;

(c) He acknowledged on occasions during his relationship with Ms [Birch] he consumed alcohol to excess (as, he said, did Ms [Birch]) and, when he had drunk more than he should, his behaviour was affected;

(d) He acknowledged calling Ms [Birch] a lesbian after the family birthday party. He realised what he had said was wrong and left the party to stop any altercation happening;

(e) At home, following a wedding at the end of [month deleted] 2021, he lost control of his bodily functions in a bathroom as a result of the

combination of medication he was taking and alcohol consumption, which caused him to be deeply embarrassed;

(f) He and Ms [Birch] were in an unhealthy and toxic relationship which was now over;

(g) Since separating, he had engaged in alcohol counselling, not because he is an alcoholic, but to better understand his use of alcohol and develop better strategies around his alcohol use;

(h) After being charged with criminal offending, he is on restricted duties and has been transferred from his former place of work to [a new location].

[10] The application for final protection, occupation and furniture orders was set down for hearing on 27 July 2021.

[11] On 26 July, Ms [Birch] filed an affidavit in reply, in which she consented to the temporary occupation and furniture orders being discharged. She provided a significant amount of new evidence with respect to the alleged assault on [date 2] 2021. This included a number of photographs taken on [date 2 and the following days] of injuries she said she sustained on [date 2] 2021 and copies of her statements to the police. Ms [Birch] noted that in his affidavit, Mr [Birch] did not specifically deny assaulting her on [date 2] 2021, but merely referred to an absence of corroborating evidence.

[12] On 27 July, the temporary occupation and ancillary furniture orders were discharged by consent. The Court accepted an oral application by Mr Sutton on behalf of Mr [Birch] to stay the application for a final protection order, and a submissions only hearing was directed.

[13] The criminal proceedings against Mr [Birch] are at the case review stage. It is not known when a trial is likely, but there could be significant delay, particularly in view of the recent COVID-19 lockdown.

Issue

[14] The sole issue for determination is whether the application for a final protection order should be stayed or adjourned pending the hearing of the criminal charges against Mr [Birch].

Submissions

[15] Mr Sutton submitted:

(a) The application for stay was made in reliance on Rule 135 of the Family Court Rules ("FCR");

(b) Mr [Birch] has exercised his right to silence in the criminal proceedings and has not made a statement to the police in those proceedings;

(c) Sections 60 and 62 of the Evidence Act entitle Mr [Birch] to privilege against self-incrimination in the criminal proceedings;

(d) If Mr [Birch] is questioned in the Family Court proceedings about the alleged assault on Ms [Birch], the Court would be obliged to give him a caution against self-incrimination;

(e) If given the caution, it is likely Mr [Birch] would decline to answer questions;

(f) In this event, Mr [Birch] could be prejudiced in his opposition to the making of a final protection order, as the Court would not hear his side of the story;

(g) If Mr [Birch] waived his right to privilege against self-incrimination in the Family Court while the police investigation is ongoing, it would be extremely prejudicial to him;

(h) It would be a miscarriage of justice for Mr [Birch] to be put in a position where, in the Family Court, he either:

(i) Waived his right to privilege to giving answers that might incriminate him; or

(ii) Exercised his privilege in the Family Court and was not properly able to answer the allegations against him;

(i) Ms [Birch] has the protection of the temporary protection order which provides the same protection as a final order. Her position would not be enhanced if she proceeded with her application for a final protection order and an order was made, and a stay until the criminal proceedings against Mr [Birch] have been disposed of would not prejudice her;

(j) A stay would not be contrary to s 84(1) of the Family Violence Act ("FVA") because a temporary order has already been made and the Court would not be declining to make a protection order;

(k) Special circumstances in terms of s 147 of the FVA exist to justify a departure from the 42 day timeframe for allocation of a hearing date with respect to the application for a final protection order. The special circumstances are:

(i) Mr [Birch]'s employment as [occupation deleted];

(ii) The likely impact of the criminal charges (if proven) on Mr [Birch]'s career and financial wellbeing;

(iii) Mr [Birch] has exercised his right not to give the police a statement;

(iv) The maximum sentences for the charges faced by Mr [Birch] if convicted;

(v) It is too early for Mr [Birch] to decide whether he will waive his right to silence in the criminal court;

(l) While on its face, *Rudman v Way*[1] is authority for the proposition that an application for a protection order under the FVA is not to be adjourned pending determination of parallel criminal proceedings against the respondent unless there is a real likelihood of prejudice in the criminal proceedings, the case can be distinguished from the present case because:

(i) In *Rudman* the appeal was not brought until a final protection order had been granted; whereas in the present case Mr [Birch] is seeking a stay before he is required to give oral evidence;

(ii) The ratio of *Rudman* is stated more broadly than the case argued before Allan J;

(iii) In *Rudman*, the appellant was charged with assault; Mr [Birch] faces far more serious charges with much more significant sentencing implications if he is found guilty;

(m) The Family Court should adopt a cautious approach which would enable Mr [Birch] to put his best case forward in both the family and criminal courts.

[16] Mr Donald submitted:

(a) Common questions of fact would arise in the Family Court and criminal proceedings (the allegation of assault on [date 2] 2021);

(b) There are allegations other than the assault allegation on which the Court could make a decision to grant a protection order;

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[1] *Rudman v Way* [2008] 3 NZFLR 404.

(c) The discretion given to the Court by Rule 135 FCR to consolidate or stay proceedings is limited to proceedings within the Family Court;

(d) The standard of proof, relief available, and the parties, each vary between the two proceedings. The criminal and family proceedings are so distinct that Rule 135 cannot have application in the present circumstances;

(e) The High Court in *Rudman v Way* dealt with an identical procedural circumstance as arises in the present case and the principles in *Rudman* should be applied. On these principles the respondent must establish that evidence he may give in the Family Court would have a real likelihood of prejudicing his defence in the criminal proceedings, which is not the case;

(f) Sections 4(o), 84, 153(2) and 154(3) of the FVA all support the proposition that an application for a protection order should not be adjourned unless there are special circumstances;

(g) The existence of concurrent Family Court and criminal proceedings is not a special circumstance;

(h) If the respondent defended both proceedings, it is unlikely his evidence would differ and therefore amount to prejudice;

(i) In any event, it is unlikely the respondent's evidence would be admitted in the criminal proceedings;

(j) The application for a stay should be dismissed.

Jurisdiction

[17] Rule 135 FCR provides:

> **Consolidation of proceedings**
>
> **135 When order may be made**
>
> (1) Subclause (2) applies if 2 or more proceedings are pending and it appears to the court—
>
> (a) that common questions of law or fact arise in both or all of them; or
>
> (b) that the rights to relief claimed in both or all of them are in respect of, or arise out of,—
>
> (i) the same event; or
>
> (ii) the same transaction; or
>
> (iii) the same event and the same transaction; or
>
> (iv) the same series of events; or
>
> (v) the same series of transactions; or
>
> (vi) the same series of events and the same series of transactions; or
>
> (c) that for some other reason it is desirable to make an order under this rule.
>
> (2) The court may order—
>
> (a) that both or all of the proceedings be consolidated, on any terms that it thinks just; or
>
> (b) that both or all of the proceedings be heard at the same time or one after the other; or
>
> (c) that any of the proceedings be stayed until the determination of any other of them.

[18] It is clear that the family and criminal proceedings both involve, at least in part, the alleged assault on [date 2] 2021 and common questions of fact are involved. However there are difficulties applying Rule 135(2)(c) to both sets of proceedings. The standards of proof, relief and the parties in the two sets of proceedings are different and, if the Rule was applied, the Family Court could make an order consolidating the

proceedings or staying the criminal proceedings. Such an outcome would not be logical.

[19] Further, in *Shi v Wilson*,[2] in the context of relationship property proceedings transferred from the Family Court to the High Court and trust proceedings commenced in the High Court, where the Family Court had purported to consolidate the proceedings, Cooper J held it had not been competent for the Family Court to make such an order; the power of consolidation conferred by Rule 135 applies only to proceedings in a Family Court.

[20] I conclude Rule 135 does not apply in these proceedings.

Correct statutory basis for application

[21] In essence, Mr [Birch]'s application is that the application for a final protection order should be adjourned until the outcome of the criminal proceedings against him is known.

[22] A general power to adjourn an application is given in Rule 192 FCR, which provides:

> **192 Adjournment of hearing**
>
> The Court or [a Registrar] may, before or at the hearing, if it appears expedient in the interests of justice to do so, postpone or adjourn the hearing for a time, to a place, and on any other terms (for example, as to the application concerned being entered on the Registrar's list (as defined in rule 8)), the Court or Registrar thinks fit.

[23] Under this Rule, the Court has the power to adjourn a hearing if it is expedient to do so in the interests of justice.

[24] Various provisions relating specifically to adjournment of proceedings under the FVA are set out in the Act.

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[2] *Shi v Wilson* [2013] NZHC 3115.

[25] Section 147 relevantly provides:

(1) If the court makes a temporary order under this Act, the respondent is entitled to notify the court that the respondent wishes to be heard on whether a final order should be substituted for the temporary order.

(2) …

(3) If the respondent notifies the court, under subsection (1), that the respondent wishes to be heard, the Registrar must assign a hearing date, which must be—

(a) as soon as practicable; and

(b) unless there are special circumstances, in no case later than 42 days after the receipt of the respondent's notice.

[26] Section 153 relevantly provides:

153 Procedure if hearing required: general

(1) This section applies if a hearing is required or held (for example, because the court is notified, under section 147 or 151, that the respondent, an associated respondent, or a person to whom section 151(3) applies, wishes to be heard).

(2) The court may at the hearing—

(a) discharge the temporary order; or

(b) make the temporary order a final order (with or without variation); or

(c) on good cause being shown (and if section 154(3) allows), adjourn the hearing to a fixed time and place.

(3) …

[27] Section 154 provides:

154 Procedure if hearing required: effect of, and limit on, adjournment

(1) This section applies if a hearing is adjourned under section 153(2)(c) to a specified date.

(2) The temporary order continues in force until that date.

(3) At the hearing on that date, the court may adjourn the hearing under section 153(2)(c) to a further date only if special reasons exist for doing so.

[28] It is relevant also to refer to the principles set out in ss 3, 4 and 84 of the Act.

[29] Section 3 provides:

> **3 Purpose of this Act**
>
> *Purpose*
>
> (1) The purpose of this Act is to stop and prevent family violence by—
>
> (a) recognising that family violence, in all its forms, is unacceptable; and
>
> (b) stopping and preventing perpetrators from inflicting family violence; and
>
> (c) keeping victims, including children, safe from family violence.

[30] Section 4 relevantly provides:

> **4 Principles**
>
> The following principles are to guide the achievement of the purpose of this Act:
>
> …
>
> (o) access to the court should be as speedy, inexpensive, and simple as is consistent with justice.

[31] Section 84 provides:

> **84 Other proceedings do not stop making of protection order**
>
> (1) A court must not decline to make a protection order merely because of the existence of other proceedings between or relating to the parties.
>
> (2) This section applies whether or not the other proceedings between or relating to the parties also relate to any other person.
>
> (3) The other proceedings may be or include, but are not limited to, proceedings relating to the role of providing day-to-day care for, or contact with, or custody of a child.

[32] In summary, the legislation provides the Court may grant a first adjournment on good cause being shown, but no further adjournment must be permitted unless there are special reasons for doing so.

[33] *Rudman v Way* was an appeal from a decision of a Family Court Judge declining to adjourn an application for a protection order pending the hearing of

criminal proceedings against the appellant. The Court proceeded with the hearing and made a final protection order.

[34] Allan J referred to *Invensys plc v Land Logic Ltd,*[3] where the Court set out various principles to be applied in an application to adjourn a proceeding pending the outcome of parallel civil proceedings and dealt also with the position where the parallel proceedings are criminal, saying:

> (a) One factor to be taken into account where there are pending or possible criminal proceedings is what is sometimes referred to as the "accused's right of silence";
>
> (b) The Court should consider whether there is a real and not merely notional danger of injustice in the criminal proceedings if the civil proceedings are dealt with first;
>
> (c) Relevant factors may include:
>
> (i) The possibility of publicity that might reach and influence jurors in the criminal proceedings;
>
> (ii) Proximity of the criminal hearing;
>
> (iii) The possibility of a miscarriage of justice, eg by disclosure of a defence enabling the fabrication of evidence by prosecution witnesses or interference with defence witnesses;
>
> (iv) Whether the defendant has already disclosed his defence to the allegations;
>
> (d) The effect on the plaintiff must also be considered and weighed against the effect on the defendant.

[3] *Invensys plc v Land Logic Ltd* HC Christchurch, CP73/01, 26 March 2002.

[35] Allan J held:

(a) It would be possible, if the defendant gave evidence in the Family Court, and inconsistent evidence in the criminal proceedings, for the Family Court evidence to be put to the defendant as a prior inconsistent statement;

(b) There was no prospect evidence of a final protection order would be admitted in the criminal proceedings; the grounds for making a protection order would be completely different from the substance of the alleged offence, the standard of proof is a different, lesser standard, and the order would prove nothing;

(c) The ordinary approach is that although continuation of a hearing in the Family Court might have a prejudicial effect on subsequent criminal proceedings, the Family Court is nevertheless bound to dispose of the proceeding before it by reason of the statutory timeframe which the Act stipulates;

(d) The power to adjourn for good cause, or adjourn for a second time for special reasons, is not to be exercised lightly and would require the applicant for an adjournment to demonstrate a real likelihood of prejudice in subsequent criminal proceedings;

(e) The legislative intention is plain; domestic violence applications are not to be adjourned as a matter of course; there would need to be cogent grounds; the mere existence of concurrent criminal proceedings will not be enough to justify an adjournment.

[36] Examples of the exercise of the power to adjourn Domestic Violence Act ("DVA") proceedings where there are criminal proceedings involving common questions of fact are:

(a) *Simon v Averill*,[4] where an application to adjourn Family Court proceedings until completion of criminal proceedings was granted. The Judge distinguished *Rudman v Way* on the basis that the case dealt with the question whether a plaintiff would be denied the right to be heard and have his remedy if the proceedings were adjourned or stayed pending the completion of criminal proceedings, but this did not apply in a case where the applicant already had a temporary protection order, which was in the same terms as a final order. The adjournment was granted on the basis the parties were persons of international prominence, and there was a small but real possibility the making of a final protection order would be reported outside New Zealand and could reach the ears of a juror. There was little prejudice to the applicant and the justice issue tipped in favour of the respondent. This was a first adjournment application;

(b) *[F] v [F]*,[5] where an application for adjournment pending completion of criminal proceedings was also granted. Despite the different standards of proof, there was a commonality of evidential matters, proximity of time between the two hearings (one and a half months) and both parties agreed to the adjournment. This was a first adjournment application;

(c) Applications for adjournment were declined in *[G] v [E]* and *[O] v [M]*.[6] In both cases temporary protection orders had been made, and both were first adjournment applications;

(d) In *[G]* the Court took into account:

(i) The criminal hearing would not take place for many months;

(ii) Under the DVA a hearing was required within 42 days unless exceptional circumstances existed;

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[4] *Simon v Averill* [2014] NZFC 6683.
[5] *[F] v [F]* [2015] NZFC 10600.
[6] *[G] v [E]* [2015] NZFC 7333; *[O] v [M]* [2019] NZFC 7068.

(iii) The existence of parallel criminal proceedings arising out of one of the incidents complained of was not exceptional;

(iv) The charges arose out of an incident after the temporary protection order had been granted. The pre-temporary protection order conduct was sufficient to establish the grounds for an order and out of caution the Court would not have felt compelled to make findings about post-temporary protection order incidents;

(v) Any evidence given in the Family Court was not admissible in the criminal Court except for the limited purpose of cross-examination on prior inconsistent statements to challenge credibility;

(e) In *[O]* the Court took into account:

(i) The respondent had waived his privilege under s 60 of the Evidence Act by filing an affidavit setting out his version of events regarding the alleged violence;

(ii) While it was possible that evidence given in the Family Court might be used against the respondent in the criminal proceedings, this was simply a consequence of the proceedings the respondent was facing and was not a proper reason for an adjournment, particularly having regard to the objectives of the DVA.

Discussion

[37] I am satisfied *Rudman* is of wider application than is referred to in *Simon v Averill* and should not be distinguished on the basis contended by Mr Sutton. While the factual circumstances in *Rudman* were different in that a final protection order had already been granted and the appellant had already given evidence, the

principles are relevant, and the more serious charges faced by Mr [Birch] compared to the nature of the charge faced by the appellant in *Rudman* is of no relevance.

[38] Family violence proceedings have to be dealt with as speedily as is consistent with the interests of justice, and the Court cannot decline to make a protection order merely because of the existence of other proceedings relating to the parties. Despite Mr Sutton's argument to the contrary, on a strict reading of s 84(1) FVA, by adjourning proceedings the Court is in effect declining to consider making a final protection order, at least for a period of time.

[39] The particular provisions relating to an adjournment in the FVA proceedings take priority over the more general, and potentially wider, provision in Rule 192 FCR, although the overall interests of justice remain relevant.

[40] The first hearing of an application cannot be adjourned unless good cause is shown and the proceedings cannot be adjourned a second time unless special reasons exist. I interpret special reasons to be reasons which take the case out of the ordinary run of cases.

[41] Applying the principles set out in the FVA, Rule 192 FCR and the cases, I conclude:

(a) The fact Mr [Birch] is facing criminal charges arising out of an incident which is part of the evidence in an application for a final protection order does not constitute good cause or a special reason for an adjournment. The existence of parallel Family Court and criminal charges is common. Nor can Mr [Birch]'s job or the likely impact of the criminal charges, if proved, on his career and financial wellbeing constitute good cause or special reasons;

(b) The FVA provisions support the Family Court proceedings being determined expediently and independently of the criminal proceedings;

(c) Given the allegations of psychological abuse, the Family Court proceedings are broader in scope than the criminal proceedings;

(d) There is no real likelihood of prejudice to Mr [Birch] in the criminal proceedings if the Family Court proceedings are not adjourned because:

(i) In his affidavit evidence filed in the Family Court, Mr [Birch] admitted drinking to excess, which affected his behaviour and psychologically abusing Ms [Birch], and he did not deny assaulting her with a phone in April or May 2021 or physically assaulting her on [date 2] 2021;

(ii) The fact Mr [Birch] may have to decide whether or not to exercise or waive the privilege against self-incrimination in the Family Court does not constitute a miscarriage of justice; it is simply a natural consequence of his situation;

(iii) The only circumstance in which evidence given by Mr [Birch] in the Family Court would be admissible in the criminal proceedings would be if he elected to give evidence in the criminal proceedings which was contrary to, or inconsistent with, that given in the Family Court;

(iv) If a final protection order is made, that fact would not be admissible against Mr [Birch] in the criminal proceedings;

(v) There are no publicity concerns which might influence potential jurors;

(e) There is likely to be a lengthy delay before the criminal proceedings are resolved;

(f) The onus is on Mr [Birch] to make out specific prejudice to himself if the Family Court proceedings are not adjourned, and while the fact Ms [Birch] already has a temporary protection order is to be weighed in the

balance in determining the overall interests of justice, this fact cannot be given great weight.

Result

[42] The application for an adjournment is a second application, the proceedings having already been adjourned on 27 July. Weighing the matters I have referred to, I am not satisfied that special reasons for a further adjournment are established.

Orders and directions

[43] I make this order and these directions:

(a) The application for an adjournment is dismissed;

(b) Any affidavit by Mr [Birch] strictly in reply to the affidavit of Ms [Birch] dated 26 July 2021 is to be filed within 14 days;

(c) A half day fixture is to be allocated on the next available date.

A J Twaddle
Family Court Judge