# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Howard v Francois* [2012] QCA 287 |
| PARTIES: | **GREGORY PAUL JACK HOWARD**<br>(appellant)<br>**v**<br>**BLANCHE FRANCOIS**<br>(respondent) |
| FILE NO/S: | Appeal No 100 of 2012<br>DC No 384 of 2007 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | District Court at Brisbane |
| DELIVERED ON: | 23 October 2012 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 6 June 2012 |
| JUDGES: | Muir and White JJA and Philippides J<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDERS: | **1. Refuse the application for an extension of time to appeal against the orders made in the District Court on 17 December 2009.**<br>**2. Refuse the application to adduce fresh evidence.**<br>**3. Refuse the application to amend the grounds of appeal.**<br>**4. Dismiss the appeal.**<br>**5. The appellant to pay the respondent's costs of and incidental to the appeal to be assessed on the standard basis.** |
| CATCHWORDS: | APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – STAY OF PROCEEDINGS – where respondent brought claim against appellant in District Court for debts of $102,000 and $95,000 – where debts were subject to Deed of Agreement – where appellant's defence as filed and served not in accordance with the *UCPR* – where appellant directed to request further and better particulars and file and serve amended defence and counterclaim subject to "guillotine" consequence of default judgment against appellant – where order subsequently made |

in District Court against appellant for whole of claim in appellant's absence – where appellant brought an application in District Court to stay enforcement warrant for sale primarily on basis that Deed signed by appellant under duress – where application dismissed – where appellant contends the statement of claim was defective and judgment irregularly entered – where appellant contends that he suffers poor health – whether enforcement warrant ought to be set aside or stayed

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – BIAS – APPREHENSION OF BIAS – where comment by judge during submissions about relevance – whether exchange gave rise to apprehension of bias or actual bias

*Supreme Court Act* 1995 (Qld), s 47(1)
*Uniform Civil Procedure Rules* 1999 (Qld), r 5, r 166, r 374(5), r 440, r 444, r 445, r 667(2)(a)

*Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175; [2009] HCA 27, considered
*Johnson v Public Trustee of Queensland as executor of the will of Brady (deceased)* [2010] QCA 260, cited
*Mango Boulevard Pty Ltd v Spencer* [2010] QCA 207, cited

COUNSEL: The appellant appeared on his own behalf
T C Somers for the respondent

SOLICITORS: The appellant appeared on his own behalf
Bridge Brideaux Solicitors for the respondent

[1] **MUIR JA:** I agree with the reasons of White JA and with the orders proposed by her Honour.

[2] **WHITE JA**: On 7 December 2011 Judge McGill heard an application by the appellant in the District Court at Brisbane to stay execution of an enforcement warrant for the sale of his unit at Tugun in respect of a judgment order made on 17 December 2009 by another District Court judge. His Honour dismissed the application with costs.

[3] The appellant has appealed that decision and seeks an order setting aside/staying the enforcement warrant and directions about continuing the proceedings which were brought to an end by the judgment on 17 December 2009. Alternatively, he seeks an extension of time within which to appeal against the orders made in the District Court on 17 December 2009.[1] He also challenges the order about costs.

[4] The appellant represents himself. His grounds of appeal are diffuse and comprise 15 closely typed (small font) pages, much of which is in narrative form. In his written outline of argument filed on 24 February 2012 he sets out, descriptively, much of how he sees the history of his long relationship with the respondent.

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[1] He also seeks an extension of time to appeal the order of 7 December 2011 but does not need to do so as the appeal was filed within the time limited by the rules.

[5] The appellant filed a "supplementary outline of argument" and affidavit on 5 June 2012, the day before the appeal hearing. In para 2 of his affidavit the appellant seeks to "lead new evidence", being factual matters not clearly referred to previously and to amend/add grounds of appeal. The respondent objected on the basis that the facts referred to could have been before the District Court and to permit amendment to the grounds would take the respondent by surprise. In truth, there is little that is "new" except the discovery by the appellant that the respondent had issued earlier proceedings against him which were discontinued on 31 January 2007. The court reserved its decision in relation to the further material and amendment to the grounds.

[6] It is not fruitful to identify the extensive grounds of appeal before setting out the circumstances giving rise to the appeal.

[7] The appellant has constantly claimed that his poor health has hampered his ability to give prompt and proper attention to his financial and legal affairs particularly after the breakdown in his relationship with the respondent and in his "new evidence" he wishes to elaborate on his health further. He exhibits a brief report from a general practitioner whom he has seen over the past year or so.

[8] In his oral submissions in this court the appellant needed to be reminded regularly to identify and focus on the alleged errors by the primary judge.[2]

*(i) Claim and Statement of Claim filed 12 February 2007*

[9] The respondent, who was the plaintiff, claimed $197,000 from the appellant pursuant to a Deed or, alternatively, slightly different amounts on different legal bases. The allegations of fact in the statement of claim refer to a joint venture between the respondent, her daughter[3] and the appellant entered into orally in about 1993 concerning the purchase of real property for the purposes of investment and gain. They obtained financial accommodation to an amount of $102,000 from the Bank of New Zealand to acquire such property. The respondent provided security for this line of credit by a registered mortgage over real property owned by her at The Gap. A term of the joint venture was that upon the sale of any property acquired pursuant to the agreement the line of credit would be repaid and any surplus distributed between the appellant, the respondent and the daughter in accordance with their respective interests.

[10] By para 6 of the statement of claim the respondent alleged that between 4 October 2000 and 30 July 2001 the appellant drew down the whole amount available under the line of credit without her consent and in breach of the terms of the joint venture agreement and utilised the whole of that sum for his own benefit.

[11] The respondent further alleged in para 10 that in or about August/September 2003 the respondent lent the appellant $95,000 to purchase a unit at Tugun which, despite demand, he has not repaid.

[12] In para 12 the respondent alleged that on 9 August 2005 the appellant agreed to pay $197,000 to the respondent in settlement of all claims between them. The appellant failed to honour the agreement and relief was sought.[4]

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2 For example, at transcript 1-10 and 1-19.

3 According to the appellant, he and the daughter had lived in a "marriage-like" relationship and shared accommodation for many years with the respondent.

4 Other relief on other bases need not be considered for this appeal.

*(ii) The Deed of Agreement of 9 August 2005*

[13] The Deed recited in its introductory paragraphs that the respondent was the registered owner of The Gap property, that it was mortgaged to the Bank of New Zealand over which there was a mortgage debt; that the appellant, the respondent and the daughter were parties to the mortgage; that the appellant was the registered owner of the Tugun unit which was free of mortgage; that the respondent had lodged caveats against dealings in respect of the Tugun unit; that the appellant and the daughter were responsible for the repayment of the mortgage debt; that the respondent had advanced funds to the appellant to purchase the Tugun unit; that the appellant and the daughter acknowledged their indebtedness to the respondent in the amount of $95,000 lent for the purchase of the Tugun unit; that the appellant and the daughter were residing in The Gap house; that the respondent wished to sell The Gap house and had served the appellant and the daughter with a demand for possession; that they had agreed to vacate The Gap house; that the appellant had listed the Tugun unit for sale; and that the appellant had agreed to repay the mortgage and the $95,000 to the respondent from the proceeds of the sale of the Tugun unit.

[14] By cl (s):

> "The parties have agreed to enter this Agreement with a view to finalising once and for all the financial arrangements between them."[5]

And, by cl (t):

> "Each of the parties has had the opportunity for obtaining their own independent legal advice in relation to this Agreement."[6]

The introductory clauses also refer to some other matters not relevant to the appeal.

[15] The operative parts of the Deed relate to the facilitation of the agreement, for example, vacating The Gap house, and the distribution of the settlement funds from the Tugun unit. By cll 16 and 17:

> "The parties agree that upon the carrying out of the terms of this Agreement the parties have no further claim one against the other.
>
> The parties intend that this Agreement shall be evidence of the end of the financial relationship between the parties."[7]

Clause 20 repeated that the parties had had the opportunity of receiving independent legal advice in respect of the agreement. The Deed was executed by each of the three parties and witnessed.

*(iii) The Notice of Intention to Defend and Defence*

[16] The appellant agrees that he executed the Deed, but pleaded in his Defence dated 10 October 2008[8] and maintained in subsequent argument before the District Court, that he had signed it under emotional duress.

[17] In a letter dated 13 October 2008 addressed to the respondent's solicitors Mr Matthew Stapleton of Nathan Lawyers enclosed the appellant's defence to the

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5 AR 229.
6 AR 229.
7 AR 230.
8 AR 239.

respondent's claim and informed the solicitors that he had been instructed to brief counsel with respect to a counter-claim and joining third parties. The defence was not filed until 30 June 2009.[9] The pleading was not in accordance with the requirements of the *UCPR* – bare denials of assertions of fact in the statement of claim were not accompanied by a direct explanation for the appellant's belief that the allegation was untrue.[10] In para 12, as mentioned, the appellant admitted that the Deed was signed but that it was signed "under duress and is invalid".[11]

[18] The respondent filed an application for judgment and alternate relief to be heard in the District Court on 10 July 2009. The appellant was, so far as court records revealed, represented by Nathan Lawyers. Those lawyers, without having filed a notice of discontinuance, informed the respondent's solicitors prior to the hearing that they no longer acted for him. According to an affidavit filed on behalf of the respondent by her solicitor, Mr Christopher Bridge, the appellant attended the solicitor's office on 8 July 2009 in an attempt to resolve the matter which was unsuccessful.

*(iv) The hearing before Tutt DCJ on 10 July 2009*

[19] The appellant told the judge that he needed further and better particulars of the statement of claim after which he would be able to file an amended defence and counterclaim. Although the respondent's counsel pressed for judgment his Honour was not persuaded in the circumstances that it was appropriate. He was of the view that "firm directions" should be made to ensure that the proceedings resolved as expeditiously as possible "and in accordance with the philosophy of the UCPR. See Rule 5".[12]

[20] The court then considered the appellant's address for service as his Honour accepted that there had been significant past difficulties in serving him. The appellant, after some pressing, gave as his residential address that of the Tugun unit but asked that his email address be utilised for service.[13] He sought four weeks to deliver a request for further and better particulars and a further four weeks to prepare his amended defence and counterclaim after receipt of those particulars.[14]

[21] Paragraph 1 of the order[15] required the appellant "before 4.00 pm on Friday, 7 August 2009 [to] deliver to the [respondent] any request for further and better particulars of the Statement of Claim." The appellant was directed to file and serve an amended defence and counterclaim (if any) within 28 days of receipt of the further and better particulars (if any). There were directions relating to other interlocutory steps. Para 9 provided for a "guillotine" consequence if the appellant failed to comply with the court order:

> "In default of the Defendant complying with his obligations pursuant to paragraphs 1, 3, 5 and 7 hereof, or any extension thereof as allowed by the Court, the Defendant's Defence, or the Defendant's Amended Defence and Counterclaim [if any] is struck out and the Plaintiff is at liberty to forthwith enter judgment against the

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9 AR 244.
10 *UCPR* r 166.
11 AR 246.
12 AR 45.
13 AR 28.
14 AR 29.
15 AR 264.

> Defendant for the amount of her claim in the sum of One Hundred and Ninety Nine Thousand Three Hundred and Ninety-eight dollars and fifty-seven cents ($199,398.57) together with interest on that sum pursuant to s.47(1) of the Supreme Court Act 1995 and the costs of and incidental to the proceeding including the costs of entering judgment. Further, an affidavit from the Plaintiff's solicitors deposing to the Defendant's non-compliance with his obligations under this order shall be sufficient for the Registrar to sign judgment for the Plaintiff."[16]

*(v) Thereafter and the hearing before Searles DCJ on 17 December 2009*

[22] On 7 August 2009, that is, the day by which, pursuant to the order of Judge Tutt, the appellant was directed to deliver his request for further and better particulars of the statement of claim to the respondent, the appellant filed an affidavit with what he described in the sole paragraph as:

> "The attached letter Addressed to Blanche Francois is the Demand for Further and Letter [sic] Particulars filed with this court registry as per orders requiring filing and service of such demand on Blanche Francois by 7-8-2009".[17]

[23] The letter is headed with the address of the Tugun unit with the direction "ADDRESS FOR SERVICE AFTER SIGNATURE". After 18 type-written pages the address is, care of "Nathan Lawyers, Level 1, 36 Cordelia St, Sth Brisbane QLD 4101, Ph [telephone number] Fax [facsimile number]".[18] The letter describes the subject-matter as "Demand for Further and Better Particulars District Court Brisbane Registry Number BD389/07".[19] The opening paragraph gives some sense of the flavour of the document:

> "Some time ago when the writer was stalked and harassed at his home by some unknown person not identifying himself or his business, and demanding the writer's identity and on part of property owned by the writer without the writer's consent, paperwork was dumped at the writers feet along with some smart and aggressive comments by the person who dumped them there. This person the writer understands later lodged an affidavit for the court, and whilst yet to be read by the writer, the writer hypothesizes that personality factors with that person are such that upon a reading, the affidavit will be found to be either untrue, incomplete, self serving or or [sic] a combination of all three and in some form thereby deceptive.
>
> This paperwork turned out to be purporting to be a claim in the District Court of Qld on the writer conceived by yourself it would seem along with assistance from persons considered to be both known and unknown at this point in time."[20]

[24] The following pages are devoted to a lengthy discourse with some observations about the hearing before Judge Tutt as well as some chronology. The appellant wrote, relevant to the issue of service,

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16 AR 265.
17 AR 266.
18 AR 284.
19 The number is 384/07 and appears as the corrected number at the heading to the affidavit.
20 AR 267.

> "As per proper procedure … you should already have a letter and certainly one has been posted, from my former lawyers who remain lawyers on the record for the purposes of service of documents as my movements are necessarily varied for safety reasons as is explained in the court transcript … you have a letter foreshadowing a joining of other parties to this action. Now you know some of these are chris bridge and his company BB Sol. It is in his interests to attempt to avoid that litigation … and he may well attempt to try to do so … at this point … you need another lawyer and this Affidavit and this Demand for Further and Better Particulars is being served directly on you as the writer is of the opinion that it is in your interests to obtain an independent lawyer. Christian Francois and Fionna [sic] Francois(nee whipp) … are also to be served with documentation and will need separate lawyers. This is unfortunate for you … and necessary for the proper defence by the writer."[21]

[25] Next there is a heading "Details of Items in Demand for Further and Better Particulars".[22] There follows 11 and a half type-written pages of demands, for example:

> "You make allegations in your purported statement of claim of "unjust enrichment" by the writer which the writer regards as defamatory. You must supply details of enrichment made by the writer's knowledge and efforts and communications and business skills on your behalf in the from [sic] of all other property purchased by you in your own name only and by your relatives Christian and Fiona Francois in all locations in New Zealand and you must supply copies of residential plans for those properties designed in conjunction by the writer in both or either plan form and descriptive written form and you must supply details of all oral agreements and contracts in regard to the building of residences on those properties and you must supply details of exactly how each purchase came about in terms of approaches to agents, locating the properties, the market evaluations, loans arranged for specific purchases, who exactly participated in the organizing of each loan, details of trips made overseas and by whom to arrange such purchases and you must include in this any other property purchases made by the writer and/or your daughter in New Zealand, your knowledge of the inter-related purposes of such additional purchases to any made by yourself and Christian and Fiona Francois, and you must reveal your knowledge in descriptive form your knowledge of the effect on the overall business plan of non-performance by any individual and you must reveal what exactly were the original situation requiring those purchases to be made. You must supply details of purchase prices and current government valuations on all such allotments."[23]

[26] The writer also sought details of seriously criminal plans alleged to be by a relative of the respondent responding to sexual molestation. It concludes with the following:

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21 AR 272.
22 AR 272.
23 AR 274-275.

> "The writer reserves the right to demand further and better particulars into the future as this matter progresses through the courts. You are reminded you can and will be cross-examined on any omissions of material demanded in the way of further and better particulars."[24]

On 5 October 2009 the appellant's former solicitors filed a Notice of Party Acting In Person directed to the respondent care of her solicitors providing the appellant's address for service as the Tugun unit address.

[27] The respondent filed an application in the District Court on 24 November 2009 for orders including that pursuant to r 374(5) or, alternatively, para 9 of the order of Judge Tutt, that judgment be entered against the appellant for failure to comply with the order, particularly in not delivering a request for further and better particulars as directed and failing to file and serve an amended defence. The respondent also sought an order pursuant to r 440 that an affidavit of the appellant sworn on 23 September 2009 and filed that day be removed from the file.[25] Orders were also sought in the alternative for default judgment pursuant to Ch 9 Pt 1 of the *UCPR* and s 47(1) of the *Supreme Court Act* 1995.

[28] In support of the application the respondent's solicitor, Mr Bridge, filed an affidavit. He deposed that on 7 August 2009 the appellant "served" the respondent by handing the daughter at The Gap residence the affidavit and letter referred to above.[26] Mr Bridge, being of the view that the documents were not compliant with para 1 of the order, filed a request for default judgment in the registry. On 22 September 2009 a Deputy Registrar refused to enter default judgment on the basis that "the defendant appears to have complied with the order".[27] Mr Bridge noted from the e-court search facility that two affidavits of the appellant had been filed but not served on 23 and 28 September 2009. The affidavit of 23 September 2009 was the affidavit which was sought to be dealt with pursuant to r 440. Mr Bridge referred to the Notice of Party Acting in Person filed on 5 October 2009 and exhibited the transcript of the proceedings before Tutt DCJ.

[29] On 15 October 2009 Mr Bridge had caused a letter to be forwarded to the appellant in accordance with r 444 of the *UCPR* requiring him to provide a proper request for further and better particulars by 4.00 pm Friday, 23 October 2009 and a response pursuant to r 445. This letter was sent by post to the Tugun unit address and by email to the email address provided by the appellant to the court on 10 July 2009. No response was received.

[30] On 17 December 2009 the respondent, represented by counsel, appeared before Judge Searles. There was no appearance by or for the appellant. The judge satisfied himself about service of the application and supporting material deposed to in an affidavit of Mr Bridge. Amongst other things Mr Bridge noted that there was no electronic message to the effect that the email transmission had not been delivered to the appellant's email address; nor had the letter sent to the Tugun unit address been returned. His Honour was satisfied that the appellant had been served with the application. The appellant has, subsequently, denied he was served.

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24 AR 283.

25 On the basis that it contained scandalous or oppressive matter.

26 At [18]-[22] above.

27 AR 294.

[31] His Honour was satisfied that the appellant had not complied with the direction to request further and better particulars describing the letter dated 5 August 2009 annexed to the appellant's affidavit as a document:

> "… which could only be described as a rambling dissertation and would not, on any view of the matter, constitute a request for further and better particulars."[28]

His Honour ordered judgment against the appellant pursuant to r 374(5) for the whole of the claim together with interest and an order that he pay the costs of and incidental to the claim including the costs ordered by Judge Tutt. His Honour was satisfied that pursuant to r 440 the affidavit of the appellant of 23 September 2009 should be placed in a sealed envelope on the file.

*(vi) The hearing before McGill SC DCJ on 7 December 2011*

[32] In an affidavit sworn on 7 December 2011 Mr Bridge deposed that he served a copy of the order of Judge Searles on the appellant on 5 March 2010 by forwarding it to the Tugun unit address. On or about 29 April 2010 Cusack Galvin & James, solicitors, wrote to the respondent's solicitors "indicating that the defendant and Cusack Galvin & James were aware that the judgment had been obtained."[29] Mr Bridge deposed that on 5 May 2010 he forwarded a letter to those solicitors advising them of the history of the matter leading up to judgment being entered and advised that an enforcement warrant would be sought. He enclosed other relevant material. Mr Bridge received a letter dated 7 May 2010 from those solicitors which was unsigned informing the recipient that they were taking instructions from the appellant. After other requests the solicitors sought an indication that the respondent would take no further enforcement action until they had had a reasonable opportunity to take instructions. Mr Bridge responded that he did not intend to respond to unsigned letters and that unless the solicitors confirmed that they acted for the appellant and filed a notice of address for service or were in the process of doing so, he would not correspond further. Further correspondence ensued to the effect that Mr Bridge would not communicate unless the solicitors filed the relevant notice.

[33] On 6 December 2011 Cusack Galvin & James foreshadowed an application to have the execution of the enforcement warrant stayed until the appellant

> "… has had the proper opportunity to ventilate his defences to your client's claims and also a counterclaim founded on the arrangements which arose during the course of his dealings with your client and various members of her family."

An auction of the property had been arranged for 8 December 2011. The Tugun unit had outstanding rates in excess of $10,000 and the Gold Coast City Council was proposing to sell the property. A similar amount was outstanding to the body corporate.

[34] On 7 December 2011 Mr Cusack appeared in the District Court before Judge McGill to assist the appellant with his application to stay the enforcement warrant. His Honour perused the material to ascertain if "there might be any sort of a defence to this claim".[30] His Honour listened to lengthy explanations from both

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28 AR 63.
29 AR 368.
30 AR 78.

Mr Cusack and the appellant about the circumstances of the relationship between the parties both personal and financial. In his reasons for dismissing the application his Honour canvassed the chronology put forward by the appellant about the signing of the Deed and that he did not dispute that he had obtained the money. His Honour noted that if the judgment order made by Judge Searles was to be set aside it was necessary to show "some good reason" for doing so.[31]

[35] His Honour said:

> "That there was a deed was not disputed. An affidavit by the defendant has been read today in which he admits executing the deed. There's material in the affidavit setting out what happened after the relationship between the plaintiff and the defendant broke down and at a time when the plaintiff was making demands on the defendant and the plaintiff had consulted a solicitor.
>
> The defendant spoke to the solicitor. According to his affidavit he said that he suggested that the solicitor draw up some sort of agreement that he thought was fair to his client and to us and that it was to be signed by the plaintiff first and given to us.
>
> There was then some delay but ultimately a document turned up from the solicitor which had been signed and witnessed by the plaintiff. The affidavit admits that the deed was signed. In relation to that there are various things in the affidavit suggesting that at the time he did not regard the amount payable under the deed as being actually payable and that he thought the deed was flawed, so that in those circumstances it can't be suggested that there was any misunderstanding about the effect of the deed, nor could he suggest that he was not aware that signing the deed would have the effect of agreeing to something which was different to what he asserted was the true position.
>
> However, he chose to sign the deed in circumstances where it seems to me on the basis of that affidavit there is simply no evidence whatever to support a defence of duress. I mention a defence of duress because that was the only substantive defence which was referred to in the defence which was filed with a notice of intention to defend on the 30th of June 2009. It was after that document was filed that the matter came before the Judge on the 10th of July 2009.
>
> There is nothing in the material before me to suggest that the defendant could possibly have even a faintly arguable defence of duress. It was also suggested that the material supported the view that the defendant was not liable on the deed on the ground of unsoundness of mind at the time of execution of the deed."[32]

[36] His Honour considered the limited medical evidence, being a letter from a psychiatrist which referred to having treated the appellant for a depressive disorder and generalised anxiety since 1996 and concluded that it was, even if accepted, insufficient to provide a defence of unsoundness of mind on an action to enforce the

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31 No issues such as were considered in *Mango Boulevard Pty Ltd v Spencer* [2010] QCA 207 about self-executing orders arise since judgment was entered after a curial hearing.

32 AR 95-97.

Deed. Neither, according to his Honour, did the affidavit evidence from the appellant suggest that he was unable to manage his affairs but rather

> "that he was unhappy about the breakdown in what had been, from his point of view, a convenient relationship with the plaintiff in the past. The plaintiff was the mother of a woman with whom he had been in a relationship."[33]

His Honour also observed that although the judgment had been entered on 17 December 2009 because of a failure to comply with an earlier order, there was no suggestion that anything had been done since then to remedy the non-compliance with the earlier order.

[37] His Honour concluded:

> "In all those circumstances, it seems to me that no reasonably arguable case has been established for setting aside the judgment and there is no reason to think that an application to set aside the judgment will ultimately be successful, and in those circumstances it seems to me that it is not appropriate to interfere with the execution, which on the face of it the plaintiff is entitled to have the benefit of, having obtained the judgment."[34]

**Grounds of appeal**

[38] The appellant's grounds of appeal, proposed amended grounds and his outline of argument and further affidavit canvas at some length the history of the relationship between the appellant, the respondent and the daughter as well as with other family members. They convey the appellant's deep disappointment at the breakdown of the relationship with the respondent, both personal and financial. He expresses his regret that he and the daughter did not take independent legal advice when served with a notice to leave The Gap residence "or prior to the execution of the alleged agreement".[35] The appellant contends that the Deed was a self-serving document which deprived him and the daughter of substantial property and other rights and benefits because of the longstanding tripartite relationship in which they pooled their talents to financial advantage. In his outline the appellant wrote:

> "The Appellant and [the daughter] ultimately signed the agreement- as the document was designated, and after the Respondent first did – on the basis that if they did so they would obtain a temporary respite from the pressure of the then circumstances but would live to fight another day – when in sufficient health to do so – if the Respondent decided to act on the agreement terms. Both perceived that the terms of the alleged agreement were grossly wrong and inaccurate and this being so they would be able to if needed be to have matters properly rectified at a later date. The possibility remained that the Respondent would not rely on the agreement as they perceived matters at that time. The Appellant was also substantially influenced by his concern for [the daughter's] then extremely poor health."[36]

[39] The appellant contends that:

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33 AR 97.

34 AR 98.

35 Para 38, appellant's outline of argument filed 24 February 2012.

36 Para 47, appellant's outline of argument filed 24 February 2012.

- the statement of claim disclosed no maintainable cause of action; omitted essential material facts; and its terms were inherently improbable;
- the judgment was irregularly entered; for an amount in excess of the liquidated debt; and without proper proof of service;
- the relationship between the appellant, respondent, and the daughter was one of partnership and the rules relating to partnership dissolution were disregarded;
- the appellant ought to have had an opportunity to rectify any alleged default;
- the appellant has a good defence;
- the appellant is disadvantaged because of poor health; and
- the respondent delayed in enforcing her rights.

[40] The appellant also contends that a reasonable apprehension of bias or prejudice arose because Judge McGill condemned "as distasteful reference to the family controversy".[37]

**Discussion and conclusion**

[41] The appellant has had considerable latitude afforded to him in the conduct of his "defence" to the proceedings instituted by the respondent. He complains that his poor health is a major factor in his failure to file a proper defence and counterclaim. He regards his request for further and better particulars as compliant with the order of 10 July 2009. His incapacity has not prevented him from composing extensive documentation to deploy against the respondent's attempts to obtain judgment and to enforce it – usually at the last minute. As Judge Searles commented, the purported request for further and better particulars does not answer that description. It was oppressive and impossible, in any reasonable sense, to respond to. The appellant has had the benefit of legal advice from time to time. It is not easy to accept his assertion[38] that he was unaware of any need to proceed expeditiously given Judge Tutt's timetable and observations to that effect.[39]

[42] The remarks of the plurality in *Aon Risk Services Australia Limited v Australian National University*[40] are as applicable to self-represented litigants as to those with legal representation:

> "… a just resolution of proceedings remains the paramount purpose … but what is a 'just resolution' is to be understood in light of the purposes and objectives stated. Speed and efficiency, in the sense of minimum delay and expense, are seen as essential to a just resolution of proceedings. This should not detract from a proper opportunity being given to the parties to plead their case, but it suggests that limits may be placed upon re-pleading, when delay and cost are taken into account. The Rule's reference to the need to minimise costs implies that an order for costs may not always provide sufficient compensation and therefore achieve a just resolution. It

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37 Para 72, appellant's outline of argument filed 24 February 2012.
38 Appellant's affidavit filed 5 June 2012 para 40.
39 AR 45.
40 [2009] HCA 27; (2009) 239 CLR 175 at [98].

> cannot therefore be said that a just resolution requires that a party be permitted to raise any arguable case at any point in the proceedings, on payment of costs."

*(i) Errors below?*

[43] Judge McGill had regard to the appellant's complaint that he had not been served with the application which founded Judge Searles' judgment orders. It may be inferred that his Honour concluded that he had been served for he then considered whether there was a reasonably arguable case to form a defence to the claim.[41] His Honour concluded there was none. The appellant has identified no error in that conclusion. The appellant did not raise that the parties and the daughter had formed a partnership but even if that were the case rather than a joint venture, the partnership at the least, was dissolved by the Deed of 9 August 2005. There would be limitation period defences to any new cause raised in any counterclaim. None of the other grounds need be further canvassed. The amount of the judgment was in the order of Judge Tutt and no challenge has ever been made to the figures until this appeal. It is too late to do so even if there were any basis for the complaint.

[44] The contention that Judge McGill in his comment at the hearing raised an apprehension of bias is disposed of by a consideration of the transcript. Mr Cusack mentioned "the issue of paedophilia and the [relative]"[42] to which his Honour replied:

> "It couldn't possibly be a – it didn't have anything to do with it."[43]

Mr Cusack responded that it happened in a family of which the appellant was a member. The following exchange occurred:

> "HIS HONOUR: Rubbish.
>
> MR CUSACK: Your Honour-----
>
> HIS HONOUR: He's being sued on a deed.
>
> MR CUSACK: Beg your pardon, your Honour?
>
> HIS HONOUR: He's being sued on a deed.
>
> MR CUSACK: No. No. No. No, but, your Honour – well, your Honour, it seems to have – that was the sort of turning point in the relationship, your Honour. I mean, the fact is that in this family we have [a person] who was convicted of paedophile offences many, many years ago and has now-----
>
> HIS HONOUR: Mr Cusack that has obviously nothing whatever to do with this claim.
>
> MR CUSACK: I agree.
>
> HIS HONOUR: Don't keep telling me about it."[44]

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41 Searles DCJ's order was made in the absence of the appellant thus giving rise to the fresh discretion in r 667(2)(a). The scope of r 374(5)(a) was discussed in *Johnson v Public Trustee of Queensland as executor of the will of Brady (deceased)* [2010] QCA 260 but need not be further considered here.

42 AR 77.

43 AR 77.

[45] Mr Cusack persisted however, arguing that these events were the catalyst for the breakdown of the close family and business relationship. His Honour then agreed to "have a look through" the appellant's affidavit to see if there were any defence. This exchange or any other attempt to keep the appellant, when he was addressing the court, focussed on the issues could not be characterised as giving rise to an apprehension of bias in the primary judge, or of actual bias in that the judge was impermissibly prejudiced against the appellant or Mr Cusack for raising this matter.

[46] The appellant has identified nothing to suggest that the judgment below was infected with error. Since Judge McGill considered any defence to the claim raised by the appellant and since no other which has any fairly arguable prospects has been advanced before this court, there is no utility in extending time to appeal the judgment entered by Judge Searles on 17 December 2009.

[47] The orders which I would make are:

1. Refuse the application for an extension of time to appeal against the orders made in the District Court on 17 December 2009.
2. Refuse the application to adduce fresh evidence.
3. Refuse the application to amend the grounds of appeal.
4. Dismiss the appeal.
5. The appellant to pay the respondent's costs of and incidental to the appeal to be assessed on the standard basis.

[48] **PHILIPPIDES J:** I have had the advantage of reading the judgment of White JA. I agree with the reasons of her Honour and with the proposed orders.

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[44] AR 77-78.