SUPREME COURT OF QUEENSLAND

CITATION:	*Wallace v Rural Bank Limited & Anor* [2014] QCA 295
PARTIES:	**CHARLIE WALLACE** (appellant) **v** **RURAL BANK LIMITED** ACN 083 938 416 (respondent) **MICHELLE LAMB** (not a party to the appeal)
FILE NO/S:	Appeal No 4307 of 2014 SC No 7928 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 November 2014
DELIVERED AT:	Brisbane
HEARING DATE:	23 September 2014
JUDGES:	Fraser and Morrison JJA and Boddice J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave to adduce further evidence is refused.** **2. The appeal is dismissed.** **3. The appellant is to pay the respondent's costs of the appeal, to be agreed or failing agreement, to be assessed on a standard basis.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – OTHER MATTERS – where default judgment was entered for the respondent in relation to a proceeding instituted by the respondent claiming monies owed by the appellant pursuant to trading and loan facilities granted in relation to two rural properties in Northern Queensland – where an application by the appellant to set aside that default judgment was dismissed, with costs – where the appellant appeals the dismissal of that application – whether the default judgment was a nullity as a consequence of the respondent's failure to comply with rule 389 of the *Uniform Civil Procedure Rules* 1999 CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – where default judgment was entered for the

respondent in relation to a proceeding instituted by the respondent claiming monies owed by the appellant pursuant to trading and loan facilities granted in relation to two rural properties in Northern Queensland – where an application by the appellant to set aside that default judgment was dismissed, with costs – where the appellant appeals the dismissal of that application – whether the Primary Judge erred in finding a deed of agreement operated to disentitle the appellant from seeking to set aside the default judgment

Uniform Civil Procedure Rules 1999 (Qld), r 389

Browning v Australian and New Zealand Banking Group Ltd [2014] QCA 43, cited
Cameron v Cole (1944) 68 CLR 571; [1944] HCA 5, applied
Cusack v De Angelis [2008] 1 Qd R 344; [2007] QCA 313, cited
In re McC (A Minor) [1985] AC 528, cited
Re Macks; Ex parte Saint (2000) 204 CLR 158; [2000] HCA 62, cited
Stone v ACE-IRM Insurance Broking Pty Ltd [2004] 1 Qd R 173; [2003] QCA 218, applied

COUNSEL: P E King for the appellant
M Gynther for the respondent

SOLICITORS: BDG Legal for the appellant
Corrs Chambers Westgarth for the respondent

[1] **FRASER JA:** I agree with the reasons of Boddice J and the orders proposed by his Honour, and the additional reasons of Morrison JA.

[2] **MORRISON JA:** I have had the advantage of reading the reasons prepared by Boddice J. I am in agreement with those reasons and wish to add some additional matters.

[3] The appellant's main attack was focussed on the Registrar's judgment. It was said that the respondent had not complied with r 389 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("**UCPR**") as it had not given a notice of intention to proceed before applying for the judgment.[1] Thus, it was said, the Registrar had no jurisdiction to enter judgment, and it was a nullity.

[4] That contention proceeded on the basis that when the Registrar enters a judgment by default, that judgment is not one of the Supreme Court. That is not correct. The rules which provide that the Registrar can enter a default judgment[2] specify that "the court, as constituted by a registrar, may give judgment". Thus the Registrar constitutes the court for that purpose, and the order is entitled as one of the Supreme Court.

[5] In *Cameron v Cole*[3] McTiernan J said:

---

1 The respondent sought to prove that it had been sent according to the usual postal practices of the respondent's solicitor's firm, however the appellant swore that it had not been received. Consequently the learned primary judge proceeded on the basis that it had not been received.

2 UCPR rules 283, 284, 285, and 286.

3 (1943) 68 CLR 571, at 598-599.

> "Where a court is a superior court of record having general jurisdiction it is impossible to treat any of its orders as a nullity. It may determine conclusively its own jurisdiction and whether the court determines it correctly or not, its order is valid."

[6] In the same case Rich J said at 590:

> "It is settled by the highest authority that the decision of a superior court, even if in excess of jurisdiction, is at the worst voidable, and is valid unless and until it is set aside."

[7] Those passages were relied on in *Stone v ACE-IRM Insurance Broking Pty Ltd*[4] where Philip McMurdo J went on to add:

> "It may not now be correct to regard the Supreme Courts of the States as being courts of general jurisdiction: see *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 211-212. But in the same case, Gleeson CJ cited with approval the above passage from the judgment of Rich J in *Cameron v Cole*, in which Rich J also said, at 590-591:
>
> > 'I am unable to feel any doubt that the Federal Court of Bankruptcy is a superior court. The language of Lord Greene MR, in *Craig v Kanssen*, where he says that 'a person who is affected by an order which can properly be described as a nullity is entitled *ex debito justitiae* to have it set aside,' is correct as an abstract proposition; but since the order before his Lordship was one of a superior court, the expression is somewhat misleading, and his statement that the distinction is 'between proceedings or orders which are nullities and those in respect of which there has been nothing worse than an irregularity' fails, I venture to think with all submission, to meet the actual facts of the case. This is true enough in the case of an inferior court (*In re the Affairs of Hart*); but in the case of a superior court the distinction is between irregularities so fundamental as to create an unconditional right, *ex debito justitiae*, to have the judgment set aside, and non-fundamental irregularities as to which the court has a discretion.'"

[8] The proposition is no longer the subject of debate in Australia. The High Court recently said in *New South Wales v Kable*:[5]

> "[32] It is now firmly established by the decisions of this Court that the orders of a federal court which is established as a superior court of record are valid until set aside, even if the orders are made in excess of jurisdiction (whether on constitutional grounds or for reasons of some statutory limitation on jurisdiction). It was not submitted that any of these decisions should be reopened and there would be powerful reasons not to disturb such a long-established stream of authority. Nor was it submitted that these

---

4 [2003] QCA 218, at [25], per Philip McMurdo J, McPherson JA and Holmes J (as she then was) concurring. Internal footnotes omitted.

5 [2013] HCA 26, the plurality at [32]-[34]; see also Gageler J at [56]. Internal citations omitted.

> principles did not apply equally to the judicial orders of a State Supreme Court. Rather, as already noted, the principles were said not to apply because the order made by Levine J was not a judicial order. And, for the reasons already given, that submission must be rejected.

[33] The roots of the doctrine, that the orders of a superior court of record are valid until set aside even if made in excess of jurisdiction, lie in the nature of judicial power.

[34] First, any court must decide whether it has authority to decide the claim that is made to it. And, as Gaudron J said in *Re Macks; Ex parte Saint*:

> > In establishing the Federal Court as a "superior court of record", the Parliament has, at the very least, validly authorised that Court to make *a binding determination on the question whether or not it has jurisdiction in a matter, subject only to the parties' right to appeal or to seek relief pursuant to s 75(v) of the Constitution*.
>
> (Emphasis added.) Second, giving the orders of a court created by the Parliament these characteristics is within legislative power, either as incidental to the power to create the court or as an exercise of the legislative powers given by ss 76 and 77 of the *Constitution*. And giving these characteristics to the orders of a court by designating it to be a superior court of record reflects the distinction between the exercise of judicial power (by the *final* quelling of controversies according to law) and the exercise of executive power (*subject* to law). As Gummow J said in *Re Macks; Ex parte Saint*:
>
> > 'That does not mean that the stream [of judicial power] has risen above its source. Rather, it is to recognise the relationship between Chs II and III of the *Constitution* and the reach of s 51(xxxix) in conjunction with ss 71 and 77(i).'"

[9] The appellant's contentions that the deed was entered into as a result of some form of unconscionable conduct on the part of the respondent, cannot be sustained. There are a several reasons for that conclusion.

[10] First, the receivers were appointed on 6 January 2014, and on 8 January the appellant was notified of their appointment, by email. The appellant was given a copy of the Deed of Appointment, which stated in clause 2, that the receivers "shall be the agent of the Mortgagor and neither the Receiver nor the Bank shall be personally liable for the Receiver's acts or omissions".[6]

[11] That mirrored the provisions of the relevant security,[7] under which the respondent could appoint receivers once an Event of Default had occurred.[8] There was no serious

---

6 AB 87.

7 Clause 10.3 of the livestock mortgage, AB 78. There is no reason to doubt that the other registered mortgages contained similar terms.

8 The respondent's solicitor deposed to default having occurred in 2012: paragraph 12, AB 123.

issue that an Event of Default had occurred as at 6 January 2014.[9] As such the receivers acted as the agents of the mortgagor (the appellant), not the mortgagee (the respondent). Thus the appellant cannot lay their conduct at the feet of the respondent.

[12] Secondly, it was the receivers who went into possession of the properties, not the respondent. The receivers announced that they were coming to the properties on 17 February. They did so,[10] and the appellant accompanied them on an inspection. During that inspection the appellant's solicitor emailed a copy of the proposed deed, received from the solicitor for the respondent. The receivers' agent pressed for them to be signed.

[13] Thirdly, on 18 February the appellant discussed the draft documents with his solicitor, who sent an email "advising me in relation to those aspects of the deed of agreement that set out what the receivers could take possession of and what my obligations were".[11] The advice also extended specifically to the clause of the draft deed that related to not setting aside the default judgment. Those clauses provided:

> "7 **No application to set aside Judgment and/or Enforcement Warrant**
> In consideration of the Bank entering into this Deed and granting the Occupation Licence to Wallace, Wallace agrees and undertakes that he will not apply to set aside the Judgment and/or the Enforcement Warrant.
>
> 8 **Bar to application to set aside Judgment and/or Enforcement Warrant**
> This Deed may be pleaded as a full and complete defence, response or answer to any application by Wallace to set aside the Judgment and/or the Enforcement Warrant."[12]

[14] Thus the appellant sought and was given legal advice as to the draft deed, from his own solicitor. The appellant's solicitor was aware that the respondent had obtained the default judgment as, about a month earlier on 20 January 2014, he advised the respondent's solicitor that he had "been instructed to file an application to set aside the default judgment … and seek to file a defence and counterclaim".[13] At the same time the appellant's solicitor advised that he had briefed counsel to advise as to "whether the proposed arrangement will prejudice my client".[14]

[15] Fourthly, the basis upon which the appellant gave up possession of the properties was negotiated for him by his solicitor. On 13 February the appellant's solicitor advised that the appellant had agreed to provide possession to the receivers, on the basis of conditions which had been set out in an email on 10 February from the respondent's solicitor to the appellant's solicitor.[15] The conditions were then finalised on 14 February, including an occupation licence under which the appellant would be entitled to remain on the properties until 28 April 2014.[16]

---

9 The appellant asserted a bald denial of having defaulted but offered no particulars: affidavit of the appellant, paragraph 3, AB 198.

10 Three agents of the receivers attended.

11 Affidavit of appellant, paragraph 63, AB 46.

12 AB 170.

13 Affidavit of Byres, paragraph 29, AB 126.

14 Email dated 20 January 2014, AB 151.

15 AB 158-159.

16 Emails at AB 160.

[16] By the time the appellant received his legal advice on 19 February, the receivers' agents were staying at the property. The appellant said that one of them was "pressuring me to sign those documents, and … indicated to me that he would not be leaving until I had signed them".[17] The appellant signed the deed and occupation licence on 21 February. The appellant asked his solicitor to be present when he signed but the solicitor advised it was not possible.

[17] The appellant contended that the "pressuring" by the receivers, referred to above, was unconscionable. Plainly it was not, and the learned primary judge was correct to reject that contention.

Conclusion

[18] I agree with the orders proposed by Boddice J.

[19] **BODDICE J:** On 28 April 2014, an application by the appellant to set aside a judgment by default entered by the Registrar on 10 January 2014, was dismissed, with costs. The judgment related to a proceeding instituted by the respondent in 2012, claiming monies owing pursuant to trading and loan facilities granted in relation to two rural properties in North Queensland.

[20] The appellant appeals that decision. At issue is whether the default judgment was a nullity as a consequence of the respondent's failure to comply with rule 389 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("*UCPR*"), whether the Primary Judge erred in finding a deed of agreement, entered into on 20 February 2014, operated to disentitle the appellant from seeking to set aside the default judgment, and whether the appellant otherwise had prospects of successfully defending the proceeding.

Background

[21] The appellant is the registered owner of two rural properties in Northern Queensland known as Newburgh Station and Coronation Station. Those properties, held pursuant to Crown leases, were operated as cattle properties. For some years prior to 2012, the respondent provided seasonal trading facilities and term loan facilities to the appellant for the operation of the properties. As security for those facilities, the appellant granted the respondent a livestock mortgage and registered land mortgages over both stations ("the Securities").

[22] On 31 August 2012, the respondent commenced proceedings against the appellant claiming repayment of the monies owing under the facilities and recovery of possession of the stations pursuant to the Securities. The appellant filed a conditional notice of intention to defend, which was subsequently abandoned, and referred the matter to the Financial Ombudsman Service. As a consequence of that referral, no steps were taken in the proceeding between October 2012 and November 2013.

[23] On 7 January 2014, the respondent filed a request for default judgment. In the accompanying affidavit, the respondent's solicitor said he had posted to the appellant a copy of a notice of intention to proceed dated 18 November 2013 in accordance with rule 389 of the *UCPR*. The Registrar, being satisfied the requirements for entry of a default judgment were met, entered judgment by default on 10 January 2014. That judgment related to the monies outstanding and recovery of the two rural properties.

---

[17] Affidavit of appellant, paragraph 67, AB 46-47.

[24] Subsequent to the entry of that default judgment, receivers and managers, who had been appointed by the respondent on 6 January 2014 pursuant to the Securities, took steps to secure possession of the properties, and to take over management of the livestock. On 20 February 2014, the appellant, the respondent and the receivers and managers executed a deed of agreement in relation to possession of the two rural properties. The appellant and the respondent also executed an occupation licence in respect of the homestead of one property. Both documents were in the form of deeds.

[25] On 11 April 2014, the appellant filed an application to set aside the judgment by default and an enforcement warrant issued pursuant to that judgment. The appellant contended the judgment by default should be set aside pursuant to rule 290 of the *UCPR* because it had been obtained without the respondent giving one month's notice of intention to proceed, as required by rule 389 of the *UCPR*.

[26] In response, the respondent maintained a notice of intention to proceed had been forwarded in accordance with the Rules. Alternatively, the respondent contended the Deed of Agreement entered into between the appellant, the respondent, and the receivers and managers, on 20 February 2014 provided a complete defence to the application.

Primary Judge's decision

[27] The Primary Judge found that notwithstanding the respondent's solicitor giving evidence he had caused the notice of intention to proceed to be posted to the defendant in accordance with his usual practice, it was necessary for the purposes of the application to accept the appellant's sworn assertion he did not receive that notice. Accordingly, the judgment by default was entered irregularly as one month's notice of an intention to proceed had not been given by the respondent as required by rule 389 of the *UCPR*. The Primary Judge accepted those circumstances would normally lead to the judgment by default being set aside.

[28] However, the Primary Judge found the Deed of Agreement entered into was a complete answer to the appellant's application. By that Deed, the appellant had agreed he would not apply to set aside the default judgment or the enforcement warrant. The appellant had also agreed the Deed may be pleaded as a full and complete defence to any such application.

[29] In coming to these conclusions, the Primary Judge rejected a submission by the appellant that he had raised an arguable case there was unconscionable dealing in the method by which the respondent had made that agreement with the appellant. The Primary Judge found the appellant was a person of full capacity, who had received legal advice before executing the Deed.

[30] The Primary Judge, being satisfied the appellant had not established any viable defence to the action, dismissed the appellant's application and ordered the appellant to pay the respondent's costs.

Appellant's Submissions

[31] A significant portion of the appellant's amended outline of submissions was devoted to a claim the then named second respondent had an equitable interest in the rural properties. However, at commencement of the hearing of the appeal, the appellant abandoned reliance upon that assertion and sought removal of the second respondent as a named party to the appeal. An order to that effect was made at that time.

[32] The remaining grounds of appeal related to essentially three contentions. First, the requirements of rule 389 of the *UCPR*, were mandatory. The failure to comply rendered the judgment by default one that could not be entered by the Registrar. The judgment so entered was a nullity, and the appellant was entitled *ex ebito justitiae* to have it set aside. Second, the Deed of Agreement was not a valid and enforceable agreement as it was premised upon untrue representations, namely, that the respondent had a valid and enforceable judgment in default. Third, the appellant has a viable defence. The circumstances presented by the appellant gave rise to issues that properly ought to be determined at trial, and the Primary Judge erred in dismissing the application.

Respondent's Submissions

[33] The respondent submitted the judgment by default had been validly entered by the Registrar. Whilst it may have been susceptible to an order setting it aside, having regard to the finding rule 389 of the *UCPR* had not been complied with, the judgment was not a nullity. Further, the Primary Judge correctly found the Deed of Agreement represented a complete answer to the application. The Deed of Agreement accurately recorded the background circumstances. The appellant had entered into that Deed knowing he was entitled to bring an application seeking orders setting aside the judgment by default, and after receiving legal advice as to the effects of the Deed of Agreement.

[34] The respondent further submitted the Deed addressed the major concern of the appellant, namely, that he be entitled to remain in occupation of the homestead on Newburgh Station. Against that background, the Primary Judge correctly found there was no basis to conclude the agreement had been entered into unconscionably, or that there was any valid ground of defence to the respondent's claim.

Discussion

[35] The term "nullity" is sometimes used when referring to a decision of an inferior court made without jurisdiction. As an inferior court has a limited and prescribed jurisdiction, a decision made without jurisdiction is no decision.[18]

[36] Whilst the term "nullity" may have application to decisions of an inferior court, it is an inapt term in respect of decisions of a superior court of record. It is impossible to treat orders of superior courts of record as a nullity.[19] The decision of a superior court of record, even if in excess of jurisdiction, is voidable but valid unless and until it is set aside.[20] This distinction was recognised in *Re Macks; Ex parte Saint*[21] where Gleeson CJ cited with approval the observations of Rich J in *Cameron v Cole.*[22]

[37] The proposition that a proceeding before this Court, even though defective, is not properly to be described as a nullity was expressly recognised in *Stone v ACE-IRM Insurance Broking Pty Ltd*.[23] There, Philip McMurdo J, (with whose reasons McPherson JA and Holmes J [as her Honour then was] agreed), observed the concept a proceeding of this Court may be a nullity is inconsistent with the principle

---

18 See generally, *In re McC (A Minor)* [1985] AC 528.
19 *Cameron v Cole* (1944) 68 CLR 571 at 598-599.
20 Ibid at 590 (per Rich J).
21 (2000) 204 CLR 158 at 161.
22 (1944) 68 CLR 571.
23 [2003] QCA 218.

that the Court retains control of all proceedings commenced within its jurisdiction. Where the Rules of Court permit a defect to be cured, and that remedial power is exercised, the proceeding is not to be described as a nullity.

[38] A defective proceeding, or step taken contrary to the Rules, may be cured under the *UCPR*. Rule 371 expressly provides:

> "A failure to comply with these rules is an irregularity and does not render a proceeding, a document, step taken or order made in a proceeding, a nullity."

The appellant sought to contend there was a difference between a judgment by default entered by a Judge of this Court, and a judgment by default entered by the Registrar. The Rules provide no such distinction. Whilst the Registrar is only empowered to enter judgment by default in certain circumstances, the judgment so entered is the judgment of the Court.

[39] The judgment by default entered by the Registrar, in circumstances where the respondent had not complied with the requirements of rule 389 of the *UCPR*, was not a nullity. It was, however, liable to be set aside. Indeed, an irregularly obtained judgment will normally be set aside on the application of a defendant. [24] However, there is a residual discretion.

[40] In *Browning v Australia and New Zealand Banking Group Limited* [2014] QCA 43, Muir JA recognised there are occasions where the Court may not order the judgment be set aside. His Honour quoted his earlier observations in *Cusack v De Angelis*:[25]

> "It has been long accepted that a defendant is entitled to have an irregularly entered judgment set aside as of right, subject to the exercise of a power of amendment and the futility of interfering with the judgment. Such judgments are the product of the exercise of administrative acts performed without legal authority. Irregularity, as that term is used in relation to default judgments, normally results from a failure to comply with the rules of court relating to the entering of default judgments." (Citations omitted)

The qualification in respect of the futility of interfering with the judgment has relevance in the present case.

[41] The appellant had entered into a compromise of the proceedings after entry of the judgment by default. That compromise expressly dealt with the making of an application to set aside the judgment entered by default. There is good reason why the appellant would execute a deed by which he forewent any entitlement to make application to set aside that judgment by default.

[42] The Deed of Agreement expressly addressed the appellant's continued occupation of a homestead on one of the rural properties. The appellant, in his affidavits, acknowledged he was aware receivers and managers had been appointed, and were going to take possession of the properties "one way or the other".[26] Entering into a deed of agreement with not only the respondent but also those receivers and managers, which enshrined the appellant's entitlement to remain in occupation of the homestead, was a significant and valuable right.

---

24 *Browning v Australia and New Zealand Banking Group Limited* [2014] QCA 43, (per Muir JA, with whose reasons Margaret McMurdo P and Daubney J agreed).

25 [2008] 1 Qd R 344 at 351; [2007] QCA 313 at [36].

26 Second affidavit of the appellant, paragraph 7.

[43] The appellant entered into the Deed of Agreement with the respondent, and its appointed receivers and managers, after entry of the default judgment. He did so knowing he had an entitlement to apply to set aside that default judgment. The appellant had specific advice from a legal practitioner to that effect. He also had legal advice as to the consequences of entering into the Deed of Agreement.

[44] There was no proper basis to contend the Deed was entered into unconscionably.

[45] There is also no substance to a contention the Deed of Agreement contained untrue representations. The Deed contained the following, "Background":

> "A. Wallace is the registered owner of those pieces or parcels of land described as:
>
> (a) Lot 4897 on Crown Plan PH1445, situated in the County of Philp, Parish of Newburgh, being the whole of the land contained in Title Reference 17665144, and otherwise known as 'Newburgh Station' located at Gregory Springs Road, via Pentland in the State of Queensland (Newburgh Station); and
>
> (b) Lot 300 on Survey Plan 137135, situated in the County of Davenport, Parish of Bletchington, being the whole of the land contained in Title Reference 17665104, and otherwise known as 'Coronation Station' located at Gregory Developmental Road, via Charters Towers in the State of Queensland (Coronation Station).
>
> B. The Bank lent money to Wallace pursuant to:
>
> (a) a seasonal trading facility (account number 300575982);
>
> (b) a term loan facility (account number 90060617); and
>
> (c) a term loan facility (account number 90117599),
>
> (collectively, the Loans).
>
> C. As security for the Loans, Wallace granted the Bank:
>
> (a) Registered Mortgage No. 704745731 over Newburgh Station;
>
> (b) Registered Mortgage No. 713250294 over Coronation Station; and
>
> (c) Livestock Mortgage dated 2 April 2001, registration number 40013987200101 over the 'mortgaged property' (as defined therein) (Livestock Mortgage),
>
> (collectively, the Security).
>
> D. Wallace defaulted under the Loans.
>
> E. On or about 31 August 2012, the Bank commenced a proceeding against Wallace in the Supreme Court of Queensland (No. BS7928/12) in which it claimed payment of monies owing under the Loans and for recovery of possession of Newburgh Station and Coronation Station (Legal Proceeding).
>
> F. On 6 January 2014, the Bank appointed William Martin Colwell and Timothy James Michael, registered liquidators of Ferrier Hodgson, as receivers and managers (Receivers) of the property described in the Security, namely:
>
> (a) Newburgh Station;
>
> (b) Coronation Station; and

(c) the livestock forming part of the 'mortgaged property' (as defined) under Livestock Mortgage.

G. On 9 January 2014, the Bank appointed the Receivers as receivers and managers of the balance of the 'mortgaged property' (as defined) under the Livestock Mortgage, which includes all plant and equipment owned by Wallace and used in connection with the Livestock or Wallace's business on Newburgh Station.

H. On 10 January 2014, at the Bank's request, judgment (by default) was entered against Wallace in the Legal Proceeding (Judgment). Judgment was for Wallace to pay the Bank the amount of $6,819,787.09 and for the Bank to recover possession of Newburgh Station and Coronation Station.

I On 23 January 2014, at the Bank's request, an Enforcement Warrant – Possession of Land was issued authorising an Enforcement Officer of the Court to enter upon Newburgh Station and Coronation Station and deliver possession of them to the Bank (Enforcement Warrant).

J. The Parties have entered into this Deed to record their agreement in relation to the Bank taking delivery of possession of Newburgh Station, Coronation Station and the Livestock, and for the arrangements which are to be put in place with immediate effect upon the Bank taking delivery of possession.

[46] Those paragraphs correctly recorded that the respondent had a judgment by default in its favour. There was no representation that judgment was a valid and enforceable judgment. Such an assertion is inconsistent with the inclusion of a specific term, in Clause 7, that the appellant, in consideration of the respondent entering into the Deed and granting the Occupation Licence, agreed and undertook not to apply to set aside that judgment, and any enforcement warrant issued subsequent consequent upon it.

Conclusions

[47] The judgment by default entered by the Registrar was not a nullity. Whilst it was liable to be set aside, by reason of non-compliance with rule 389 of the *UCPR*, the Deed of Agreement entered into by the appellant provided a complete answer to the application to set aside that judgment by default. There was, accordingly, a futility in interfering with that judgment.

[48] The Primary Judge did not err in finding the Deed provided a complete answer to the appellant's application. The Deed of Agreement was a valid and enforceable agreement. The Deed had not been entered into unconscionably. The Primary Judge correctly refused to set aside the judgment by default, and dismissed the Plaintiff's application.

[49] This conclusion renders consideration of the appellant's proposed defence and counterclaim irrelevant. That document was not even in existence at the time of the appellant's application to set aside the judgment. I would refuse the appellant leave to rely on that document.

[50] This conclusion also renders consideration of the respondent's notice of contention unnecessary.

Orders

[51] I would order:

(1) leave to adduce further evidence is refused;

(2) the appeal is dismissed;

(3) the appellant is to pay the respondent's costs of the appeal, to be agreed or failing agreement, to be assessed on a standard basis.