# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Jorgensen v Jorgensen & Ors* [2016] QSC 193 |
| PARTIES: | **BRIAN LAURENCE JORGENSEN**<br>(applicant)<br>**v**<br>**ALAN JORGENSEN**<br>(first respondent)<br>and<br>**MANTONELLA PTY LTD (ACN 069 012 531)**<br>(second respondent)<br>and<br>**MIJAC INVESTMENTS PTY LTD (ACN 089 820 280)**<br>(third respondent) |
| FILE NO/S: | No 12751 of 2015 |
| DIVISION: | Trial Division |
| PROCEEDING: | Civil Application |
| ORIGINATING COURT: | Supreme Court of Queensland at Brisbane |
| DELIVERED ON: | 5 September 2016 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 17 February 2016; 28 April 2016 |
| JUDGE: | Daubney J |

ORDERS:

1. **The applicant Brian Laurence Jorgensen has leave to apply for a vexatious proceedings order under the *Vexatious Proceedings Act* 2005.**

2. **Pursuant to s 6(2) of the *Vexatious Proceedings Act* 2005, it is ordered that the first respondent Alan Jorgensen, or any entity controlled by the first respondent (including each of the second respondent and the third respondent) shall not without the leave of the Court institute or cause to be instituted any proceedings with respect to, connected with or arising out of the Rainbow Motor Inn Unit Trust.**

3. **The respondents shall pay the applicant's standard costs of and incidental to the application.**

CATCHWORDS: PROCEDURE – STATE AND TERRITORY COURTS: JURISDICTION, POWERS AND GENERALLY –

VEXATIOUS LITIGANTS, PROCEEDINGS AND RELATED MATTERS – VEXATIOUS PROCEEDINGS – where the applicant has brought an application for orders under the *Vexatious Proceedings Act* 2005 (Qld) and/or by an exercise of the inherent jurisdiction of the Court to prevent an abuse of process – where the applicant seeks orders against the respondent to restrain proceedings – where the respondent has been involved in frequent litigation – where the respondent has exhibited behaviour of disregard for practices and rulings of the courts and tribunals – whether leave should be granted to bring the application under the *Vexatious Proceedings Act* 2005 (Qld) – whether the respondent is a person who has frequently instituted or conducted vexatious proceedings in Australia – whether an order should be made under the *Vexatious Proceedings Act* 2005 (Qld)

PROCEDURE – STATE AND TERRITORY COURTS: JURISDICTION, POWERS AND GENERALLY – INHERENT AND GENERAL STATUTORY POWERS – TO PREVENT ABUSE OF PROCESS – GENERALLY – where the applicant has brought an application for orders under the *Vexatious Proceedings Act* 2005 (Qld) and/or by an exercise of the inherent jurisdiction of the Court to prevent an abuse of process – where the respondent has evinced an intention to seek to abuse court processes – whether it is an appropriate case for the Court to exercise its inherent jurisdiction to prevent an abuse of process

*Vexatious Proceeding Act* 2005 (Qld) s 5(2), s 6

*Cooper v Mbuzi* [2012] QSC 105, considered
*Hambleton & Anor v Labaj* [2011] QCA 17, cited
*Schultz v Rowe* [2015] QSC 143, cited
*Von Risefer v Permanent Trustee Company Ltd* [2005] 1 Qd R 681, cited

COUNSEL: R Perry QC for the applicant
The first respondent appeared on his own behalf
A Jorgensen appeared in his capacity as director of Mantonella Pty Ltd and Mijac Investments Pty Ltd for the second and third respondents

SOLICITORS: Miller Harris for the applicant
The first respondent appeared on his own behalf
A Jorgensen appeared in his capacity as director of Mantonella Pty Ltd and Mijac Investments Pty Ltd for the second and third respondents

[1] This is an application brought by Brian Jorgensen ("BJ") against his brother Alan Jorgensen ("AJ"), Mantonella Pty Ltd ("Mantonella") and Mijac Investments Pty Ltd ("Mijac") seeking orders, principally against AJ, under the *Vexatious Proceedings Act*

2005 ("*VPA*") and/or by an exercise of the Court's inherent jurisdiction to restrain a multiplicity of proceedings.

[2] It is not in issue that AJ is the controlling mind of Mantonella and Mijac and he was granted leave to appear for those entities in the hearing before me.

[3] The present application has its genesis in proceedings commenced in the Cairns Registry of this Court (SC 15 of 2015) ("the Cairns proceeding") in which Mantonella is the named plaintiff and the named defendants are Grancroft Pty Ltd ("Grancroft"), Mainrace Pty Ltd ("Mainrace") and BJ. BJ is the controlling mind of Grancroft and Mainrace. The Cairns proceeding commenced as an application by Mantonella, in its capacity as trustee of the Jorgensen Family Trust, seeking orders with respect to the ownership of interests in a unit trust known as the Rainbow Motor Inn Unit Trust ("the Trust").

[4] As will shortly become apparent, the Cairns proceeding initially provided a vehicle to enable AJ to pursue historic internecine claims against BJ but was then expanded in scope to engage a diverse range of issues between members of the Jorgensen family concerning the Trust. I can do no better than to repeat and respectfully adopt the following statement of the background to the dispute by Henry J in his judgment in the Cairns proceeding, *Mantonella Pty Ltd v Grancroft Pty Ltd & Ors*[1]: (omitting references and citations)

> "[2] The plaintiff company filed an originating application, in its capacity as trustee of the Jorgensen Family Trust, on 9 January 2015 seeking relief under r 643 of the *Uniform Civil Procedure Rules* ("UCPR") with respect to the ownership of shares in the Rainbow Motor Inn Unit Trust.
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> [3] The plaintiff's claim relates to an historic dispute between the plaintiff's director, Alan Jorgensen, and the third defendant Brian Jorgensen, who controls the first and second defendant companies. The plaintiff company, Mantonella Pty Ltd ('Mantonella') did not exist in the era of the dispute.
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> [4] Alan and Brian Jorgensen are twin brothers. Together, they purchased the Rainbow Motel in October 1977. In 1985, the Rainbow Motor Inn Unit Trust was formed for the purpose of holding the brothers' interests on trusts for their respective families.
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> [5] The unit trust provided that the first defendant, Grancroft Pty Ltd ('Grancroft'), would act as trustee of the Rainbow Motor Unit Inn Trust, with Brian Jorgensen and the twins' mother, Patricia, appointed as directors. Alan Jorgensen deposes that as he was self-employed at the time, it was agreed he not be a director of Grancroft, in case it prejudiced future loan applications for the motel's development.
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> [6] The Rainbow Motor Inn Unit Trust comprised 20 units. Nine of these units were held by Nicholas John Holdings Pty Ltd, a company controlled by Alan Jorgensen, in its capacity as trustee of the Jorgensen Family Trust. The remaining 11 units were held by Nevgold Pty Ltd, a company controlled by Brian Jorgensen, in its capacity as trustee of the Brian Jorgensen Family Trust.

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1 [2015] QSC 191.

[7] The current unit holders of the Rainbow Motor Inn Unit Trust are Nevgold Pty Ltd, with 55 per cent, and Mainrace Pty Ltd, with 45 per cent. Brian Jorgensen is also a director of Mainrace Pty Ltd. It is the circumstance under which Mainrace Pty Ltd came to hold the units previously held by Nicholas John Holdings Pty Ltd which is at the heart of this dispute.

[8] Alan Jorgensen represents the plaintiff, Mantonella, in these proceedings, purportedly in his capacity as its director. He alleges that a dispute arose between the brothers in about August 1992 when Grancroft ceased making profit distributions from the unit trust to the beneficiaries, after six years of doing so. He claims this was done without consulting or notifying Patricia as co-director of Grancroft, and Alan as director of Nicholas John Holdings Pty Ltd as trustee for his family's trust. Curiously, in his affidavit filed 9 January 2015, Alan Jorgensen deposes that following a profit distribution from the Rainbow Motor Inn Unit Trust in 1991 and before any dispute had arisen, it was decided prudent that further profit distributions be put on hold due to a pending property settlement with Alan's former wife, Sandra, and due to uncertainty over dealings with the ANZ Bank with respect to Alan and his company, Nicholas John Holdings Pty Ltd.

[9] In 1989, Nicholas John Holdings Pty Ltd granted a fixed and floating charge over its assets in favour of the ANZ Bank. This charge included those assets held by the company in its capacity as trustee of the Jorgensen Family Trust.

[10] In 1991, Nicholas John Holdings Pty Ltd filed its annual return with ASIC, the result of which indicated that the value of the company's assets equalled the sum of its liabilities, yielding a net asset position of $0.00.

[11] In January 1992, the ANZ Bank appointed Robert Kus as receiver and manager of property of Nicholas John Holdings Pty Ltd described as 'the whole of the assets whatsoever and wheresoever held by Nicholas John Holdings Pty Ltd as trustee of the Jorgensen Family Trust'. This included the nine units of the Rainbow Motor Inn Unit Trust.

[12] In April 1992, Robert Kus was replaced as receiver and manager by Peter Gerard Ryan.

[13] Following an approach by Mr Ryan, the third defendant caused his company Mainrace Pty Ltd, as trustee of the Brian Jorgensen Family Trust No. 2, to enter into an agreement to purchase the nine units held by Nicholas John Holdings Pty Ltd for a price of $125,000. The third defendant deposes this price was the ascribed value of the units under a Report as to Affairs completed by Alan Jorgensen in his capacity as director of Nicholas John Holdings Pty Ltd.

[14] By late 1992 Alan Jorgensen was aware that Mainrace Pty Ltd, as trustee for the Brian and Evelyn Jorgensen Family Trust, had acquired

> the 45 per cent share of the unit trust held by Nicholas John Holdings Pty Ltd for $125,000.
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> [15] Some 22 years later he initiated the present proceeding."

[5] That judgment concerned an application by Grancroft, Mainrace and BJ for security for costs of the Cairns proceeding. The application was heard on 1 April 2015 and a judgment delivered on 30 June 2015. Henry J relevantly ordered that Mantonella provide security for costs in the amount of $35,000 by 21 July 2015 and that the Cairns proceeding be stayed pending provision of that security. There was no appeal against that order.

[6] It is not in issue that this security for costs has not been provided.

[7] Further elucidation of the claims advanced in the Cairns proceeding is also conveniently set out in the following paragraphs of the judgment of Brereton J in *Jorgensen (as trustee for Jorgensen Family Trust) v Grancroft Pty Ltd*[2] ("the NSW proceeding"), which I also respectfully adopt:

> "1 The first defendant Grancroft Pty Limited was until recently the trustee of the Rainbow Motor Inn Unit Trust, a unit trust in which the original unit holders were Nevgold Pty Limited as to 11 of 20 issued units and Nicholas John Holdings Pty Limited as to nine of the 20 issued units. Each of those companies held its units as trustees of the discretionary family trusts associated respectively with the second defendant Brian Jorgensen and the first plaintiff Alan Jorgensen who are twin brothers.
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> 2 Nevgold was trustee of the Brian Jorgensen Family Trust, and Nicholas Holdings was the trustee of the Jorgensen Family Trust (to which, for the sake of clarity, I will refer as the Alan Jorgensen Trust).
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> 3 The second plaintiff Patricia Jorgensen is the elderly mother of Alan and Brian Jorgensen. Until early last year she held nine of the ten issued shares in Grancroft, although Alan Jorgensen claims to have had some beneficial interest in them. The other share in Grancroft is held by Brian Jorgensen.
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> 4 On 24 August this year, the current purported unit holders removed Grancroft as trustee of the Rainbow Trust and replaced it with another company Potinak Pty Limited. For the purposes of the present application, it may be assumed that, if necessary, Potinak would be added as a defendant in the proceedings.
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> 5 Mr Alan Jorgensen resides at Kewarra Beach in North Queensland. Mr Brian Jorgensen resides in or near Cairns. Mrs Patricia Jorgensen resides with Mr Alan Jorgensen at Kewarra Beach.
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> 6 The assets of the Rainbow Trust comprise a motel in Cairns, and the trust administered in Queensland. It appears – or at least the defendants contend – that by the early 1990s, Nicholas Holdings had given a charge over its assets and undertaking to the ANZ Bank including in its capacity as trustee of the Alan Jorgensen trust. The

[2] [2015] NSWSC 1723.

bank appointed receivers who in due course, after discussions with Mr Brian Jorgensen, sold the nine units in the Rainbow Trust to Mainrace Pty Limited, another company associated with Mr Brian Jorgensen. In any event, it is now alleged by the defendants that Mainrace holds the nine units in the trust that were formally the property of the Alan Jorgensen Trust.

7 It also appears that, on 17 March 2014, Mrs Jorgensen executed a share transfer of six shares in Grancroft to Mijac Investments Pty Limited, a company associated with Alan Jorgensen. However, it appears that she may also have, on 13 April 2014, executed a share transfer dated 18 March 2014 of all her nine shares in Grancroft to Brian Jorgensen. It is that transfer of the nine shares to Brian Jorgensen that is at the heart of the present proceedings, although the circumstances by which Mainrace claims to have become entitled to the nine units formerly held by the Alan Jorgensen Trust have also been raised.

8 On 9 January 2015, Mantonella Pty Limited, of which Mr Alan Jorgensen was a director and which claimed to have become the trustee of the Alan Jorgensen Trust in place of Nicholas Holdings, commenced proceedings in the Supreme Court of Queensland at Cairns seeking relief with respect to the matters to which I have referred. That court ordered that the proceedings continue on pleadings, and when the plaintiff filed a statement of claim in those proceedings, it sought, *inter alia*, declarations to the effect that the Alan Jorgensen Trust is still the beneficial owner of the nine $1 units in the Rainbow Trust which it had held since its inception, and that the unauthorised removal of Mrs Patricia Jorgensen as a director on 30 November 1993 and as a shareholder in Grancroft on 4 April 2014 were void, thereby reinstating her prior status. That statement of claim was subsequently amended, and in the amended statement of claim, Mantonella claimed, *inter alia*, declarations that the Alan Jorgensen Trust was the beneficial owner of the nine $1 units in the Rainbow Trust as at 30 July 1992 which it held since its inception, and that the unauthorised removal of Mrs Jorgensen as a director on 30 November 1993 and as a shareholder of Grancroft on 14 April 2014 were void, thereby reinstating her prior status as a director and shareholder of nine shares in Grancroft as it was on 29 November 1993.

9 In the course of the Queensland proceedings, Mantonella on 27 March 2015 filed an interlocutory application seeking orders, *inter alia*, that the nine shares held by Mrs Jorgensen in Grancroft be ratified, and the form 484 lodged with ASIC dated 14 April 2014, purporting to transfer those shares to Brian Jorgensen be declared void and set aside. That interlocutory application was dismissed on 1 April 2015, without determining the merits of the claim, on the basis that it effectively sought to circumvent the court's decision that those claims for relief ought to proceed by way of pleadings."

[8] Brereton J referred to the security for costs application before Henry J in the Cairns proceeding, and then provided the following chronology:

> "11 According to the plaintiffs, Mantonella was replaced as trustee of the Alan Jorgensen Trust by Mijac Investments Pty Limited. On 28 May 2015 – that is to say, before Henry J's judgment on the security for costs application was delivered – Mijac commenced proceedings in this Court. It is unnecessary in the circumstances to refer to those proceedings in much detail; because of their relationship with the current proceedings, they have been dismissed.
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> 12 On 31 July 2015, the present plaintiff Mr Alan Jorgensen, claiming to have succeeded Mijac as trustee of the Alan Jorgensen Trust, commenced these proceedings by *ex parte* application before Sackar J sitting as a duty judge, and obtained an abridgement of time for service and directions for service of the initiating process on the defendants.
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> 13 The proceedings were commenced irregularly by a notice of motion. On 7 August, when the proceedings returned before the Court, the plaintiff Alan Jorgensen indicated that he pressed only for a declaration as to the ownership of the nine ordinary shares in Grancroft purportedly transferred to Brian Jorgensen on 14 April 2014, and consequential orders. Directions were made for the filing of the summons to regularise the commencement of the proceedings, limited to that claim for relief, and making provision for the joinder of Mrs Patricia Jorgensen who appeared to be a necessary party.
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> 14 In due course, a summons which included Patricia Jorgensen as second plaintiff was filed. That summons, which is extant initiating process before the Court, claims the following relief:
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> (1) A declaration that Patricia Jorgensen is still the registered owner of her nine ordinary shares held in Grancroft Pty Limited which she has held since its inception in June 1985.
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> (2) In the alternate (sic) Alan Jorgensen is the equitable owner of those nine Grancroft shares transferred from Patricia Jorgensen.
>
> (3) In the further alternate (sic) Alan Jorgensen is the equitable owner of six of those nine shares transferred from Patricia Jorgensen.
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> 15 What is said to be a consequential order for the convening of a meeting is then also sought.
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> 16 At that stage, it appeared that with careful management, the limited issue which Mr Alan Jorgensen sought to agitate could be expedited and decided relatively promptly. However, a number of difficulties emerged, not least that the restoration of the nine shares in question to Mrs Jorgensen, if successful, would have no effect on the beneficial ownership of the trust, unless something was also done about the unit holding. Thus, Mr Alan Jorgensen foreshadowed an application to amend the summons to enlarge the relief claimed, so as to assert that his trust remained the beneficial owner of the nine units. However, in

> the course of argument today, Mr Jorgensen resiled from that proposal, and indicated that he would press only for the relief currently claimed in the summons – that is to say, to impugn the transfer of the nine shares in Grancroft."

[9] The matter with which Brereton J was concerned was an application by BJ and his companies for the NSW proceeding to be dismissed or permanently stayed on the basis that it was an abuse of process because of the pendency of the Cairns proceeding in which, essentially, the same relief was sought. Brereton J was of the view that it was "strongly arguable" that the NSW proceeding was an abuse of process because it raised the identical issue being litigated in the Cairns proceeding.[3] His Honour considered the subject matter of the NSW proceeding had no connection whatsoever with New South Wales, and ought be transferred to Queensland under the cross-vesting legislation. He also noted the following submissions made to him by AJ:

> "26 Mr Jorgensen also argued that it was not appropriate to transfer the proceedings to Queensland as Cairns was a 'one-judge town'; this was a very large case; the Queensland Supreme Court did not have the specialist arrangements involving equity lists that this Court has; and the matter could be heard more expeditiously and justly in this Court. He went so far as to say that if the matter were transferred, he would not bring at least certain aspects of the proceedings in Cairns."

[10] Brereton J was unpersuaded by these contentions, and relevantly ordered that the New South Wales proceedings be transferred to this Court pursuant to s 5(2) of the *Jurisdiction of Courts (Cross-Vesting) Act* (NSW).

[11] Those New South Wales proceedings now lie in this Court in File No 12602 of 2015.

**Alan Jorgensen's history as a litigant**

[12] Given the substance of BJ's present application, it is necessary to essay AJ's history, and that of his companies, as litigants in this and other courts and tribunals.

[13] To that end, BJ's counsel provided me with a bundle of some 23 judicial decisions, as well as the judgments of Henry J and Brereton J to which I have already referred. I should say that even this bundle does not represent the full extent of AJ's experience as a litigator. It is clear, even from a perusal of the judgments with which I was provided, that there were numerous other pieces of litigation, and interlocutory skirmishes which are referred to in these judgments, in which AJ played a leading role. For present purposes, however, I have not strayed beyond the authorities referred to by BJ's counsel in the present hearing.

**AAT proceedings in 2001**

[14] In November 1998, the Australian Securities and Investment Commission ("ASIC") made a decision under the *Corporations Law* prohibiting AJ from managing a corporation for a period of three years without the leave of the Court. On 28 December 2000, AJ applied to the Administrative Appeals Tribunal ("AAT") for an extension of time within which to lodge an application to review that decision. The decision of Deputy President

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[3] At [21].

Forgie on that application for extension of time is *Jorgensen v Australian Securities & Investments Commission*[4]. The Deputy President refused the application for an extension of time for, essentially, two reasons:

(a) AJ had failed to give a full and proper explanation for the two year delay in seeking to appeal against ASIC's decision. The operation of the decision had not been stayed, and taken effect immediately, and other judgments in the meantime (including the disposition of criminal charges brought against AJ for contravention of the *Corporations Law*) had taken account of the prohibition decision.[5]

(b) In any event, the Deputy President did not consider that AJ would have reasonable prospects of succeeding in having ASIC's decision set aside.[6]

**Freedom of information litigation in the Federal Court**

[15] The decision by ASIC to ban AJ from acting as a director was one of the consequences of an investigation which ASIC had been conducting into the applicant's involvement in the control and management of a particular group of companies. After the ban was imposed, AJ complained to ASIC about the conduct of certain ASIC staff in relation to the investigation. ASIC conducted an internal investigation into the substance of AJ's complaints. A report from that investigation concluded that there had been no impropriety in the conduct of the investigation. AJ then complained to the Commonwealth Ombudsman about the way in which the Regional Commissioner had undertaken the review. The Ombudsman subsequently advised AJ that the internal investigation had been conducted properly, and affirmed the findings of the investigation. Then, in July and August 2001, AJ made two separate requests under the *Freedom of Information Act* 1982 ("the *FOI Act*") for access to documents relating to ASIC's investigation report. He subsequently made a further application for further documents. ASIC granted access to a number of documents, and refused access to the remainder. Ultimately, AJ applied to the AAT for a review of ASIC's decision concerning the release of documents. The AAT's decision was, in effect, that AJ could see a number of documents he had been seeking, but only those which ASIC had in any event been prepared to make available to him. AJ then appealed to the Federal Court under s 44 of the *Administrative Appeals Tribunals Act* 1975 (Cth) ("the *AAT Act*"). The judgment of Weinberg J is found in *Jorgensen v Australian Securities & Investments Commission*.[7] After undertaking a lengthy review of the history of the matter and the submissions put before him, Weinberg J concluded that, apart from one relatively minor matter, he was unable to detect any error in the AAT decision.[8] The outcome was that AJ enjoyed small success by gaining access to only eight documents out of the hundreds that he was seeking, and he was ordered to pay 80 per cent of ASIC's costs of the appeal.[9]

[16] AJ filed an appeal against Weinberg J's judgment, but comprehensively failed to comply with directions made for the conduct of the appeal. ASIC then applied for the appeal to be dismissed for AJ's failure to comply with the Court's directions. The judgment of

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4 [2001] AATA 424.
5 At [63] – [64].
6 At [66].
7 [2004] FCA 143.
8 At [60].
9 At [81].

Black CJ on that application is found at *Jorgensen v Australian Securities & Investments Commission*[10]. Black CJ traversed the procedural history of the appeal, including the directions which had been made and with which AJ had failed to comply. His Honour concluded:

> "10 Whilst the Court endeavours to make allowances for parties who do not have the benefit of legal assistance, there are limits beyond which, in the interest of fairness to both parties, it simply cannot go. Moreover, the proper conduct of proceedings before the Court requires that when an order is made that something be done, that the thing ordered actually be done, and done in substance, not merely in point of form.
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> 11 I am satisfied that the order made by Crennan J has not been complied with and in the circumstances that I have outlined, including the referral of the matter by me to the duty judge to give Mr Jorgensen an opportunity to obtain legal advice and to put his notice of appeal in proper form, and the further observations and the warning given by Crennan J, I see no reason not to make the order sought by the Australian Securities and Investments Commission, and I will order accordingly."

**Dynacast litigation**

[17] In 2004, the Australian Competition and Consumer Commission ("ACCC") brought an action against a company then called Phoneflasher.com Pty Ltd, AJ and his daughter, Jimeale Jorgensen, for conduct alleged to be in contravention of certain provisions of Part V of the *Trade Practices Act* 1974 (Cth). Those proceedings in the Federal Court culminated in consent orders made on 2 November 2004. The consent orders were signed by the solicitors on the record for the respondents to the proceedings. In October 2005, the ACCC instituted further proceedings relating to alleged contempts of court, relevantly committed by Dynacast (Int) Pty Ltd (formerly Phoneflasher) and AJ. Those proceedings were brought in the South Australian Registry of the Federal Court. AJ applied for the proceedings to be transferred to the Brisbane Registry. The decision on that point is found in the judgment of Mansfield J in *Australian Competition and Consumer Commission v Dynacast (Int) Pty Ltd*.[11] His Honour refused the application to transfer the proceedings. AJ also sought, in that application, for the allocated docket judge to be recused from hearing the case. Mansfield J noted AJ's submissions as including:[12]

> "Mr Jorgensen, in his forceful submissions today complained that he perceived his rights as a citizen to have been unfairly trodden over in the course of the previous proceedings and in the course of these proceedings."

Mansfield J rejected these arguments by AJ, and considered it inappropriate to make any order regarding the application for disqualification of the docket judge.

[18] The final hearing of the contempt proceedings came on before Finn J. His Honour's judgment is found in *Australian Competition and Consumer Commission v Dynacast (Int) Pty Ltd (formerly Phoneflasher.com Pty Ltd) ACN 061 234 642*[13]. Finn J found that the

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[10] [2004] FCA 990.
[11] [2006] FCA 778.
[12] At [28].
[13] [2007] FCA 429.

corporate entity, i.e. Dynacast, was guilty of contempt for failure to comply with the consent orders which had previously been made. In relation to AJ's involvement in that company, and notwithstanding that he was not a director, Finn J found:[14]

> "[AJ] was, I am satisfied, the company's 'ring master' in these proceedings and acted accordingly in manipulating legal representation for the company, in providing instructions to lawyers and in negotiating for, and providing the relevant consents to, the orders made by the Court. … For all practical purposes relating to the principal proceedings (the only known matter of continuing significance to the company), Mr Jorgensen presumed, without apparent let or hindrance of Mr Kerville, to act as the company's mind and will notwithstanding that he was not at the time a person who had been appointed to the position of director."

[19] In relation to the contempt charges brought against AJ, Finn J found:

> "79 On the case he puts, Mr Jorgensen stands in a different, and fortuitously fortunate, position. He may have known at the time of the consent orders that the Order could not be complied with as of course. Nonetheless, that knowledge, coupled with his giving the company's consent to the Order, cannot properly be said to be aiding or abetting the company's non-compliance with the Order. The possibility of non-compliance resulted from the erroneous factual premise of the order itself. Neither can it be said that Mr Jorgensen did an act intending to subvert the effect of the order. He simply agreed to the Order insisted upon by the ACCC.
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> 80 The self-serving character of Mr Jorgensen's defence is self-evident. Nonetheless, when considered in light of the available evidence, it is sufficient to raise a reasonable doubt as to whether he controlled the website and in consequence, as to whether he aided or abetted the company's non-compliance with Order 6 or that he acted intending to subvert the order's effect.
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> 81 I do not find the charge of contempt against Mr Jorgensen to have been made out."

**Dynacast litigation with GE Capital**

[20] In the meantime, Dynacast was involved in other litigation in the County Court of Victoria in which it and another company, Teksid Pty Ltd, sued GE Capital Asset Services and Trading Asia Pacific Pty Ltd ("GE Capital") seeking to recover some $100,000 paid to GE Capital by the group of companies to which I referred above. The claim was dismissed.[15] Notable were the findings of credit about AJ made by the trial judge, who said:[16]

> "The plaintiffs relied upon the evidence of Alan Jorgensen and the exhibits which were tendered by the plaintiff to establish their case. Having had the opportunity of observing Alan Jorgensen's demeanour in the witness box and

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[14] At [71] – [72].
[15] *Dynacast (Int) Pty Ltd v GE Capital Asset Services and Trading Asia Pacific Pty Ltd* [2007] VCC 1858.
[16] At [35].

> listening to the evidence, I find the evidence given by Alan Jorgensen to be most unsatisfactory. He was a witness who, in effect, would say what he thought would assist the plaintiffs' case as opposed to a witness who was endeavouring at all times to give a truthful and accurate account of the facts. Alan Jorgensen was evasive and prevaricated when answering questions in cross-examination."

[21] The learned trial judge also referred to the fact that AJ had given inconsistent evidence and inconsistent answers in cross-examination,[17] that he admitted that he had entered into a Part X Deed of Composition with creditors in 1996, that he had introduced himself to various financial corporations under a false name because of his financial situation, and that he had impersonated under this false name with a number of financial companies.[18] The learned trial judge noted that AJ had been charged and pleaded guilty to two criminal charges of impersonation in an attempt to obtain money from a number of financial institutions.[19] The learned trial judge also referred to AJ's history of having been banned by ASIC from acting as a director, and concluded that, having considered the whole of the evidence, the judge "cannot rely upon Alan Jorgensen as being a witness of truth".[20]

**Litigation against Myles Thompson**

[22] In 1997, proceedings were commenced against a Cairns solicitor, Myles Thompson. In 1998, that proceeding was amended to substitute Mantonella as plaintiff. By May 1999, the proceeding lay dormant, and remained in that state until 2005 when an application was made for leave to proceed. That leave was finally granted in 2006, and the matter subsequently came on for trial in the Magistrates Court. AJ conducted the proceeding on behalf of Mantonella. The claim arose out of a contract which AJ had signed in 1994 for the purchase of a restaurant business. The solicitor had previously acted for AJ and his companies. In the restaurant matter, however, that solicitor was acting for the executor of the deceased estate which was selling the business. The purchase did not proceed, and AJ and his company sued the solicitor for damages, claiming, in effect, that the solicitor had been retained to act for AJ's interests. The Magistrate completely rejected AJ's version of events, and accepted the evidence of the solicitor rather than that of AJ about disputed factual matters. Mantonella lost the case before the Magistrate.

[23] Mantonella then appealed to the District Court. The judgment of Dodds DCJ is found in *Mantonella Pty Ltd v Thompson*[21]. AJ represented Mantonella in the hearing of the appeal. Dodds DCJ comprehensively refused the appeal, concluding:

> "[39] It has not been shown that the Magistrate's findings were not reasonably open to her on the evidence. Her reasons for preferring the evidence of the respondent to that of Jorgensen do not demonstrate any error. They reveal a thorough consideration of the evidence after seeing and hearing the witnesses. There appears no misdirection about the law. Her conclusions regarding the appellant's pleaded case were reasonably available to her on the evidence she accepted. The criticisms Jorgensen made in argument on the appeal do not displace

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17 At [36].
18 At [39].
19 At [40] – [41].
20 At [47].
21 [2008] QDC 92.

> Her Honour's reasoning nor persuade me that I should reach a different view about the appellant's case as pleaded."

[24] An appeal to the Court of Appeal, in which AJ appeared for Mantonella, was dismissed, it being held that Mantonella had failed to demonstrate any material error at first instance or on appeal to the District Court.[22]

[25] On 9 December 2009, an application for special leave to appeal to the High Court was refused on the basis, *inter alia*, that there was no reason to doubt the correctness of the Court of Appeal's conclusions.[23]

**Litigation against Slater & Gordon**

[26] In the mid-2000s, AJ was engaged in a dispute with the law firm Slater & Gordon over legal fees he owed to that firm. On 19 October 2005, the County Court of Victoria found, with one exception, in favour of the law firm with respect to that dispute. AJ then sought to appeal to the Victorian Court of Appeal. In the course of that appeal, a Master of the Supreme Court ordered AJ to deliver appeal books on or before 20 October 2008. He failed to do so. That was not the least of his failures. The extent of AJ's dilatoriness was summarised by Maxwell ACJ and Forrest AJA in their judgment on an application for the appeal to be dismissed:[24]

> "1 The appellant, Alan Jorgensen, is a serial defaulter. That is to say, he has been persistently dilatory in taking steps in his appeal.[25] His notice of appeal was lodged in January 2006. More than two years later, there is no agreement on the contents of the appeal book.
>
> 2 On 31 March 2008, the respondent ('SG') applied to strike out Jorgensen's appeal for want of prosecution or, alternatively, for failure to comply with certain orders made by the Acting Registrar of this Court on 28 November 2007. The litany of Mr Jorgensen's failures to take steps within times fixed either by the rules or by the Court is set out in the reasons for judgment of Ashley and Neave JJA. Their Honours made it quite clear in their reasons that they had given very serious consideration to acceding to the strike-out application but, in the event, had decided to give Mr Jorgensen one last chance.
>
> 3. Their Honours made a self-executing order concerning the service by Mr Jorgensen of the revised notice of proposed contents of the appeal book, and subsequent steps necessary for the prosecution of the appeal. In conclusion their Honours said:
>
> > … in our view Mr Jorgensen should not be given an opportunity to seek further indulgences, if he fails to comply with the orders which we now propose to make. We note that Slater & Gordon has had to expend time and energy in the management and defence of an appeal which is not being diligently prosecuted by Mr

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22 *Mantonella P/L v Thompson* [2009] QCA 80.
23 *Mantonella Pty Ltd v Myles Thompson* [2009] HCASL 258.
24 *Jorgensen v Slater & Gordon* [2008] VSCA 110.
25 Cf *Freeman v Rabinov* [1981] VR 539, 544 (Lush J).

> Jorgensen. Further, that appeal involves serious allegations of fraud and breach of fiduciary duty against it.[26]
>
> Mr Jorgensen was ordered to pay SG's costs of the application on an indemnity basis."

[27] Their Honours noted that AJ's subsequent failure to comply with a self-executing order meant that the appeal stood dismissed. Ultimately on that application, however, their Honours concluded that the interests of justice required that AJ be relieved of the consequence of the self-executing order.[27]

[28] Despite being given that further chance by the Court of Appeal, AJ failed to comply with an order for delivery of appeal books, and under the relevant rules of court his appeal was taken to be abandoned. He then sought an order that his appeal not be taken to be abandoned. Maxwell P and Ashley JA refused that application.[28] Ashley JA, with whom Maxwell P agreed, said:[29]

> "At first glance, it would seem harsh that an appellant, self-represented at times, should be denied the opportunity of pursuing an appeal by being a few days late in making delivery of appeal books. But this is no ordinary case. In order to understand why that is so, it is necessary to detail the history of delay in prosecuting the appeal and the reasons for such delay; and to consider the circumstances in which the appellant failed to comply with the order for delivery of the appeal books."

[29] His Honour then traversed the history of the proceedings at some length, noting that the default by AJ in delivering the books was significant for several reasons, including that "it was another instance of the appellant's non-compliance with orders of this Court".[30] Ashley JA was of the view that AJ's "want of compliance with the order for delivery of the appeal books was simply a further example of the appellant's repeated disregard of orders made by the Court".[31] The application to reinstate the appeal was refused.

[30] On 1 October 2009, an application by AJ for special leave to appeal to the High Court was refused.[32]

**ASIC litigation in the Supreme Court of Queensland**

[31] In 2007, ASIC commenced proceedings against AJ and a number of other parties arising out of AJ's conduct of the business known as "Jim's Water Tanks".[33] In September 2008, the matter came on before de Jersey CJ in circumstances which his Honour summarised as follows:

> "[1] In para 9 of its originating application filed 28 November 2007, the applicant sought orders permanently restraining the respondents from dealing with their property, comprising payments received in respect of

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[26] Reasons [30].
[27] At [30].
[28] *Jorgensen v Slater & Gordon Pty Ltd* [2009] VSCA 39.
[29] At [8].
[30] At [18].
[31] At [58].
[32] *Jorgensen v Slater & Gordon Pty Ltd* [2009] HCASL 195.
[33] *Australian Securities and Investments Commission v Jorgensen & Ors* [2008] QSC 233.

> the third respondent's tank supply business, and monies in a number of specified bank accounts. The orders were sought under ss 1324(1) and/or 1323(1) of the *Corporations Act* 2001 (Cth).
>
> [2] Section 1324(1) provides that the court may, on the application of ASIC, enjoin a person from engaging in conduct involving a contravention of the Act. Section 1323(1) provides that where ASIC is carrying out an investigation, in order to protect creditors, the court may restrain persons from dealing with their property. ASIC's application was based in part on s 184, which relates to the duties of directors, and s 588G, as to the duty of directors to prevent insolvent trading.
>
> [3] The applicant seeks leave to discontinue its claim for relief under para 9 of the application, under rule 304(2) of the *Uniform Civil Procedure Rules* 1999 (Qld). If that leave is granted, then subject to costs, the originating application will have been fully disposed of. The respondent to this application, Mr Jorgensen, did not oppose the effective termination of the claim for relief in para 9, but sought an order that the applicant pay his costs of the proceeding, to be assessed on the indemnity basis. The applicant seeks an order that the first respondent pay its costs. The court's discretion as to costs in this situation is unfettered (rule 307(2))."

[32] His Honour then summarised the procedural history of the matter, including relating to the grant of injunctions and further orders. He also referred to the fact that there had been a trial of a contempt application against AJ, but those contempt proceedings had failed because ASIC had not prosecuted the contempt case with the necessary precision. That being said, de Jersey CJ noted that the trial judge in the contempt hearing (Douglas J) had observed: [34]

> "It seems to me that the conduct of Mr Jorgensen gave rise to legitimate concern in [ASIC] that his conduct was in breach of the orders made against him even if it failed, for a number of reasons, some of which may be described as technical, to establish that he was in contempt of court."

[33] de Jersey CJ then recorded:

> "[8] It is useful to give one example of the sort of conduct which confronted the applicant. Following interlocutory injunctions granted in late 2007, the first respondent set up a bank account to process the as then unprocessed credit card transactions provided to the company earlier in the year. As observed by Douglas J in his reasons:
>
> > 'After this processing had been commenced, several of the managers at (the company's) business became concerned about their conduct and independently checked (the applicant's) website and obtained a copy of an order of the Chief Justice. Forming the view that the order appeared to prohibit the processing which they were undertaking, one of them, Mr Hutchinson, raised the issue of potential contempt of court with Mr Jorgensen, specifically drawing to his attention that what they were doing was in contempt of the

[34] Quoted by de Jersey CJ at [7].

> Chief Justice's order to which Mr Jorgensen's response was said to be: "it's only a hundred thousand dollars".'"

[34] In the course of dealing with the disposition of the costs of the proceedings brought by ASIC, de Jersey CJ noted that AJ had been critical of the conduct of ASIC's counsel, had asserted that ASIC was driven by an improper agenda, namely to put him out of business, and also asserted that ASIC was "poisoned against him" by separate proceedings brought in Victoria.[35]

[35] de Jersey CJ held that, despite it being unusual to contemplate ordering that a respondent pay an applicant's costs when an applicant chooses not to proceed with an application, such an order may be warranted where the application was reasonably brought and prosecuted and further prosecution becomes unnecessary because of intervening events. He considered that this was such a case,[36] and relevantly ordered that ASIC had leave to discontinue the claim and further ordered that AJ pay ASIC's costs of the proceeding.

[36] AJ then sought to appeal to the Court of Appeal on 9 February 2009. The Court of Appeal, however, on an application by ASIC, ordered that the appeal be struck out because the appeal related to orders as to costs left to the discretion of the Chief Justice, and by reason of s 253 of the *Supreme Court Act* 1995, leave was required to allow those orders to be appealed. That leave was not sought or obtained, the appeal was incompetent, and accordingly it was struck out.[37] The Court of Appeal separately ordered that AJ pay ASIC's costs of and incidental to the appeal and the application to strike out.[38]

[37] AJ then applied to the High Court for special leave to appeal. That application, however, was deemed abandoned because of his failure to file a draft notice of appeal, as required by the relevant rules, within 28 days after filing his application. AJ then applied for reinstatement of his application. That application was heard and determined by Kiefel J on 11 August 2009. AJ appeared for himself. In her Honour's ex tempore reasons for refusing the application for reinstatement, Kiefel J observed:[39]

> "The grounds for special leave did not challenge the order for discontinuance. They are confined to the order of the Court of Appeal, which prevented the question of the order for costs being ventilated.
>
> The applicant, in his grounds for special leave, complains that the Court of Appeal should have itself granted leave and heard the appeal about the costs order. He gives no basis for that save that a date had been allocated for the appeal. The applicant would also argue that there was a denial or procedural fairness by the primary judge, Chief Justice de Jersey. This refers to a refusal to adjourn the Commission's application which arose in connection with the applicant's assertion that he had a right to represent the company on the application for discontinuance. The Court of Appeal held that even if some such error had occurred on the way towards the ultimate decision as to costs that did not provide a basis for setting that decision aside. The fact that some transcript of the hearing before the primary judge where the applicant

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35 At [11].
36 At [12].
37 *ASIC v Jorgensen & Ors* [2009] QCA 20.
38 *ASIC v Jorgensen & Ors* [2009] QCA 55.
39 *Jorgensen v ASIC* [2009] HCATrans 188, 23.

reasserted his rights to represent the company was not available before the Court of Appeal does not alter that conclusion.

No error in the decision of the Court of Appeal is identified in the grounds for special leave. It follows that the application for that leave has no prospects of success. The reinstatement of the application is not warranted. The application is refused."

**Litigation against Meredith and NAB**

[38] In 1998, Mantonella and another party commenced proceedings against a Mr Meredith and the National Australia Bank in relation to transactions connected with the group of companies to which I referred above. The detail of the claims is not relevant for present purposes. What is relevant is that in 2008, Daly AsJ made a number or orders, including an order which dismissed an application which had been brought by the plaintiffs in the proceedings (including Mantonella) seeking that a previous self-executing order dismissing the plaintiffs' claims be set aside. An appeal against those orders of the Associate Judge was heard by Byrne J in the Supreme Court of Victoria.[40] Byrne J summarised the plaintiffs' conduct of that litigation as follows:

> "19 Procedurally speaking, from the plaintiffs' point of view, this case has had a bad history – about as bad as one could imagine. I will not burden this judgment with the disastrous events which have beset the plaintiffs' claims over the 11 years that have elapsed since the writ was filed on 20 October 1998. I annex a chronology which I have adapted from that provided by counsel for the defendants. I mention only the following as an indication of the conclusion which I have expressed.
>
> - The plaintiffs failed to file a statement of claim within the time specified by the Rules. Upon the defendants' application to strike out the proceeding for that reason the time was extended to 16 December 1999. The first statement of claim was filed on that date, 14 months after the proceeding was initiated. Over the next two-and-a-half years the plaintiffs filed no less than seven statements of claim. Five orders were made striking out this pleading until, on 24 July 2002, the current pleading[41] was filed.
>
> - The plaintiffs have had difficulties with legal representation. No less than 11 firms of solicitors have acted for them in the proceeding.[42] Their current solicitors, Lesley Simons & Associates, appear to have been retained only in May of this year. I know nothing of the reasons for these changes. I would infer that it cannot, in every case, be due to the poor performance of the solicitors concerned. In any event, these changes have contributed to the delay in proceeding the claim. Ms Simons, for example, told me that she had not yet been able to obtain the file from her predecessors.

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40 *Mizzi Pty Ltd v Meredith* [2009] VSC 367.

41 Rather bravely called second further amended statement of claim.

42 The plaintiffs in fact changed solicitors 13 times and were on occasions unrepresented.

- The plaintiffs have persistently failed to comply with interlocutory orders within time or at all. On four occasions a self-executing order has been made.[43]

- On numerous occasions interlocutory applications were adjourned by reason of the default or unreadiness of the plaintiffs or for non-appearance on their behalf.

20 While there may have been some delay or duplication of work due to the change of solicitors by the defendant, the responsibility for the inordinate 11 year delay to date lies with the plaintiffs."

[39] Byrne J refused the appeal against the Associate Judge's orders. Relevantly, his Honour said this:

> "31 A further consideration upon which I place some weight is the plaintiffs' sorry history of neglect of their obligations as litigants. The chronology shows persistent and repetitious default. While the need for the court to assert its authority is a factor, it must always give place to its obligation to do justice to the parties before it – all of the parties. The neglect here is one which I place at the feet of Mr Jorgensen and not his lawyers. In all the circumstances, I see in this case no reason to relieve him and the plaintiffs of the consequence of this neglect. The appeal against the order of Daly AsJ of 18 May 2009 will be dismissed. The proceeding, therefore, will stand dismissed by reason of the plaintiffs' failure to comply with the order of 18 July 2008."

[40] The matter then went to the Victorian Court of Appeal.[44] The plaintiffs (including Mantonella) had purported to appeal to the Court of Appeal, but had failed to obtain the necessary leave to appeal. Accordingly, it was necessary for it to apply for leave to appeal out of time. There was a cross-application for the purported appeal which had been filed to be struck out.

[41] The Court of Appeal refused the application for leave to appeal out of time, and granted the order striking out the purported appeal. In the course of summarising the case, Hansen JA, with whom Weinberg JA agreed, said:[45]

> "[Byrne J] noted, as a further consideration upon which he placed some weight, the applicants' 'sorry history of neglect of their obligations as litigants'. The chronology, his Honour observed, showed 'persistent and repetitious default'. His Honour referred to the need to do justice to all of the parties but observed that in the circumstances he saw no reason to relieve the director and the applicants of the consequence of the neglect which he placed at the feet of the director and not his lawyers. It was in those circumstances that his Honour concluded that the appeal against the self-executing order ought be dismissed."

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43 On 3 October 2000, on 12 December 2007, on 18 July 2008 and on 10 December 2008.
44 *Mizzi Pty Ltd & Anor v Meredith & Anor* [2010] VSCA 186.
45 At [21].

**Commonwealth Bank litigation**

[42] In December 2009, the Commonwealth Bank of Australia sued AJ in the District Court of Queensland seeking to recover $69,960 which had been paid into AJ's home loan account under a mistake of fact. A further sum of $24,245 was also sought to be recovered. AJ failed to file a defence in that proceeding, and default judgment was entered on 3 September 2010. AJ then sought to set aside that default judgment, and also sought an order that the proceedings be transferred to the New South Wales District Court. The application came on before Jones DCJ.[46]

[43] In the hearing before Jones DCJ, AJ acknowledged that the Court did not have the power to transfer the proceedings to the District Court of New South Wales, and AJ sought the alternative that it be transferred to the Cairns Registry of the District Court.

[44] In any event, Jones DCJ refused the application to set aside the default judgment. After traversing the arguments which had been advanced before him, his Honour observed:[47]

> "For the purposes of this application, I have some real reservations about whether a satisfactory explanation has been provided which might provide sufficient reason to doubt either the appropriateness of the order for substituted service or the making of the order now sought to be reviewed. Even if the applicant had convinced me in respect of the first two of those matters to which I have referred, it is perhaps in respect of the third and arguably the most important matter, that I am not convinced on the material before me that a prima facie defence has been established."

His Honour continued:[48]

> "In my view the applicant [AJ] has failed to establish either by way of a draft defence or in his affidavit, sufficient facts, circumstances or matters of law to show that he has a plausible defence. The references to which I have already referred to above are vague, uncertain and in circumstances where it is alleged that agreements have been made in writing, as I have said, that writing has not been included in the evidence provided by the applicant and, in my view, no sufficient explanation has been provided as to why that has not occurred."

[45] In 2011, then, AJ sought an extension of time within which to appeal against that decision of Jones DCJ. The Commonwealth Bank applied for summary dismissal of that application, and the hearing came on before the Court of Appeal on 14 November 2011. Judgment was delivered on 16 December 2011.[49] Margaret McMurdo P summarised the history of the appellate proceedings as follows:

> "[5] On 3 September 2010, the Bank entered default judgment against Mr Jorgensen. The following month, Mr Jorgensen applied to set aside that default judgment. On 22 October 2010, the primary judge dismissed his application. On 20 June 2011, he filed an application for an extension of time to appeal from the primary judge's order. His appeal was then about seven months out of time. On 21 June 2011, the Senior

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[46] *Commonwealth Bank of Australia v Jorgensen* [2010] QDC 437.
[47] At pg 8.
[48] At pg 10.
[49] *Commonwealth Bank of Australia v Jorgensen* [2011] QCA 376.

> Deputy Registrar (Appeals) issued the parties with a timetable for the preparation of Mr Jorgensen's application. Mr Jorgensen did not comply with that timetable. On 11 July 2011, a sequestration order under the *Bankruptcy Act* was entered against Mr Jorgensen in the Federal Magistrates Court. On 8 August 2011, his trustee in bankruptcy was issued with a notice under s 60(3) *Bankruptcy Act* informing him of Mr Jorgensen's application and to which the trustee has made no response within the time prescribed by s 60(3)."

[46] The President, with whom Margaret Wilson AJA and Douglas J agreed, held that the "critical, insurmountable difficulty" faced by AJ was that, as a bankrupt, he had no standing to appeal from the judgment of Jones DCJ, and accordingly he had no standing to apply for an extension of time.[50]

**Bankruptcy proceedings**

[47] When AJ did not pay the money due to the Commonwealth Bank under the default judgment, the bank issued a creditor's petition under the *Bankruptcy Act* 1966 (Cth). That petition was opposed, and was heard by Jarrett FM in July 2011. His Honour's decision is found in *Commonwealth Bank of Australia v Jorgensen*.[51] In the course of those reasons, his Honour outlines the numerous delays associated with the hearing of the contested creditor's petition due to a variety of factors including AJ's purported illness, overseas travel, and change in legal representation. In any event, the contested creditor's petition was ultimately dealt with by Jarrett FM in a judgment which dealt with each of the numerous objections taken to the petition. One of the grounds of objections raised by AJ was that he had not been given an opportunity to be heard because of the fact that the bank had obtained a default judgment. His grounds of objection characterised the bank's conduct as an "outrageous continual abuse of process" which the courts should not condone "where members of the ignorant public have no knowledge of dealing with". As to this, Jarrett FM said:[52]

> "[This ground] of the notice of opposition to the petition does not articulate an appropriate ground to the opposition of making a sequestration order but it seems to be that the debtor says he has been denied the opportunity of being heard. That does not, in my view, carry any weight. Each time the matter has come before this court, whether it be before a registrar, deputy registrar or a federal magistrate, the respondent has asked for an adjournment. It has been before the court on a number of occasions now and there has been a considerable period of time between when the creditor's petition was first before the court and now. The respondent has had ample opportunity to put his case together and put his case before the court. For reasons that are entirely unclear, he has chosen not to do so. The last week provides the best example of that. The matter was adjourned from Friday before last to today. True it was that the respondent was undergoing some medical tests Friday before last but the inference that is clearly open is that there was nothing that came out of those tests that was of any significant import because he now, via his solicitor, says that he is in China.

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50 At [10].
51 [2011] FMCA 767.
52 At [31] – [32].

> Why things were not done, why the case was not prepared between Friday last and now, is completely unaddressed in the material that the respondent relied upon for the purposes of the adjournment. It is just not right to say that the respondent debtor has not been given any opportunity to properly be heard."

[48] The notice of opposition to the creditor's petition also asserted that the rules of natural justice required that AJ's "defence and counterclaim" be heard by the Court. As to this, Jarrett FM observed that, even if a sequestration order be made, this is not a bar against agitation of the counterclaim. His Honour said:[53]

> "It might be that if there is a sequestration order made, [AJ] will need to interest his trustee in bankruptcy in prosecuting those proceedings but that, seems to me, is probably a good thing because it will bring to the potential claim an independent eye, an eye with a view to a number of matters which will mean that if proceedings are commenced by the trustee in bankruptcy they ought to be taken very seriously by the bank. That is something that will work in Mr Jorgensen's favour, or at least his creditors.
>
> To put it shortly, he has had the opportunity to agitate his cross-claim, his counter-claim or his setoff and he has failed to take the opportunities presented to him. He still has the opportunity in an around about sort of way and so as a matter of discretion it is not something that would mean a sequestration order in this case should not be made."

[49] Jarrett FM made a sequestration order against AJ's estate.

[50] That order having been made by Jarrett FM on 11 July 2011, on 2 August 2011 AJ purported to file a notice of appeal. The time for appealing had expired, albeit by only one day. The bank subsequently filed a notice of objection to competency and the matter came on for hearing before Dowsett J in the Federal Court on 20 November 2011. His Honour upheld the objection to competency and ordered that AJ's appeal be dismissed.[54] In dismissing the appeal, Dowsett J noted that he would not have treated the one day delay in filing the notice of appeal as decisive if he were able to see that there was any substance in the proposed appeal. His Honour, however, considered that there was no substance at all in any of the grounds of appeal put forward by AJ.[55]

**Mijac litigation in the Federal Court in Victoria**

[51] AJ's attitude to the conduct of litigation is also manifested in the conduct of proceedings commenced in the Victorian Registry of the Federal Court by Mijac against a Mr Graham and certain other parties. For present purposes, it is sufficient to refer to the opening paragraphs of an interlocutory judgment in that proceeding by Tracey J:[56]

> "1 This is the most recent of a series of procedural applications which are designed to open the way for the applicant ('Mijac') to appeal from a judgment of Gordon J which was published on 22 July 2009: see *Mijac*

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53 At [34] – [35].
54 *Jorgensen v Commonwealth Bank of Australia* [2011] FCA 1504.
55 At [6].
56 *Mijac Investments Pty Ltd v Graham* [2013] FCA 296.

*Investments Pty Ltd (ACN 084 820 280) v Graham (No 2)* [2009] FCA 773.

2 Mijac filed a notice of appeal on 12 August 2009. Complications arose because Mijac sought a waiver of fees which was rejected and Mijac failed to serve its notice of appeal on the respondents.

3 Between August 2009 and January 2010 a series of procedural orders were made by the Court (Ryan J, Middleton J and Luxton R) with a view to readying the appeal for hearing. For the most part Mijac failed to comply with these directions. The result was that the respondents moved the Court for orders under s 25(2B)(bb)(i) of the *Federal Court of Australia Act 1976* (Cth) ('the Act') that the appeal be dismissed for failure of Mijac to comply with directions of the Court. Following a hearing on 20 January 2010 Gray J made such orders: see *Mijac Investments Pty Ltd (ACN 084 820 280) v Graham* [2010] FCA 87.

4 On 16 August 2010 Marshall J refused an application by Mijac for orders extending the time for the filing and serving a notice of appeal from Gordon J's judgment: see *Mijac Investments Pty Ltd (ACN 084 820 280) v Graham* [2010] FCA 895. On the same day his Honour also refused an application by Mijac to set aside the order of Gray J: see *Mijac Investments Pty Ltd (ACN 084 820 280) v Graham* [2010] FCA 896.

5 By interlocutory application dated 22 January 2013 Mijac has applied to the Court for orders setting aside the decision of Gray J or, in the alternative, what are described as 'the unentered decisions' of Marshall J. These applications are said to be made under Rule 39.05(c) and Rule 39.04 of the *Federal Court Rules 2011* (Cth) ('the Rules') respectively. Mijac also seeks an order that the appeal which Gray J dismissed 'be reinstated'."

[52] For reasons explained at length in his judgment, Tracey J found no reason to disturb the orders made by either Gray J or Marshall J. His Honour also observed:[57]

> "Before concluding these reasons, I want to record my serious disquiet at some of the contents of affidavits sworn by Mr Alan Bradley Jorgensen on 12 January 2013 and 26 February 2013. A number of passages in these affidavits make serious, unsubstantiated and unwarranted allegations of professional misconduct against the solicitor acting for the respondents. The allegations should not have been made and it would be proper for them to be withdrawn. I cannot, however, direct that they be publicly withdrawn."

[53] Further in his judgment, Tracey J referred to the fact that AJ had, in an affidavit, made a "series of serious and unsubstantiated allegations against judges of this Court, an associate of one of the judges and Registrars".[58]

[54] It is notable, too, that Tracey J ordered costs against the solicitor who had represented Mijac in the proceedings. The solicitor acted, in effect, as a "postbox" for AJ and allowed

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[57] At [39].
[58] At [43].

himself, as Tracey J expressly found,[59] to be used by AJ to bring a number of wholly unmeritorious applications before the Court. Those applications were supported by affidavits sworn by AJ and to which the solicitor did no more than lend his name. It is clear that Tracey J considered that AJ was the driving force behind the conduct of the litigation on behalf of Mijac.

**Originating Application No 12751 of 2015**

[55] By the operation of s 5(2) of the *VPA*, an application by BJ for an order under the *VPA* against relief under the *VPA* requires the leave of the Court. An assessment of whether that leave ought be granted requires consideration of the merits of the substantive application.

[56] Section 6 of the *VPA* provides:

> "**6 Making vexatious proceedings orders**
>
> (1) This section applies if the Court is satisfied that a person is –
>
> (a) a person who has frequently instituted or conducted vexatious proceedings in Australia; or
>
> (b) a person who, acting in concert with a person who is subject to a vexatious proceedings order or who is mentioned in paragraph (a), has instituted or conducted a vexatious proceeding in Australia.
>
> (2) The Court may make any or all of the following orders –
>
> (a) an order staying all of part of any proceeding in Queensland already instituted by the person;
>
> (b) an order prohibiting the person from instituting proceedings, or proceedings of a particular type, in Queensland;
>
> (c) any other order the Court considers appropriate in relation to the person.
>
> (3) The Court may make a vexatious proceedings order on its own initiative or on the application of a person mentioned in section 5(1).
>
> (4) The court must not make a vexatious proceedings order in relation to a person without hearing the person or giving the person an opportunity of being heard.
>
> (5) For subsection (1), the Court may have regard to –
>
> (a) proceedings instituted or conducted in any Australian court or tribunal, including proceedings instituted or conducted before the commencement of this section; and
>
> (b) orders made by any Australian court or tribunal, including orders made before the commencement of this section."

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[59] At [50].

[57] The scheme of the *VPA* was comprehensively described by White JA (with whom McMurdo P and Cullinane J agreed) in *Hambleton & Anor v Labaj*.[60] It is unnecessary for me to repeat those observations here.

[58] By s 6(1)(a), the relevant threshold question is whether I ought be satisfied that AJ is a person who has frequently instituted or conducted vexatious proceedings in Australia.

[59] For the purposes of considering that question, it is appropriate that I repeat and adopt, as I did in *Schultz v Rowe*[61], the following observations by Mullins J in *Cooper v Mbuzi*[62]:

> "[65] The definition of "vexatious proceeding" in the schedule to the Act is:
>
> '**vexatious proceeding** includes-
> (a) a proceeding that is an abuse of the process of a court or tribunal; and
> (b) a proceeding instituted to harass or annoy, to cause delay or detriment, or for another wrongful purpose; and
> (c) a proceeding instituted or pursued without reasonable ground; and
> (d) a proceeding conducted in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose."
>
> [66] That definition of what can be a vexatious proceeding is expansive and not prescriptive. That is consistent with the objective of the Act, as expressed in the Explanatory Notes for the *Vexatious Proceedings Bill* 2005 to address the problems created by vexatious litigants:
>
> 'A vexatious litigant is a person who demonstrates particular behaviours in the pursuance of legal actions through the courts. These behaviours include taking legal action without any reasonable grounds, a repetition of arguments which have already been rejected, disregard for the court's practices and rulings, and persistent attempts to abuse the court's processes. The consequences of pursuing such actions include wastage of public resources and the harassment and annoyance of defendants in litigation that lacks a reasonable basis.'
>
> [67] In *Re Cameron* [1996] 2 Qd R 218, 220, Fitzgerald P considered what makes legal proceedings vexatious:
>
> 'It is also necessary to decide what makes legal proceedings vexatious. Although there are sometimes statutory indications, the broad test potentially concerns such factors as the legitimacy or otherwise of the motives of the person against whom the order is sought, the existence or lack of reasonable grounds for the claims sought to be made, repetition of similar allegations or arguments to those which have already been rejected, compliance with or disregard of the court's practices, procedures and rulings, persistent attempts to use the court's processes to circumvent its decisions or other abuse of process, the wastage of public resources and funds, and the harassment

[60] [2011] QCA 17 at [12] – [25].
[61] [2015] QSC 143.
[62] [2012] QSC 105.

> of those who are the subject of the litigation which lacks reasonable basis … .'

[68] The justification for imposing restrictions under the Act on a vexatious litigant was referred to by White JA in *Hambleton & Anor v Labaj* [2011] QCA 17 at [71] (*Labaj*):

> 'As Kirby J observed in *Re Skyring* it is a serious thing to keep a person out of the courts and the rule of law requires that, ordinarily, a person should have access to the courts in order to invoke their jurisdiction. But the resources of the court are not limitless and must be deployed responsibly. Those against whom proceedings are commenced which are vexatious at their inception, or which become so by frequent, irrational interlocutory processes, may expect to be protected from the abusive use of the court's processes.' (*footnote omitted*)

[69] The term "frequently" is a relative term that must be considered in the context of the relevant litigation: *Jones v Cusack* (1992) 66 ALJR 815, 816. Making a mistake in bringing an application or using a particular means to proceed (such as r 668 of the *UCPR*) where it is not appropriate does not necessarily characterise the litigation as vexatious. Persistence in repeating the mistaken application or inappropriate means of proceeding may result in characterising the litigation as vexatious.

[70] If the conditions for the making of a vexatious proceedings order under the Act are satisfied, the court must consider whether, in all the circumstances, the order should be made in the exercise of the court's discretion. Relevant matters include the serious implications of interfering with a person's right of access to the courts and other powers available to the court to regulate and control its own proceedings: *Attorney-General v Wentworth* (1988) 14 NSWLR 481,484."

**Submissions**

[60] BJ's primary submission on this application was to the effect that AJ's history of seeking effectively to circumvent the Cairns proceeding by instituting separate proceedings for essentially the same relief, when viewed in light of his lamentable history in the conduct of other litigation, is sufficient to enliven the jurisdiction to make orders under the *VPA*. It was contended that his history of litigation reveals:

(a) a preparedness to litigate both endlessly and fruitlessly;
(b) a preparedness to make serious claims of dishonest conduct without evidentiary basis;
(c) a complete disregard for the rules concerning, and obligations of, litigants; and
(d) an appreciation by AJ that his conduct cannot be inhibited by costs orders.

[61] For his part, in both written submissions and affidavits filed in response to the application, AJ comprehensively failed to grapple with or address the substance of the relevant application with which I am presently concerned. Rather, AJ sought to argue the merits of the principal claims which he and those associated with him sought to pursue against

BJ, criticised the actions of BJ and those advising him in bringing the present application, and sought to justify the raft of previous adverse judgments by arguing the merits of those past pieces of litigation.

[62] In oral argument before me, AJ was mercurial and again evinced a complete lack of willingness to address the substance of the present application. Much time, for example, was devoted to a notion initially advanced in argument by AJ that he (via Mantonella) would simply discontinue the Cairns proceedings and pursue limited relief in other proceedings. This suggestion was premised on the notion that he (and those he effectively represented) had made a "commercial decision" not to pay the $35,000 security for costs in circumstances where the amount claimed in the Cairns proceeding was far less than that.[63] As it further emerged in argument, however, the premise for this "commercial decision" was flawed, in that the ambit of the relief claimed in the Cairns proceeding went far beyond a relatively minor claim for an historic accounting (as explained in the judgments of both Henry J and Brereton J, and as is apparent on the face of Mantonella's own pleadings in the Cairns proceeding). Moreover, it took no account either of the existence of costs orders already in place against Mantonella or the ineluctable consequences of Mantonella simply discontinuing the Cairns proceeding. When the impracticality of that course became apparent to AJ, he sought, almost in an *ad hoc* way, to advance alternative modes by which he could persist with the litigation against his brother, including some sort of summary determination of an issue concerning transfers of shares in the trustee company and the appointment of a case assessor. Yet despite being repeatedly reminded that there was a perfectly good litigation vehicle already on foot for the ventilation of these claims, i.e. the Cairns proceeding, AJ clearly regarded this as an inconvenience to be avoided. AJ's thrust before me was to seek to orchestrate an outcome which would enable him to persist with the claims already encompassed within the ambit of the Cairns proceeding without having to comply with the order for security for costs.

[63] When it became apparent in the course of argument that his pursuit in this regard was not being well received, AJ resorted to *ad hominem* attacks on his brother, his brother's legal advisers, and on a number of judicial officers. In that latter regard, I should note that one of the reasons for the delay in finalising this judgment is that, after I had reserved my decision at the conclusion of oral argument to enable me to read the voluminous material (including the bundle of previous cases), AJ brought an application for me to recuse myself from the matter. That application, when eventually heard, was dismissed for reasons given at the time.

[64] AJ also made the point in his submissions that the mere fact that he has been involved in many actions, as a plaintiff and a defendant, does not of itself make him a vexatious litigant. That proposition is, of course, correct – there are many examples of frequent litigators who are not vexatious litigators, such as insurers. That is why, as I noted above, the threshold question under the *VPA* is whether AJ is a person who has frequently instituted or conducted vexatious proceedings in Australia.

**Discussion**

[65] My review of the previous cases in which he has been involved (including the Cairns proceeding and the NSW proceeding) together with my assessment of AJ in his conduct

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[63] See, for example, transcript at 1-17.

of the present application lead me to the following conclusions in relation to his conduct in litigation.

[66] AJ has, and has evinced, an overweening sense of entitlement to have recourse to the courts without any, or any proper, appreciation of the responsibilities of litigants to adhere to the rules of court, to comply with court orders and directions, and not to abuse the court's process. Some of the cases he has pursued in the past were assessed to have little merit. That is not determinative for present purposes, but even in those cases, as is clear from the above survey, he compounded the difficulties he faced by repeated failures to comply with even the most basic directions and practices of the relevant courts.

[67] What I have described as AJ's overweening sense of entitlement is also manifested by the fact that, when faced with opposition to his chosen mode of proceeding at any particular time, he resorts to scurrilous personal attacks on his opponents, on their lawyers, and on the judges involved in making decisions which are adverse to his interests.

[68] In my view, AJ's conduct in litigation on his own account and on behalf of his companies amply demonstrates a chronic and persistent preparedness to abuse the court processes. This is not a situation such as is often encountered in vexatious proceeding applications where a litigant repeatedly pursues a particular baseless contention or repeatedly institutes proceedings for the manifest purpose of vexing the targets of their attention. Rather, it is an example of a case where a litigant (AJ) has, over many years and in numerous courts and tribunals, exhibited behaviour which bespeaks a persistent disregard for the practices and rulings of those courts and tribunals. That behaviour is now compounded by his clear attempt to circumvent the operation of the security for costs order made by Henry J in the Cairns proceeding by launching the NSW proceeding, thereby abusing the processes of the courts.

[69] Accordingly, I would hold that AJ is a person who has conducted vexatious proceedings in Australia.

[70] Further, it is apparent from my review of the other cases and from his conduct of the Cairns proceeding and the NSW proceeding, that this behaviour has manifested itself in litigation with such regularity over a period of some 15 years that it is appropriate to regard it not only as persistent, but as behaviour in which AJ has been frequently involved.

[71] Accordingly, I am satisfied that AJ is a person who has frequently conducted vexatious proceedings in Australia.

[72] I am also satisfied in those circumstances that BJ should have leave to bring this application under the *VPA*.

[73] The making of those findings enlivens the discretion to make an order under s 6(2) of the *VPA*. In approaching the exercise of that discretion, I am conscious that an order under the *VPA* can impact seriously on one of a citizen's fundamental rights in our society, namely the right of access to the courts. Accordingly it seems to me that it is necessary to consider whether, in all the circumstances, an order is warranted, and if so to ensure that the ambit of the order goes no further than is necessary to control the vexatious behaviour.

[74] The short, and obvious, point in this case is that it is clear that AJ, and those associated with him, wish to pursue litigation against BJ and his interests in relation to the Trust. Yet the inconvenient truth for AJ is that there already exists a perfectly good and competent vehicle for the pursuit of those claims, namely the Cairns proceeding. It is AJ's attempts to circumvent the Cairns proceeding, and the operation of the unchallenged security for costs order in that proceeding, which ought be the object of an order under the *VPA*. Such an order is necessary, in my view, to prevent AJ from persisting with his vexatious behaviour of abusing the court's process and disregarding court orders and rulings. But in my view, there is no warrant for making an order which would act as a general fetter on AJ's access to the courts. Rather, the order, in the circumstances of this case, should be limited to litigation concerning claims in respect of the Trust.

[75] I should also record that, even if I am wrong about the application of the *VPA* to this case, I would have granted relief on the alternative basis, namely the Court's inherent jurisdiction to prevent an abuse of the Court's process. The availability of the inherent power to protect a party in BJ's position by preventing a party such as AJ from bringing further or future proceedings of the same or similar nature to proceedings already on foot between the parties has been expressly recognised.[64] AJ has clearly evinced an intention to seek to abuse this Court's processes by circumventing the operation of the security for costs order made by Henry J in the Cairns proceeding. It is quite clear from AJ's conduct that, unless restrained, he will continue to institute, or cause to be instituted, further proceedings which traverse the same or similar territory to that already under consideration in the Cairns proceeding.

[76] Accordingly, I would in any event have held this to be an appropriate case for the Court to exercise its inherent jurisdiction to prevent an abuse of the Court's process.

[77] There is no reason why costs should not follow the event on this contested application.

**Conclusion**

[78] For the reasons set out above, there will be the following orders:

1. The applicant Brian Laurence Jorgensen has leave to apply for a vexatious proceedings order under the *Vexatious Proceedings Act* 2005.

2. Pursuant to s 6(2) of the *Vexatious Proceedings Act* 2005, it is ordered that the first respondent Alan Jorgensen, or any entity controlled by the first respondent (including each of the second respondent and the third respondent) shall not without the leave of the Court institute or cause to be instituted any proceedings with respect to, connected with or arising out of the Rainbow Motor Inn Unit Trust.

3. The respondents shall pay the applicant's standard costs of and incidental to the application.

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[64] *Von Risefer v Permanent Trustee Company Ltd* [2005] 1 Qd R 681, per Keane JA at [16]; *Hambleton v Labaj* [2011] QCA 17, per White JA at [57].