SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v Friend* [2011] QCA 357
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (appellant) **v** **ROY FRIEND** (respondent)
FILE NO/S:	Appeal No 9192 of 2011 SC No 883 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	25 November 2011
JUDGES:	White JA, Margaret Wilson AJA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appellant's application to read and file:** **a. The affidavit of Grant Hughes sworn 8 November 2011;** **b. The affidavit of Robert Wildin sworn 7 November 2011; and** **c. The affidavit of Robert Wildin sworn 23 November 2011** **is refused.** **2. Leave to read and file:** **a. The psychiatric report of Professor Basil James dated 20 March 2010;** **b. The psychiatric report of Dr Scott Harden dated 10 April 2010;** **c. The psychiatric report of Dr Scott Harden dated 11 October 2010;** **d. The psychiatric report of Professor Basil James dated 15 October 2010;** **e. The psychiatric report of Professor Basil James dated 26 March 2011; and** **f. The psychiatric report of Dr Scott Harden dated 28 March 2011.**

3. **The appellant's application for leave to amend the notice of appeal dated 11 October 2011 is refused.**
4. **The appellant's application for leave to amend the application dated 22 September 2011 is refused.**
5. **Appeal allowed.**
6. **The respondent continue to be detained in custody pending the hearing and determination of the breach proceeding.**

CATCHWORDS: CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – GENERALLY – where primary judge ordered respondent be released from custody and made a supervision order until finalisation of hearing of contravention proceedings – where alleged contravention relates to respondent approaching boy aged 15 – where appellant contended that primary judge erred in finding respondent had a 'record of compliance' with supervision order, that psychiatrists were not aware of current alleged contravention and might have altered their assessments, and that it was not open to primary judge to find that respondent had discharged onus under s 21(4) *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) – whether exceptional circumstances exist to justify respondent's interim release

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – ADMISSION OF NEW EVIDENCE – IN GENERAL – where appellant sought to bring new evidence of alleged breach(es) by respondent of supervision order after orders made by primary judge – whether fresh evidence should be received

Corrective Services Act 2006 (Qld), ch 5
Corrective Services Bill 2006 (Qld), Explanatory Notes
Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 20, s 21(3), s 21(4), s 21(5), s 22, s 27, s 43
Uniform Civil Procedure Rules 1999 (Qld), r 766(1)(c)

A-G (Qld) v Beattie [2007] QCA 96, cited
A-G (Qld) v Lawrence [2011] QCA 347, cited
Attorney-General for the State of Queensland v Dugdale [2009] QSC 358, cited
Attorney-General for the State of Queensland v Fardon [2011] QCA 111, cited
Attorney-General for the State of Queensland v Friend [2006] QSC 131, cited
Attorney-General v Friend [2008] QSC 27, cited
Attorney-General for the State of Queensland v Friend [2009] QSC 135, cited
Attorney-General for the State of Queensland v Friend [2010] QSC 408, cited

Attorney-General for the State of Queensland v Friend [No. 2] [2011] QSC 226, cited
Attorney-General v Francis [2007] 1 Qd R 396; [2006] QCA 324, cited
A-G (Qld) v Francis (2008) 250 ALR 555; [2008] QCA 243, cited
Cairns City Supermarkets Pty Ltd & Anor v Lightbrake Pty Ltd [2011] QCA 205, cited
Clarke v Japan Machines (Australia) Pty Ltd [1984] 1 Qd R 404, cited
Devries v Australian National Railways Commission (1993) 177 CLR 472; [1993] HCA 78, cited
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, cited
Harvey v Attorney-General for the State of Queensland [2011] QCA 256, considered
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
Luxton v Vines (1952) 85 CLR 352; [1952] HCA 19, cited
Norbis v Norbis (1986) 161 CLR 513; [1986] HCA 17, cited
R v Kelly (Edward) [2000] 1 QB 198, cited
Salter v West Moreton Community Corrections Board [2007] QSC 29, cited
Swain-Mason v Mills & Reeve [2011] 1 WLR 2735; [2011] EWCA Civ 14, cited

COUNSEL: P J Davis SC, with A D Scott, for the appellant
R A East for the respondent

SOLICITORS: Crown Law for the appellant
Legal Aid Queensland for the respondent

[1] **WHITE JA**: The Attorney-General has appealed the order of Mullins J made on 30 September 2011 pursuant to s 21(4) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) ("the Act") that the respondent be released from custody subject to conditions until 20 April 2012 (or until the finalisation of the hearing of the contravention proceedings).

[2] On 20 October the Attorney-General applied for and was granted a stay of the operation of the order releasing the respondent pending the hearing and determination of the appeal. The appeal came on for hearing on 8 November but the Attorney-General sought to file an amended application and to rely on fresh evidence of further alleged breaches. The court also wished to be provided with the reports of the psychiatrists referred to by the primary judge which were not in the appeal record. They had not been tendered below. Because of both those matters but particularly the need to take instructions in respect of the material relating to the further breaches, the appeal hearing was adjourned.

[3] When the appeal came on for hearing on 25 November the Attorney-General sought to place further new evidence before the court in addition to that of 8 November; to file a further amended application; and to file amended grounds of appeal to refer to the further alleged breaches. Before considering the issues raised by the appeal and the further evidence it is necessary to say something about previous proceedings involving the respondent.

Background and chronology

[4] The respondent is now aged 58. His relevant criminal history was set out in the reasons for judgment of Skoien AJ[1] hearing an application to rescind a supervision order in 2008 as follows:

> "[4] First, Mr Friend was convicted in 1991 at Townsville of the offences of indecent dealing with a boy under 17 (5 charges) and indecent assault (16 charges). The offences occurred in 1987 and 1988. He was sentenced to 2 years' imprisonment.
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> [5] The second set of offences was for possession of child abuse photographs in August 1997. Mr Friend was convicted and sentenced to 6 months imprisonment (suspended for three years).
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> [6] The third set of offences concerned indecent treatment of a boy under 16. They were committed while Mr Friend was in the company of another child sex offender. In December 1997 they took the boy for a drive. The other man began sexually abusing the boy and insisted that Mr Friend do so also. Mr Friend briefly touched the boy twice on the genitals. The sentence imposed was 12 months imprisonment which was reduced on appeal to 3 months imprisonment. The sentencing Judge (Wall DCJ) recommended that Mr Friend undertake psychiatric and psychological treatment as considered appropriate and that he participate in the sexual offenders treatment program.
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> [7] The fourth set of offences in April 2003 concerned indecent treatment of a boy under 16 (13 charges) and indecent treatment of a boy under 12 (2 charges). They occurred after Mr Friend had become acquainted with boys, generally between the ages of 14 and 16. He met and befriended them as part of his employment. His behaviour would normally involve brushing up against the boys and touching their genitals through their clothes, but pretending the contact was accidental. Later, he took some of the boys home and showed them pornographic videos and masturbated himself in their presence. He touched the penis of the boy under 12 by putting his hands inside the boy's pants."

[5] The respondent was released from prison on 10 July 2006 under a supervision order imposed by Moynihan SJA on 2 June 2006.[2] He contravened the supervision order, not, as found by Skoien AJ, by being convicted of any offence which would constitute a contravention of the order but by virtue of admissions made to examining psychiatrists which were conceded to amount to admissions of breach of conditions (s) and (t) of his then supervision order[3], namely, that he not:

> "(s) … have any unsupervised contact with male children under 16 years of age except with the supervising corrective services officer's prior written approval;

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1 *Attorney-General v Friend* [2008] QSC 27.

2 *Attorney-General for the State of Queensland v Friend* [2006] QSC 131.

3 The current supervision order is expressed slightly differently and uses numbers instead of letters.

> (t) … establish and maintain contact with non-related children under 16 years of age."

[6] Because of the nature of the allegations of breach in the present proceedings it is fruitful to consider the breaches considered by Skoien AJ. In the course of an interview with Dr Michael Beech, a psychiatrist, the respondent said that in November 2007 he had spoken to a young male person at his place of work. He did not know if the boy was under age but he spoke to this boy about going to the beach, being naked and showering. The next day he returned to the shopping centre, saw the boy again but realised that he was not comfortable. The boy was aged 16. The respondent told Dr Beech that he was not actually sexually interested in the boy and did not intend to meet him clandestinely but had approached him as a ruse to get police involved so that he could kill himself. The respondent did make serious attempts to do so. Part of the stimulus for the suicide attempts arose when the respondent began to recall the sexual abuse he had suffered as a child during the sex offender treatment program in the prison. That history as set out by Skoien AJ was as follows:

> "The sexual abuse which he detailed involved frequent, regular, abuse of a particularly degrading, sadistic and violent nature, perpetrated by a detective. It made him fear that he would be shot. He was then aged between 7 and 10. There is no reason to doubt his account of these events."[4]

[7] Before Skoien AJ the respondent expressed the desire to be given professional assistance and counselling in prison to manage his emotional disturbances. The respondent was diagnosed by Dr Beech as meeting the criteria for the disorder of Paedophilia of a non-exclusive kind. Dr Beech also believed that as a result of his own abuse the respondent had developed a severe Post-Traumatic Stress Disorder which had affected his personality development and suffered a mixed personality disorder in the realm of a Borderline Personality Disorder.

[8] His Honour noted as a possible explanation for this breaching behaviour:

> "…having initially approached the boy, Mr Friend realised he had breached the order or had offended and this led to his suicidal ideation …. Nonetheless Dr Beech believes that it has increased his risk of re-offending. It highlights his emotional disturbance, his severe PTSD and his perception of limited support."[5]

On 27 February 2008 Skoien AJ rescinded the supervision order made on 2 June 2006 and made a continuing detention order with a particular focus on the respondent receiving structured treatment whilst detained.

[9] The respondent's continuing detention came before the court for periodic review as required by s 27 of the Act on 14 April 2009 before Daubney J.[6] The management plan for the respondent which had been anticipated at the hearing before Skoien AJ had failed to eventuate in any worthwhile fashion. It is unnecessary now to review the impediments which were placed in the way of the respondent receiving treatment in the prison which is discussed by Daubney J. His Honour concluded that it was necessary for the treatment to take place in prison:

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4 *Attorney-General v Friend* [2008] QSC 27 at [13].
5 *Attorney-General v Friend* [2008] QSC 27 at [25].
6 *Attorney-General for the State of Queensland v Friend* [2009] QSC 135.

> "… the evidence both of Mr Whittingham and Dr James, and also to some extent of Dr Nurcombe, paints the picture of a man for whom there are clear prospects of rehabilitation (in the sense of significantly lessening the risk of recidivism), but who needs to undergo a properly monitored and administered course of treatment in order to achieve that result. Regrettably, lapses in the treatment regime to date have meant that this level of rehabilitation has not yet been able to be achieved. The rehabilitation treatment, however, also clearly carries further risks of trauma or destabilisation for the respondent such that, in my view, the administration of this further treatment, which is clearly necessary to ensure adequate protection to the community, is likely to be effective only while the prisoner remains in detention."[7]

His Honour ordered that the respondent continue to be subject to the continuing detention order.

[10] The next review of the order for continuing detention came before Mullins J on 29 April 2010. However, as related by her Honour[8], Professor James recommended in a report dated 20 March 2010 that the treatment should continue in prison for a further six months. The respondent accepted that recommendation and, accordingly, the review hearing was adjourned until 1 November 2010 when it again came on before Mullins J. Her Honour had the benefit of reports which had been prepared for the April review as well as updated reports from psychiatrists, Professor Basil James and Dr Scott Harden, and a detailed report from Mr Whittingham, a psychologist who had been treating the respondent within the prison system.

[11] Mr Whittingham described the respondent's treatment as continuing to be "challenging" due to the respondent's "long-term risk, personality disturbance and vulnerability for developing depressive illness and post-traumatic symptoms."[9] Her Honour said:

> "Mr Whittingham identified that the respondent will likely continue to require long-term multi-disciplinary treatment, including psychological treatment and support and psychiatric treatment and support, to assist with ongoing management of his complex mental health and sexual offending needs and risks."[10]

[12] Professor James was of the opinion

> "that the main risk for the respondent in acting out his paedophilic tendencies was inversely related to the degree to which he attained a stable improvement in his personality disorder."[11]

Her Honour noted that in his report of 15 October 2010 Professor James had expressed the opinion that the respondent's treatment in prison was no longer necessary and it was reasonable to recommend that the risk of re-offending could be managed in the community:

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7 *Attorney-General for the State of Queensland v Friend* [2009] QSC 135 at [38].
8 *Attorney-General for the State of Queensland v Friend* [2010] QSC 408.
9 *Attorney-General for the State of Queensland v Friend* [2010] QSC 408 at 1-4.
10 *Attorney-General for the State of Queensland v Friend* [2010] QSC 408 at 1-4.
11 *Attorney-General for the State of Queensland v Friend* [2010] QSC 408 at 1-5 – 1-6.

> "… provided there was a supervision order that restricted the respondent's contact with young males …"[12]

Professor James said the respondent's risk of re-offending was moderate within the first year to 18 months and if the respondent successfully rehabilitated "including strict adherence to the terms of the supervision order, then the risk of re-offending [would] decrease progressively."[13]

[13] Dr Harden considered that the respondent could be released from prison but was of the opinion that his "future risk of sexual reoffence continues to be high if released into the community without appropriate monitoring support and therapeutic intervention"[14].

[14] Before Mullins J the Attorney-General accepted that the respondent could be released into the community on a supervision order and her Honour ordered accordingly.

[15] On 24 May 2011 Mullins J amended the supervision order by deleting requirement (xlv) that the respondent "not knowingly associate or have contact with anyone convicted of a sexual offence against children, except for incidental conduct with others …" That came about because of the respondent's living arrangements at the Wacol Precinct and because corrective services officers requested the respondent to transport another sex offender in his motor vehicle. Dr Harden expressed reservations about this change noting that previous offending had occurred in the company of another sex offender.

[16] On 24 June 2011 the respondent was brought before Fryberg J pursuant to a warrant issued under s 20 of the Act. The evidence was uncontested that the respondent had contravened the terms of the supervision order insofar as he had failed to advise an authorised corrective services officer of repeated contact with the parents of a child under the age of 16, condition (xxix).

[17] Because of the reliance placed on his Honour's remarks by the primary judge I propose referring to them and the circumstances of the breach in some detail. The respondent visited a couple who had three children under the age of 15 in the company of another man known to them who was subject to a supervision order under the Act. Although they understood the men had been in prison they did not know that they were subject to supervision orders. The visit concerned a discussion about swapping some furniture. On a subsequent occasion the respondent went to the house by himself to further the deal about the furniture. He spoke to the parents outside the residence, did not speak to the children and did not enter the residence. There was to be some further contact about the furniture but the respondent was apprehended for breach of the order before it could take place. It was accepted before Fryberg J that the respondent's account, in an affidavit, of what had occurred was consistent with the account of the parents and he was not subjected to cross-examination.

[18] In the course of his ex tempore reasons his Honour said:

> "There is nothing in the material to suggest that the conduct was, in any way, grooming and the two occasions to which I have referred were the only two occasions where there was contact."[15]

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12 *Attorney-General for the State of Queensland v Friend* [2010] QSC 408 at 1-6.
13 *Attorney-General for the State of Queensland v Friend* [2010] QSC 408 at 1-6.
14 *Attorney-General for the State of Queensland v Friend* [2010] QSC 408 at 1-7.
15 *Attorney-General v Friend [No. 2]* [2011] QSC 226 at p 3.

His Honour observed:

> "It is, however, of concern that he should have breached the order. He says in his affidavit that he did not report his contact with the two parents because it was a limited contact and not ongoing and was of a business-like nature. It was not a matter of friendship. He says he did not realise he was obliged to report contact of that nature. I find that a very suspicious proposition.
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> …
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> Be that as it may, it is a story that will work only once. He must realise that these orders are extensive, they have a lot of paragraphs, and every one of them is important. Every one of them must be complied with and complied with strictly. The breaches which have been committed are not trivial breaches …"

His Honour did not regard those breaches as sufficient to warrant the continued detention of the respondent and concluded:

> "It must, however, be realised that because of the requirement to strictly adhere to these conditions, any further breach is likely to engender a different belief in any judge of this Court. It is most unlikely a further breach of any sort would be treated as other than evidence, when combined with the evidence of this breach, of a willingness to treat the order as something that is only optional. Such an attitude would be one in this prisoner which would mean inevitably that the Court could not be satisfied that he should not be detained, that is that the supervision order should not be rescinded. In other words, the outcome this time is unlikely to happen again if there is any further breach."

Circumstance of subject alleged contravention

[19] On 22 August 2011 Task Force Argos informed members of the Queensland Police Service that an informant (a person subject to a supervision order) had reported that the respondent had engaged in conduct in breach of his supervision order. On 20 September 2011 detectives attended a shop at Goodna and spoke with the manager. He identified that the most likely person, the subject of interest, was an ex-employee aged 15 years at the time of the alleged breach. Another employee positively identified the respondent from a photo board indicating that he had frequented the store in the past. Detectives contacted the child's mother and interviewed the boy at home. He positively identified the respondent and said that he had regularly attended at the store where he worked. On two specific occasions, once in December 2010 and the other in January 2011 the respondent had engaged the boy in conversation "that was not incidental to the customer/sales person relationship".[16] In December 2010 the respondent asked the boy about his personal relationships and whether he had a boyfriend or a girlfriend. He was described by the boy as being "over friendly and had crossed the line when two people first meet". On the second occasion in January 2011 the respondent provided the boy with his contact number and told him to contact him. The boy felt uneasy and discarded the telephone number.

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16 AR 31.

[20] In April 2011 the respondent was driving a silver hatchback motor vehicle and stopped and spoke to the boy as he walked along the road. The court brief describes the encounter as follows:

> "The [respondent] got out and showed him [the child] a stab wound near his ribs. He stated that he was stabbed by another person and that he was currently helping Detectives with the investigation. The [respondent] asked the child if he wanted a lift home. The child said no…"[17]

The boy had recently turned 16. It appears that the respondent had stabbed himself in the torso with a knife sometime earlier.

[21] On 21 September 2011 detectives attended at the Wacol Precinct and questioned the respondent. He admitted attending the store at the relevant time but denied breaching his supervision order. The respondent was arrested pursuant to a warrant. He was refused bail and brought before the Supreme Court on 22 September 2011. An oral application was made on his behalf that he be released on the existing supervision order pending the final determination of the alleged breach under s 22. The determination of the breach is due to be heard in the Trial Division on 20 April 2012. Justice Mullins remanded the respondent in custody as required by s 21(5) until 30 September when his application for release could be heard.

The hearing on 30 September

[22] An affidavit of Andrew Wilson, Acting Manager of the High Risk Offender Management Unit, Queensland Corrective Services, was tendered before her Honour. Mr Wilson oversees the supervision and surveillance of offenders released on supervision orders. He exhibited to his affidavit the Integrated Offender Management System (IOMS) records from 27 June to 21 September 2011 monitoring daily contacts by corrections officers with the respondent.

[23] No affidavit by the respondent went into evidence, however, Mr East, who was counsel for the respondent, said, without challenge:

> "… all I can do is point to his appearance before his Honour Justice Fryberg and the very clear statements made to him, and Mr Friend instructs that since that time he's endeavoured to follow to the letter the obligations of the order and there's been no suggestion of any other concerning contact … it's my submission that that risk, so far as that boy is concerned, has passed, and his appearance before Justice Fryberg has cemented in his mind the need to follow the order very specifically."[18]

[24] After a short hearing her Honour observed that the respondent had discharged the onus on the basis of his compliance since June 2011.[19] In her reasons her Honour said:

> "The matters that I have relied on to reach the satisfaction that is required in order to make the release order for the respondent pending the determination of the contravention hearing are the timing of the alleged contravention in relation to other evidence of

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17 AR 31.
18 AR 5.
19 AR 13.

> compliance by the respondent with the supervision order. The respondent was released in November 2010. He has been residing at the Wacol Precinct. His attempts to comply with the order have not been without difficulty, even apart from the alleged contravention."[20]

Her Honour noted that the contact with the male at the store at Goodna and subsequently was not disclosed by the respondent to corrective services officers as required by the supervision order.

[25] Her Honour considered the "relatively minor contravention"[21] of the supervision order dealt with by Fryberg J and said:

> "It seems that Fryberg J was emphatic in his reasons in emphasising how strict compliance was required with the supervision order and that, even though his Honour concluded in that case that the breaches were not sufficient to warrant continued detention of the respondent and he was released back into the community on the supervision order, the respondent had the benefit of hearing the words of Fryberg J about the need for absolute strict compliance with the supervision order.
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> Mr East of counsel who appeared for the respondent today, conveyed his instructions that his client is willing to continue with strict compliance of the supervision order and that he has endeavoured to do so since appearing before Fryberg J. That is borne out to the extent that the records of the supervision by Corrective Services reveal no conduct of the respondent that is of the nature to give concern that he may be treating the conditions with less than the appropriate respect.
>
> It is because of the record of compliance since 24 June 2011 and against the background of the relatively recent psychiatric evidence that was obtained for the purpose of the hearing on 1 November 2010 that I am persuaded by the respondent that his continued detention in custody pending final decision is not justified."[22]

The grounds of appeal

[26] The Attorney-General seeks orders on the appeal that the supervision order made by Mullins J on 1 November 2010 be rescinded and that the respondent be detained in custody until the hearing and determination of a contravention application. The grounds are:

> "(a) The primary judge erred by finding that the Respondent has a *"record of compliance"* with the supervision order made by Mullins J on 1 November 2010 ("the supervision order") since contravention proceedings in relation to that order determined by Fryberg J on 24 June 2011 ("the 24 June 2011 contravention proceedings").

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20 AR 124.
21 AR 125.
22 AR 126-127.

(b) The discretion of the primary judge miscarried by reason that the primary judge did not take into account that:
   (i) the psychiatrists who gave evidence for the proceedings before Mullins J on 1 November 2010 were not aware of the current alleged contravention at the time they gave that evidence; and
   (ii) whether those psychiatrists might change their assessments because of the current contravention.

(c) There was no basis upon which the primary judge could have found that the associated risks from any release pending determination of the contravention proceedings are not such as to justify continuing detention;

(d) It was not open to the primary judge to find that the Respondent had discharged his onus under s 21 of the Act; and

(e) Alternatively, the finding that the Respondent had discharged the onus upon him under s 21 of the Act was:
   (i) Unreasonable; and
   (ii) Against the weight of the evidence."

[27] The Attorney-General accepts that the decision of the primary judge as to whether she could be satisfied that exceptional circumstances were demonstrated to exist such as to justify the respondent's interim release was a value judgment about which reasonable minds may differ and must demonstrate that the discretion miscarried in the sense explained in *House v The King*[23]. That is, that before an appellate court can interfere it must be shown that the primary judge acted on a wrong principle, failed to take a material consideration into account, took into account an immaterial consideration or that the result "is unreasonable or plainly unjust".[24] Observations made in decisions such as *Fox v Percy*[25] and *Devries v Australian National Railways Commission*[26] about the allowance which must be made for the benefits enjoyed by the primary judge in seeing the witnesses and presiding over a trial in which the evidence unfolds are not relevant here. No witness who swore an affidavit was required for cross-examination and that evidence itself was quite limited. Accordingly, this court is in as good a position as her Honour to evaluate the evidence and apply the requirements of the Act. That does not mean, of course, that the court can substitute its discretionary opinion for that of the primary judge unless of the view that her Honour erred in one of the ways described in *House.*

The legislation

[28] Before turning to the Attorney-General's contentions it is as well to set out the relevant provisions of the Act which govern these proceedings. Part 2 of the Act concerns continuing detention or supervision and div 5 relates to the contravention

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23 (1936) 55 CLR 499.

24 *House v The King* (1936) 55 CLR 499 at 505 per Dixon, Evatt and McTiernan JJ. The approach to appeals under the Act has most recently been discussed by Muir JA in *A-G (Qld) v Lawrence* [2011] QCA 347 at [27] *et seq*.

25 (2003) 214 CLR 118 at 128 per Gleeson CJ, Gummow and Kirby JJ.

26 (1993) 177 CLR 472 at 479 per Brennan, Gaudron and McHugh JJ.

of a supervision order or an interim supervision order. Section 20 provides for the procedure if there is a reasonable suspicion that a released prisoner "is likely to contravene, is contravening, or has contravened," a requirement of his supervision order. The section provides for a police officer or a corrective services officer to apply for a warrant from a magistrate to arrest the released prisoner "and bring the released prisoner before the Supreme Court to be dealt with according to law".[27] If the warrant issues then a copy of the warrant must be given to the Attorney-General within 24 hours.

[29] By s 21 if a released prisoner is brought before the court under a warrant issued under s 20:

> "The court must –
>
> (a) order that the released prisoner be detained in custody until the final decision of the court under section 22; or
>
> (b) release the prisoner under subsection (4)."[28]

Section 22 concerns contravention proceedings. Section 21 is concerned with how the released prisoner is to be dealt with pending the hearing and determination of those contravention proceedings. By s 21(3) the released prisoner may, when the issue of his or her custody is raised under subsection (2) or at any time after the court makes an order detaining him, apply to the court to be released pending the final decision. When the respondent came before Mullins J on 22 September he made such an oral application through his counsel. When considering an application of that kind a court pursuant to s 21(4):

> "… may order the release of the released prisoner *only* if the prisoner satisfies the court, on the balance of probabilities, that his or her detention in custody pending the final decision is not justified *because exceptional circumstances exist*." (emphasis added)

By s 21(5) if the court adjourns an application made by the released prisoner to be released the court must order the released prisoner to remain in custody pending the decision on the application.

Ground 1: ***A "record" of compliance***

The Attorney-General's contentions

[30] The Attorney-General contends that other than the IOMS records which were exhibited to Mr Wilson's affidavit for the period 27 June 2011 to 21 September 2011 there was no evidence before the court as to the respondent's compliance with the supervision order after he had appeared before Fryberg J on 24 June 2011. He accepts that the IOMS records contained no note of non-compliance during that period, but submits while some conditions can be objectively tested for compliance, such as keeping medical appointments, conduct of the kind the subject of the contravention allegations depends almost entirely upon the co-operation of the respondent in identifying departures from those conditions. The Attorney-General emphasised that the respondent did not reveal the breaches that brought him before Fryberg J.

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27 s 20(2).

28 s 21(2).

[31] The Attorney-General further contends that the evidence from the IOMS records since 24 June 2011 was circumstantial rather than direct and, in order to satisfy the standard of proof under s 21(4), there must be evidence giving rise to a reasonable and definite inference. Here the evidence did no more than give rise to conflicting inferences of equal degree of probability. The choice between them was no higher than conjecture and could not satisfy the onus. [29]

Respondent's contentions

[32] Mr East submits that not only did the IOMS records demonstrate that since 27 June there was no record of any contravention by the respondent, they also went further and verified that the respondent had complied with the order. For example, he had complied with the curfew requirement such that it was gradually relaxed; had attended upon his psychologist in compliance with conditions (xxv) and (xxvii); and had breath tested negative in compliance with condition (xxiii). He had also reported contact with parents of a child under 16 years in compliance with condition (xxix).[30] In respect of that latter entry, on 18 July 2011 the respondent reported that he had made friends with two 19 year olds with a new born daughter whom he had met through frequenting the local shopping centre. He had offered to build a bike trailer so that they could cycle around with her and said that he had told them he was a convicted sex offender just out of gaol. The entry reads:

> "Asked why he made disclosure to practically strangers, FRIEND said that he was too worried police or QCS will make disclosure before he has the chance so just tells people straight away. Has told them that if they ever have a male child he won't be able to see them anymore."[31]

[33] Mr East submits that in addition to the IOMS records there was a concession by counsel for the Attorney-General below that there was no note of non-compliance in those records. Her Honour said:

> "But it is relevant for me to take into account that the – there has been compliance since the outing before the Court in June in 2010."[32]

To which counsel for the Attorney-General responded: "So far as we know."[33] Her Honour also observed, in the course of argument, that from the IOMS records it appeared that the respondent had been compliant with appointments and disclosures. To this observation counsel responded "It would appear to be so, yes."[34]

Discussion

[34] The evidence contained in the IOMS records does demonstrate that, so far as was reported to the corrective services officers overseeing the respondent, there had been compliance with the order. That evidence could not be taken too far since the current alleged breach, the conduct in April 2011, and the breach before Fryberg J

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29 *Luxton v Vines* (1952) 85 CLR 352 at 358 per Dixon, Fullagar and Kitto JJ.
30 AR 90.
31 AR 90.
32 AR 10.
33 AR 10.
34 AR 12.

became known through informants and not by disclosure by the respondent or vigilance by corrective services. Nonetheless, there is no sense that her Honour disregarded those matters and it is not apparent that she took that ostensible compliance further than it could sensibly be relied on.

[35] No error has been demonstrated.

Ground 2: ***The fact that the circumstances of the current contravention were not known to the expert psychiatrists when they provided those assessments and might change their assessments***

[36] Her Honour's conclusion in favour of release "against the background of the relatively recent psychiatric evidence" is accepted to be a reference to the assessments that informed her Honour's decision in making the supervision order on 1 November 2010, perhaps less strongly, and the supplementary reports for the application to amend the supervision order on 24 May 2011. There is no reference in the transcript below about her Honour's familiarity with the psychiatrists' reports as at the hearing. It must be supposed that counsel had some expectation that her Honour would recall their substance because they were not tendered nor did her Honour seek to be given them.

The Attorney-General's contentions

[37] The Attorney-General submits that there is a strong *prima facie* case that the circumstances of this alleged contravention involved grooming behaviour by the respondent with close parallels to his past contravention in 2007. The Attorney-General also submits that there is significant cause for concern that this behaviour started approximately one month after the respondent's release on the supervision order and that

> "[i]t could reasonably be expected that the psychiatrists who provided the assessments that informed the decision of the primary judge on 1 November 2011 might change their assessments because of the current contravention."[35]

Accordingly, he contends, her Honour erred in not taking into account that the psychiatrists necessarily were unaware of the contravention when they provided their risk assessments and did not reflect on whether this might change their risk assessments, and thus, her reliance on them.

Respondent's contentions

[38] Mr East submits that it is "simply fantastic"[36] to infer that her Honour somehow failed to take into account that the alleged contraventions occurred after the psychiatric assessments which informed her Honour's decision to release the respondent on a supervision order. The possibility that the psychiatrists might change their risk assessments could only be known at the final hearing.

Discussion

[39] The court was provided with the psychiatric assessments that had been considered by the primary judge when she made the original supervision order on

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35 Written submissions on behalf of the appellant, para [21].

36 Written submissions on behalf of the respondent, p 4.

1 November 2010 and the supplementary reports prepared for the amendment to the supervision order. Mr East did not object to the court receiving this new evidence as it could be strongly inferred that the primary judge had it in mind. There are three reports from Professor Basil James dated 20 March 2010[37], 15 October 2010[38] and 26 March 2011.[39] There are also three reports from Dr Scott Harden dated 19 April 2010[40], 11 October 2011[41] and 28 March 2011.[42] In his March 2010 report Professor James said:

> "It is my opinion that very significant progress has been made in the alleviation of the most pressing dimensions of the previously identified Borderline Personality Disorder; and it is my opinion that this improvement is very significantly attributable to the regular, routine and consistent treatment provided by his Therapist, Mr Whittingham.
>
> Nevertheless, it must be borne in mind that Mr Friend's very severe psychopathology and associated behavioural dysfunction had been manifest for over forty-five years …"[43]

[40] Dr Harden, after a review of previous psychiatric opinion about the respondent and analysis of his offending, opined in his report of 19 April 2010:

> "The actuarial and structured professional judgement measures I administered would suggest that his future risk of sexual reoffence is high if released into the community without appropriate monitoring, support and therapeutic intervention … If he were to reoffend based on this previous sexual offences it would be against a boy aged between 13 and 16 years of age and such activity is most likely to be of low level such as mutual masturbation or exposure and is not likely to be physically dangerous."[44]

Dr Harden considered the respondent could be released into the community immediately provided that he participated in a sex offender treatment maintenance program in the community and had regular psychiatric follow-up by a stable treating team "to enhance psychological intervention and provide a rapid ability to respond to negative emotionality and therefore increased risk of self harm or offending."[45]

[41] Professor James' addendum report of 15 October was prepared for the application which was heard on 1 November 2010. He reviewed entries from the Offender Case File in the IOMS records which noted advances. He had regard to the report of the respondent's treating psychologist, Mr Whittingham, who also noted improvement in the respondent's post traumatic and depressive symptomatology including:

> "… motivational enhancement strategies have continued to target sexual and general self-regulation risks, and attitudes tolerant of sexual assault …"[46]

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37 Supplementary Appeal Record at 1.
38 Supplementary Appeal Record at 60.
39 Supplementary Appeal Record at 77.
40 Supplementary Appeal Record at 21.
41 Supplementary Appeal Record at 52.
42 Supplementary Appeal Record at 85.
43 Supplementary Appeal Record at 10.
44 Supplementary Appeal Record at 38-39.
45 Supplementary Appeal Record at 39.
46 Supplementary Appeal Record at 65.

Mr Whittingham considered that overall the respondent's level of risk had fallen to "moderate/high". He needed continued long term multi-disciplinary treatment including psychological treatment and support and psychiatric treatment and support.

[42] Professor James, after examining the respondent in September 2010, reported:

> "With respect to his sexuality, he said that 'young men had (now) lost their appeal' and his sexual orientation was much more directed to adult females …"[47]

He concluded:

> "In my opinion, Mr Friend's response to treatment appears to have been very good; indeed, given his mental health status at the time of his re-offending in November 2007, and in its immediate aftermath, I consider [his] progress most noteworthy.
>
> Although the major question now is to what degree can Mr Friend's progress be translated into successful community life, I am now of the opinion that Mr Friend has assimilated and consolidated the changes brought about by these treatments to a sufficient degree for it to be no longer necessary for the treatment to continue whilst he is in prison; and that it is reasonable to recommend that the risk of re-offending can now be managed in the community.
>
> It is my further opinion that this management of risk requires:
>
> - a Continuing Supervision Order, *containing in particular provisions which very markedly limit his contact with young males …*"[48] (emphasis added)

The other conditions which Professor James regarded as important were the continuation of the respondent's medication and ongoing psychological and psychiatric therapy. Provided those conditions were imposed (and, impliedly, carried out) Professor James expressed the respondent's risk of re-offending as moderate within the first year to 18 months. If that were successful then the risk of his recidivism would decrease progressively.

[43] In his report of 26 March 2011 prepared for the respondent's application for the removal of condition (xlv) from the supervision order that he not knowingly associate or have contact with anyone convicted of a sexual offence against children, Professor James referred to the profound nature of the respondent's Borderline Personality Disorder and that it was essential that he receive long term and appropriate psychotherapy. He concluded:

> "What is important, however, is the context of continued close (but not excessively intrusive) monitoring of other elements of his Supervision Order (i.e. conditions I, xvi, xviii, xx, xxv-xlv); and no less important, the provision and facilitation of regular psycho-dynamically informed psychotherapy with consistency of Psychotherapist being a high priority. *In my view, this degree of specification of the treatment is desirable given the duration, complexity and severity of Mr Friend's psychiatric disorder.*"[49] (emphasis added)

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47 Supplementary Appeal Record at 69.

48 Supplementary Appeal Record at 72.

49 Supplementary Appeal Record at 82-83.

[44] In his supplementary report of 28 March 2011 Dr Harden noted Professor James' recommendation for ongoing psychological therapy and a supervision order "with provisions that limited his contact with very young males".[50] Dr Harden noted that the respondent was co-offending with another child sex offender during a period of offending when he had approximately five victims and later had conflict with another child sex offender with whom he was associating. Dr Harden thought it was unhelpful for him to have continued association with such men during his rehabilitation as it formed part of his previous offence pathway.

[45] The psychiatric reports suggest that when the respondent was regarded as ready for release into the community on strict conditions he was thought to have the capacity to resist making poor choices. His statement to Professor James that young men had now lost their appeal clearly did not, on the material (which is persuasive), withstand his exposure in the community. This is not the breach hearing, but as the material presently stands, these were not chance encounters, as may have been the case before Fryberg J. On the material there was a deliberate seeking out of the boy and "grooming" conversations. Although that person had attained the age of 16 when the respondent allegedly stopped in the street to offer him a lift and engage him in inappropriate conversation, it was concerning conduct because it reflected previous breaches in 2007. This condition (together with the treatment conditions) was "core" to his release. Professor James and Dr Harden made it clear that this was the essential condition.

[46] It seems to me, with respect, that her Honour ought to have reflected upon the basis on which the psychiatrists thought that the respondent was sufficiently prepared for the stressors of release into the community. Had her Honour done so she would likely have concluded that the risk of re-offending was high, even on an interim basis, when the material had not been tested. In that circumstance it was necessary to examine carefully if the respondent had discharged the onus in s 21(4). That issue is developed under Grounds 3-5.

Grounds of appeal 3 – 5

[47] As the Attorney-General concedes[51], grounds 3 to 5 turn on the one issue whether it was open to the primary judge to find that the respondent had discharged his onus under s 21(4) of the Act to show "on the balance of probabilities, that his… detention in custody pending [the hearing and determination of the contravention proceedings] is not justified because exceptional circumstances exist".

[48] At the commencement of her reasons her Honour referred to *Harvey v Attorney-General for the State of Queensland*.[52] That decision concerned an application by a released prisoner to be released from custody pursuant to s 21(3) pending the court's final determination of an alleged contravention. In considering what constituted exceptional circumstances Boddice J said:

> "The word 'exceptional' is an ordinary, familiar English adjective. It 'describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special or uncommon'. It need not be 'unique, or unprecedented, or very rare', but it cannot be a circumstance that is 'regularly, or routinely, or normally encountered'.

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50 Supplementary Appeal Record at 86.

51 Written outline para 23.

52 [2011] QCA 256.

> Whether exceptional circumstances are shown to exist will depend on the facts and circumstances of a particular case. A breach that is trivial or accidental may well present little difficulty for a released prisoner to show 'exceptional circumstances'. However, exceptional circumstances require a conclusion the associated risks from any release pending determination of the contravention proceedings are not such as to justify continuing detention."[53]

[49] The primary judge concluded that she was satisfied in the way mandated by the legislation because of the timing of the contravention "in relation to other evidence of compliance by the respondent with the supervision order".[54]

The Attorney-General's contentions

[50] The Attorney-General contends that the respondent did not meet the degree of proof in s 21(4) because the evidence did not permit such a positive finding. The respondent had sworn no affidavit that he had heeded the statements of Fryberg J on 24 June 2011 and its impact upon him; he did not swear that no contraventions of the conditions had occurred (it seems to have been accepted by the Attorney-General that the respondent did not need to go on oath about the present allegations of contravention).

Respondent's contentions

[51] The respondent adds little more than that the primary judge was entitled to exercise her discretion in the way in which she did and no error can be demonstrated. The risk is to be determined at the time of the application and there was no evidence to suggest that the risk had become heightened since the last concerning conduct had occurred in April 2011; and the absence of evidence of non-compliance from the time of the alleged breach was germane to the exercise of her Honour's discretion.

[52] Mr East cited the following passage in *Attorney-General v Francis*[55] referring to observations in *Norbis v Norbis*:[56]

> "It is to be emphasised here that the primary judge's assessment 'call[s] for value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right'. It follows that it would be wrong for;
>
> > "a court of appeal to set aside a judgment at first instance merely because there exists just such a difference of opinion between the judges on appeal and the judge at first instance. In conformity with the dictates of principal decision-making, it would be wrong to determine the parties' rights by reference to a mere preference for a different result over that favoured by the judge at first instance, in the absence of error on his part. According to our conception of the appellate process, the existence of an error, whether of law or fact, on the part of the court at first instance is an indispensable condition of a successful appeal."[57]

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53 At [42]-[43], citing *Attorney-General for the State of Queensland v Dugdale* [2009] QSC 358.
54 AR 124.
55 [2007] 1 Qd R 396 at 402.
56 (1986) 161 CLR 513.
57 At [34].

[53] Mr East further submits that, unlike *Attorney-General for the State of Queensland v Fardon*[58], there was no evidence which called into question the efficacy of the supervision order as a means of reducing the risk of re-offending to acceptable limits and, further, it was not a situation as in *Harvey* where, although the breaches were relatively minor, they displayed an attitude of disrespect and defiance to the supervision order.

Discussion

[54] A fundamental difference between the allegations of breach the subject of the contravention proceedings, and the "minor" or "trivial" breaches referred to in some other decisions such as being late back from curfew by a few minutes, failure to keep a medical appointment, or have one beer when the condition imposed total abstinence, is that the alleged conduct and its avoidance is central to the respondent's capacity to live in the community without offending. It was the single necessary condition (apart from treatment) identified by Professor James in his addendum report of 15 October 2010 and endorsed by Dr Harden.[59] The psychiatrists emphasised the fragile nature of the respondent's personality and his propensity to offend and self-harm under stress. The legislation is clear. The court *must* detain in custody a released prisoner and may release him *only* if the released prisoner satisfies the court that "exceptional circumstances exist" such that his continued detention is not justified.

[55] The analysis of the expression "exceptional circumstances" in *Harvey* quoted above[60] derived from statements of Lord Bingham of Cornhill CJ in *R v Kelly (Edward)*[61] quoted with approval by Callinan J in *Baker v The Queen*[62] and this court in *A-G (Qld) v Francis.*[63] In *Baker* the High Court was considering the expression "special reasons" which had to be shown before the court could impose a determinate sentence in respect of a prisoner serving an indeterminate sentence under the *Sentencing Act* 1989 (NSW). Gleeson CJ commented that such or similar verbal formulae are

> "commonly used where it is intended that judicial discretion should not be confined by precise definition, or where the circumstances of potential relevance are so various as to defy precise definition. That which makes reasons or circumstances special in a particular case might flow from their weight as well as their quality, and from a combination of factors."[64]

[56] The expression "exceptional circumstances" is used in ch 5 of the *Corrective Services Act* 2006 (Qld). A prisoner may apply for an exceptional circumstances parole order[65]. A parole board may release a prisoner on parole (at any time) "if satisfied that exceptional circumstances exist". There is no definition of "exceptional circumstances" but the Explanatory Note to the *Corrective Services Bill* 2006 provides examples, namely,

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58 [2011] QCA 111.
59 Supplementary Record 72.
60 At [48].
61 [2000] QB 198 at 208.
62 (2005) CLR 513 at [173]; [2004] HCA 45.
63 [2008] QCA 243.
64 At [13]; see Kirby J at [123] and Callinan J at [173].
65 s 176.

> "… a prisoner who develops a terminal illness with a short life expectancy or who is the sole carer of a spouse who contracts a chronic disease requiring constant attention may be granted an exceptional circumstances parole order."[66]

At the same time, the Note is clear that the discretion is unconfined. Although the *Corrective Services Act* is allied legislation it serves only to demonstrate that content will be given to the expression by reference to the purpose of the provision in which it appears.

[57] What is clear in the case of the Act is that a released prisoner must demonstrate to the requisite standard that the circumstances are not ordinary. On one view the expression "exceptional" is not apt to cover the situation of minor breaches of the conditions. To prove that the breach is "trivial" is not at all the same as proving that exceptional circumstances exist. But, as *Harvey* suggests, the associated risks from any release must not be such as to justify continuing detention. Considering the centrality of the requirement to avoid males under the age of 16 her Honour, with respect, ought to have required something more tangible from the respondent. The alleged conduct went to the heart of the assessment of the risk he posed.

[58] It was argued that her Honour erred in not considering the nature of the risk should the respondent be released. The evidence suggests it would be in the manner described by Dr Harden above.[67] In *A-G (Qld) v Beattie*[68] Keane JA, with whom Holmes JA and Douglas J agreed, said:

> "For the appellant, it was argued that the expert description of the risk of the appellant's re-offending as 'moderate' meant that the risk fell short of 'unacceptable'. But this argument overlooks the point that whether or not a moderate risk is unacceptable must be gauged by taking into account the nature of the risk and the consequences of the risk materialising."[69]

It seems, from the observations of the experts, that in the case of this respondent the risk of that conduct occurring is moderate to high *only* if the supervision regime and the therapeutic intervention regime continues successfully. It cannot be supposed that her Honour, with her considerable familiarity with this respondent, did not appreciate the nature of the risk. It would, however, appear to be high on the state of the evidence.

New evidence - amended application and amended grounds of appeal

[59] New evidence of alleged breach(es) by the respondent of the supervision order emerged after the orders were made by the primary judge on 30 September. The Attorney-General sought to put this evidence before the court in the form of two affidavits from Mr Rob Wilden, Manager of the High Risk Offender Management Unit of Queensland Corrective Services and Detective Senior Constable Grant Hughes of Task Force Argos. That evidence relates to events which occurred on 20 and 21 October 2011. The evidence concerns a packet

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66 *Queensland Acts* 2006 Volume 1 Explanatory Notes Acts Nos. 1-29 at 1053. Reference is made to the same provision in the 2000 Act by Atkinson J in *Salter v West Moreton Community Corrections Board* [2007] QSC 29 at [4]-[7] but does not discuss the expression further.

67 At [40].

68 [2007] QCA 96.

69 At [19].

containing a bundle of photographs of boys wearing only shorts found in the respondent's car and not otherwise associated with him. He also failed to keep a medical appointment but in circumstances of considerable stress for him.

[60] Section 43 of the Act concerns the court's powers on appeal. By s 43(2)(c) the court may "on special grounds" receive further evidence about questions of fact either orally in court, by affidavit or in another way. Section 43 is in identical terms to r 766(1)(c) of the *Uniform Civil Procedure Rules* 1999 (Qld). Recently, in *Cairns City Supermarkets Pty Ltd v Lightbrake Pty Ltd*[70] Dalton J, with whom the President and Fraser JA agreed, endorsed the well-known approach to the reception of fresh evidence expressed in *Clarke v Japan Machines (Australia) Pty Ltd.*[71] In considering an appeal from the exercise of a judicial discretion it will be, in most cases, inappropriate to receive further evidence which was not before the primary judge.[72] Whatever the kind of case in which fresh evidence might be received on appeal[73] the present is not, in my opinion, one. The appropriate course is for the Attorney-General to file a fresh application in the Trial Division relating to the additional alleged breaches. I would decline to receive the new evidence.

Conclusion

[61] There was some discussion that if the appeal is allowed the court should exercise the discretion afresh. I have concluded that the primary judge ought not to have been satisfied that the respondent had demonstrated exceptional circumstances such that his continuing detention was not justified. In view of the additional evidence represented by the affidavits of Mr Wilden and Mr Hughes it is appropriate that any additional alleged breaches be joined with the present so that the judge seized of the contravention hearing may have the benefit of all the relevant material.

Treatment

[62] There was some suggestion that it was questionable whether corrective services would facilitate the respondent continuing with his treatment regime whilst in detention. The court would not seek to intervene in operational matters concerning corrective services but the need for the respondent to continue with his therapy and appropriate medication has been expressed strongly by the psychiatrists who have reported to the court and noted by others.

[63] The orders which I would make are:

1. The appellant's application to read and file:
   a. The affidavit of Grant Hughes sworn 8 November 2011;
   b. The affidavit of Robert Wildin sworn 7 November 2011; and
   c. The affidavit of Robert Wildin sworn 23 November 2011

   be refused.
2. Leave to read and file:
   a. The psychiatric report of Professor Basil James dated 20 March 2010;
   b. The psychiatric report of Dr Scott Harden dated 10 April 2010;
   c. The psychiatric report of Dr Scott Harden dated 11 October 2010;
   d. The psychiatric report of Professor Basil James dated 15 October 2010;

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70 [2011] QCA 205.

71 [1984] 1 Qd R 404 at 408.

72 *Swain-Mason v Mills & Reeve* [2011] EWCA Civ 14; [2011] 1 WLR 2735 per Lloyd LJ at [102]

73 In civil appeals.

e. The psychiatric report of Professor Basil James dated 26 March 2011; and
f. The psychiatric report of Dr Scott Harden dated 28 March 2011.

3. The appellant's application for leave to amend the notice of appeal dated 11 October 2011 be refused.
4. The appellant's application for leave to amend the application dated 22 September 2011 be refused.
5. Allow the appeal.
6. The respondent continue to be detained in custody pending the hearing and determination of the breach proceeding.

[64] **MARGARET WILSON AJA**: I agree with the orders proposed by White JA and with her Honour's reasons for judgment

[65] **DOUGLAS J**: I have had the advantage of reading the reasons of White JA with which I agree. I also agree with the orders proposed by her Honour.

[66] In circumstances such as these, where a serious breach of the conditions of the supervision order is alleged, it does not seem to me to be appropriate normally to accept that the prisoner has established the onus of showing that exceptional circumstances exist by relying on inferences as to his conduct to be drawn from departmental records where the prisoner does not support those inferences by swearing an affidavit dealing with the accuracy and comprehensiveness of the records in respect of any relevant conduct by him.