DISTRICT COURT OF QUEENSLAND

CITATION:	*Crowley v Crowley (No. 2)* [2020] QDC 256
PARTIES:	**KELLY CROWLEY** (applicant) v **MARION ELAINE CROWLEY (AS EXECUTOR OF THE ESTATE OF JOHN PATRICK CROWLEY – DECEASED)** (respondent)
FILE NO/S:	226/18
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	12 October 2020
DELIVERED AT:	Cairns
HEARING DATE:	2 October 2020, supplementary written submissions received 8 October 2020
JUDGE:	Fantin DCJ
ORDER:	**1. The application is dismissed.** **2. The applicant pay the respondent's costs of and incidental to the application to be assessed on the standard basis.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – AMENDING, VARYING AND SETTING ASIDE JUDGMENTS AND ORDERS – GENERAL PRINICPLES – where final orders were made by the Court giving effect to the compromise of a family provision claim pursuant to s 41 of the *Succession Act 1981* (Qld) – where the applicant applies pursuant to rr 667 and 668 of the *Uniform Civil Procedure Rules 1999* (Qld) to set aside those final orders – whether the applicant is a person "against whom" the order is made – whether the matters are "facts" for the purposes of r 668 - whether the court should exercise its discretion to set aside the final orders and permit a re-exercise of the discretion under s 41 of the *Succession Act 1981* (Qld).

Legislation

Limitation of Actions Act 1974 (Qld) s 35, s 36
Rules of the Supreme Court 1900 (Qld) O 45 r 1
Succession Act 1981 (Qld) s 41
Trusts Act 1973 (Qld) s 96
Uniform Civil Procedure Rules 1999 (Qld) r 667, r 668

Cases

Amos v Wiltshire [2016] QCA 77
Australia & New Zealand Banking Group Ltd v Hubner (unreported) Supreme Court of Queensland, Jones J, 6 November 1997
Commonwealth Bank of Australia v Quade (1991) 178 CLR 134
Crime and Misconduct Commission v Bioletti [2006] QSC 159
Crowley v Crowley [2019] QDC 114
Crowther v State of Queensland [2008] QPEC 76
D'Orta-Ekenaike v Victoria Legal Aid (2005) 223 CLR 1
Fairmont Suites and Hotels Pty Ltd v Duck Holes Creek Investments Pty Ltd [2009] QSC 98
Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd [2003] QB 679
Haller v Ayre [2005] QCA 224
IVI Pty Ltd v Baycrown Pty Ltd [2007] 1 Qd R 428
Manly v The Public Trustee of Qld [2008] QCA 198
Rankin v Agen Biochemical Ltd [1999] 2 Qd R 435
Re McIntyre [1993] 2 Qd R 383
Rockett v The Proprietors – "The Sands" BUP 82 [2002] 1 Qd R 307
Stage Club Limited v Millers Hotels Pty Ltd (1981) 150 CLR 535
Stephens v Chee; Chee v CBC Properties (Qld) Pty Ltd in its own capacity and as trustee of the Chee Family Trust & Ors [2015] QSC 269
Stott v Lyons & Anor [2006] QSC 228
Taylor v Johnson (1983) 151 CLR 422
Tutt v Doyle (1997) 42 NSWLR 10
Wentworth v Woollahra Municipal Council (1982) 149 CLR 672
Wollongong Corporation v Cowan (1955) 93 CLR 435
Woods v Sheriff of Queensland (1895) 6 QLJ 163

COUNSEL: C Ryall for the Applicant

M Jonsson QC for the Respondent

SOLICITORS: Preston Law for the Applicant

Murray & Lyons Solicitors for the Respondent

Nature of the application

[1] Kelly Crowley applies to set aside final orders giving effect to the compromise of his family provision claim pursuant to s 41 of the *Succession Act 1981* (Qld) ('the Act') in the estate of his father, John Patrick Crowley.[1]

[2] The respondent, Marion Crowley, is the elderly sister of the deceased and the executor of his will.

[3] The applicant and the respondent reached a settlement of his family provision claim at a mediation in April 2019. They were both legally represented. Final orders were made by consent on 21 May 2019. The orders have been perfected and performed.

[4] Fifteen months after those final orders were made in the applicant's favour, he applied to set them aside pursuant to ss 667(2)(e) and 668(1)(b) of the *Uniform Civil Procedure Rules 1999* (Qld) ('*UCPR*').[2] The respondent opposes the application.

[5] The issues for determination are whether the facts relied upon by the applicant attract the operation of those rules, and if they do, whether the court should exercise its discretion to set aside a final and perfected order to permit a re-exercise of the discretion conferred under s 41(1) of the Act.

[6] For reasons explained below, the answer to those questions is no.

Factual background

[7] The circumstances leading to the making of the final orders are set out in my reasons in *Crowley v Crowley* [2019] QDC 114.

[8] A summary will suffice. In 2015, the deceased made a will in which he gave $100,000 to the applicant, $20,000 to his friend, Mr Hards, and the residue to the respondent. At the same time, he wrote to the applicant saying that he may alter the amount given to the applicant in a later will, depending on the amount of contact he had with the applicant and how well they got on.

[9] In 2017, the deceased made another will, which was his last. In it, he gave only $20,000 to the applicant, $20,000 to his friend, Mr Hards, and the residue to the respondent.

[10] At the same time, the deceased made a statement about his relationship with the applicant in which he said that the applicant had very little do with him in recent years, had been a great disappointment to him, had treated him badly and had been uncooperative in communications. He said that he had provided to the applicant in the past, and was disappointed that the applicant had a sense of entitlement to receive his estate on his death.

[11] The deceased died on 10 August 2018, aged 72. He left no spouse and no children other than the applicant. His assets were very modest. In April 2019, the net value of the estate was only $194,718.79, which comprised a small house in Cairns.

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[1] *Crowley v Crowley* [2019] QDC 114.
[2] Reliance on r 667(2)(d) was abandoned in oral submissions.

[12] When final orders were made in May 2019, the parties were aware that the deceased had a potential interest as a beneficiary of a discretionary trust.[3] There was evidence that the deceased was a sole director and shareholder of a trustee company which was the trustee for the Crowley family discretionary trust created in 2012. The deceased had won a substantial sum of money in a lottery, and the trust bought a rural property at Malanda for $443,000. The only specified beneficiary of the trust was the deceased. But the other potential beneficiaries under the discretionary trust included children and brothers and sisters of the deceased. In support of the original application for final orders, the respondent deposed that the rural property owned by the trust did not form part of the deceased's estate (because he did not hold those assets in a personal capacity). At that stage there was no other evidence about other assets of the trust or their value. The deceased's accounting firm had closed down and been wound up. The deceased's accountant had gone bankrupt. The respondent's solicitors had requested financial information from the accountants but had not received any response and it seemed unlikely they would receive one. Both parties were aware of the above information when they compromised the family provision claim.

[13] The other beneficiary, Mr Hards, did not become a party to the family provision proceeding, and no other eligible applicants applied under s 41 of the Act.

[14] At the date of the final orders, the applicant was 39 years old and living interstate with his mother. He suffered from a number of chronic illnesses which rendered him unable to work. He was receiving a disability support pension. His assets were limited to modest amounts of cash and personal effects.

[15] The respondent was 71 years old, lived alone and owned a house in the Sunshine Coast valued at about $300,000. She relied upon the age pension and a modest amount of superannuation. She owned an inexpensive car, had a small amount of savings and superannuation of about $170,000. The respondent was in a better financial position than the applicant, notwithstanding her greater age, but she was not well off. There was no other competitor for the deceased's estate.

[16] The applicant and the deceased did not enjoy a close a relationship. The deceased separated from the applicant's mother when the applicant was only three years old, leaving his mother with the sole care of the applicant and his older brother. After the deceased left, the applicant had only sporadic contact with him. The applicant met the deceased again only in 2013 at the funeral of his older brother. They had some contact between 2015 and 2017, during which they both made some effort to improve the relationship. Those attempts were not particularly successful. I found that their poor relationship could not be ascribed to fault on the part of the applicant, necessarily, or even the deceased. Nonetheless, that poor relationship did not relieve the deceased of his moral duty to provide support to his son.

[17] In making the final orders, I was satisfied that only very modest provision was made for the applicant in the deceased's will, that the deceased failed to provide proper maintenance and support for the applicant, and that the applicant had a financial

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[3] *Crowley v Crowley* [2019] QDC 114 [7].

need and a moral claim. In those circumstances, I found that the jurisdiction of the court under s 41 of the Act was clearly enlivened.

[18] The final orders were made by consent. I approved a compromise reached by the parties after mediation, and with the assistance of legal advice. The effect of the final orders was to vary the will to increase the gift to the applicant by an additional $100,000 (so he received a total gift of $120,000), and to order that the applicant's costs of the proceeding fixed in the sum of $35,000 be paid out of the estate. The effect of those orders was that the applicant would receive more under the will than the respondent as residuary beneficiary. I found that was justifiable, given that the applicant had greater financial needs of support than the respondent. The orders, however, respected the deceased's desire to give a gift to his sister and to the other beneficiary. I found that there was no reason for the court not to act on the agreement reached by the parties and make the order applied for. I also took into account the relatively small value of the estate and the extent to which it was likely to be further depleted by legal costs if the matter continued to be litigated. I was satisfied that the orders to give effect to the compromise were appropriate provisions for the proper maintenance and support of the applicant from the deceased's estate.

Grounds relied upon

[19] The principal basis for the application was *UCPR* r 668(1)(b). Two subsidiary grounds were also relied upon: common mistake (although this ground was not advanced strongly in oral submissions); and *UCPR* r 667(2)(e) (relied upon only in a supplementary written outline after I invited further submissions on the point).

[20] The circumstances in which a court will reopen a judgment that it has pronounced are extremely rare. The public interest in maintaining the finality of litigation necessarily means that the power to reopen to enable a rehearing must be exercised with great caution.[4] There are specific rules that permit for the court to set aside an order in certain circumstances.

The power to vary an order under *UCPR* r 668

[21] *UCPR* r 668 provides:

> **"668 Matters arising after order**
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> (1) This rule applies if—
>
> (a) facts arise after an order is made entitling the person against whom the order is made to be relieved from it; or
>
> (b) facts are discovered after an order is made that, if discovered in time, would have entitled the person against whom the order is made to an order or decision in the person's favour or to a different order.
>
> (2) On application by the person mentioned in *subrule (1)*, the court may stay enforcement of the order against the person or give other appropriate relief.

[4] *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672, 684; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 17.

(3) Without limiting *subrule (2)*, the court may do one or more of the following—

(a) direct the proceedings to be taken, and the questions or issue of fact to be tried or decided, and the inquiries to be made, as the court considers just;

(b) set aside or vary the order;

(c) make an order directing entry of satisfaction of the judgment to be made."

[22] The applicant relies on r 668(1)(b).

[23] The predecessor to *UCPR* r 668 was O 45 r 1 of the *Rules of the Supreme Court 1900* (Qld).[5] In *Woods v Sheriff of Queensland* Griffith CJ, with whom Harding and Real JJ concurred, explained the nature of the power to grant relief under such a rule, emphasising that an application for such relief is not in the nature of an appeal or rehearing: "The only question is whether the party applying is entitled under the altered circumstances to be relieved from the operation of the order." [6]

[24] The rule is not a substitute for an appeal but rather assumes that the order was correct on the facts as then known.[7] An order, once made, is usually final unless successfully appealed against. *UCPR r* 668 operates in conjunction with that general rule.

[25] In considering an application under r 668 to set aside a consent order in *Fairmont Suites and Hotels Pty Ltd v Duck Holes Creek Investments Pty Ltd* [2009] QSC 98, Applegarth J said:

"Close attention is required to the "facts" that are alleged to attract *UCPR* 668, and the basis upon which those facts are said to *entitle* the person against whom the order is made to be relieved from it; or, if they had been discovered in time, would have *entitled* the person against whom the order is made to an order or decision in the person's favour or to a different order. The words "entitle" and "entitled" in O 45 r 1 RSC were held by the Court of Appeal to be "capable of referring to instances in which the person seeking relief has to depend on a favourable exercise of discretion and claims no absolute right to relief" (fn 7: *Rankin v Agen Biochemical Ltd* [1999] 2 Qd R 435 at 438). The same interpretation should be given to the words "entitling" and "entitled" in *UCPR* 668."

[26] The interpretation of "entitled" in the context of O 45 r 1 in *Rankin* should be applied. An absolute right to relief is not necessary where resolution of the application depends on the exercise of the Judge's discretion. The fact that the making of orders under s 41 of the Act is discretionary does not *per se* prevent the applicant applying under *UCPR* r 668.

[27] In *Crime and Misconduct Commission v Bioletti*, where the Court was asked to set aside a judgment, Muir J summarised the Court's discretion in these terms: [8]

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[5] *Rockett v The Proprietors – "The Sands" BUP 82* [2002] 1 Qd R 307, 311 [13].
[6] (1895) 6 QLJ 163, 165.
[7] *IVI Pty Ltd v Baycrown Pty Ltd* [2007] 1 Qd R 428, 439.
[8] [2006] QSC 159 [10].

> "Relevant to the exercise of the discretion, by analogy with the principles governing the admission of fresh evidence on appeal, is whether the evidence of complainant A's mental condition could have been obtained by reasonable diligence for use on the appeal. Also relevant is whether there is a high degree of probability that there would have been a different decision had such evidence been used, or whether it is reasonable clear that the use of such evidence would have produced an opposite result. But the discretion in r 668 cannot be exercised on the basis that such considerations are part of the rule and necessary prerequisites for the favourable exercise of the discretion." [footnotes omitted]

[28] In *IVI Pty Ltd v Baycrown Pty Ltd*, the Court held that the principles applicable when a party relies upon fresh evidence in an appeal should be taken into account when deciding whether or not relief should be given under *UCPR* r 668(1)(b).[9] Jerrard J cited *Wollongong Corporation v Cowan* (1955) 93 CLR 435: [10]

> "It must be **reasonably clear that if the evidence had been available at the first trial and had been adduced, an opposite result would have been produced**, **or,** if it is not reasonably clear that it would have been produced, it must have been **so highly likely as to make it unreasonable to suppose the contrary**. Again, reasonable diligence must have been exercised to procure the evidence which the defeated party failed to adduce at the first trial." [emphasis added]

[29] It is not enough to show that the fresh evidence relied on might or even would have led to the exploration of other questions, if such an exploration would not have had any potential to lead to a different outcome.[11]

[30] Rule 668 applies only to proven or accepted facts and not to a claim that some facts or different facts may exist.[12] It is the evidence as set out in the affidavit (rather than any particular interpretation of it as asserted by the applicant) that constitutes the relevant facts for the purposes of r 668(1)(b).[13]

[31] The granting of relief under r 668 is discretionary. In this case the discretion is informed by principles that apply in cases in which a party seeks an order setting aside or varying a consent order.

[32] In *Rockett v The Proprietors – "The Sands" BUP 82* McPherson JA (with whom Williams JA and Wilson J agreed) stated:

> "Courts have only limited power to set aside their orders, and the power to do so is even more restricted when the order in question has been made by consent of the parties to it; at least that is so when a compromise is involved……In *Harvey v Phillips* (1956) 95 CLR 235, 243-244, the High Court said that the question whether a compromise embodied in a consent order is to be set aside "depends on the existence of a ground which would suffice to render a simple contract void or voidable or to entitle the party to equitable relief against it"."[14]

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[9] [2007] 1 Qd R 428. Applied in *Amos v Wiltshire* [2016] QCA 77.
[10] And *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134, 140.
[11] *IVI Pty Ltd v Baycrown Pty Ltd* [2007] 1 Qd R 428, 462 [106].
[12] *Australia & New Zealand Banking Group Ltd v Hubner* (unreported) Supreme Court of Queensland, Jones J, 6 November 1997.
[13] *Stott v Lyons & Anor* [2006] QSC 228 [24]-[25] per Mullins J.
[14] [2002] 1 Qd R 307, 310.

The application pursuant to *UCPR* r 668

[33] *UCPR r* 668(1)(b) requires an applicant to satisfy the stated criteria, and if that threshold is reached, the Court then has a discretion under r 668(3) to make orders of the type set out in that subrule.

A person "against whom the order is made"

[34] Both limbs of r 668(1) are expressly limited in their operation to "the person against whom the order is made". On the literal wording of r 668, it has no application where the applicant is not a party "against whom" the order is made.[15] There is no reference in r 668 to a party who has the benefit of the order. That can be contrasted with r 667(2)(e) which expressly provides that the court may set aside an order at any time if "the party who has the benefit of the order consents". Had the legislature wished to extend the application of r 668 to a party who has the benefit of the order, it could easily have done so.

[35] Here, the order was made in the applicant's favour. The order varied the will to increase the gift to him by $100,000 and ordered the estate to pay his costs. The applicant was the beneficiary of the order. He was also bound by it. But no part of the order was made "against" him in the sense that it adversely affected his rights under the will, or required or obliged him to do anything.

[36] Rule 668 applies if facts are discovered that "would have entitled the person against whom the order is made to an order or decision *in the person's favour* or *to a different order*" [emphasis added]. The latter encompasses the notion of an order more favourable to the applicant than the one originally made. But both scenarios are limited in their application to "the person against whom the order is made".

[37] The applicant relies upon the cases in respect of the construction of the word *"entitled"* to submit that rule 668 has been construed broadly as a remedial provision. In my view, that does not justify reading into the plain words of r 668 a more expansive construction. The legislature has specified that orders may be set aside only in specific circumstances where certain conditions are satisfied.

[38] The applicant submits that the order gave effect to a compromise of the applicant's family provision claim and it represented less than what was claimed because part of the claim for both provision and costs was given away in exchange for the certainty of the compromise. He further submits that although the order was in his favour, it was made *"against"* him because it bound him not to proceed to a contested hearing that could have resulted in orders more favourable to him. In my view, this is straining the meaning of the rule. The use of the word "against" in r 668 posits a direct relationship, rather than the less direct relationship which would be contemplated, by contrast, had the words "relating to" or "in respect of" been used. In my view, the relevant meaning of "against", in this context, is *in opposition to*, *adverse or hostile to*.[16] The order sought to be set aside could not be said to be in opposition to, or adverse to, the applicant.

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[15] See *Stephens v Chee; Chee v CBC Properties (Qld) Pty Ltd in its own capacity and as trustee of the Chee Family Trust & Ors* [2015] QSC 269 [6]; *Crowther v State of Queensland* [2008] QPEC 76 [10]; *Fairmont Suites and Hotels Pty Ltd v Duck Holes Creek Investments Pty Ltd* [2009] QSC 98 [35].

[16] *Macquarie Dictionary* (Revised 3rd ed, 2001) (def 1).

[39] For the reasons above, r 668 does not apply to the applicant because he is not a person *against whom the order is made*, and he has no right or standing to make an application under it.

[40] The application under r 668(1)(b) fails at the first hurdle. Thus it is unnecessary to consider whether the other mandatory preconditions are satisfied.

[41] But if I am wrong about that, I would dismiss the application in any event. That is because, for the reasons below, it does not satisfy the other requirements of r 668(1)(b), and there are discretionary factors that would militate against making the orders sought.

Matters alleged to be "facts" for the purposes of r 668

[42] The applicant says the "fact" discovered after the final orders were made is the existence of a debt or loan payable to the estate of the net value of approximately $400,000.

[43] The respondent's counsel submits that the evidence of the existence of the loan is not a "fact" for the purposes of r 668 because of the uncertainty about the loan, whether it is in fact payable to the estate, whether it can be enforced, and whether it is statute barred. All of these issues are disputed by the applicant.

[44] It is not in dispute that certain information was discovered after the final orders.

[45] At the date of compromise, the parties were aware of the existence of the discretionary trust and its ownership of the rural property. There was evidence from the respondent that the assets held by the trust did not form part of the estate, and that the respondent and her solicitors had undertaken enquiries with respect to assets and liabilities of the estate. There was nothing in the respondent's evidence that put the parties on notice that there was something further the respondent should have done to ascertain the assets of the estate.

[46] The information about the alleged debt or loan came to light in the following way. The respondent is an elderly woman who had not previously acted as executor of an estate. She had limited knowledge of financial matters and almost no knowledge of how to administer an estate. She engaged solicitors to assist her in the administration of the estate, including in identifying the assets and liabilities. The deceased was a very private person who had not shared with the respondent information about his personal or financial circumstances. Before the mediation, the respondent's solicitors identified the information about the trust referred to earlier in these reasons. The respondent participated in the mediation which resulted in the compromise of the claim and final orders.

[47] After agreement was reached, the respondent organised the sale of the deceased's home in Cairns. It was in a very poor condition and an untidy state. In the course of cleaning it out, the respondent packed up some of the deceased's personal items into boxes and had them delivered to her home in the Sunshine Coast. In July 2019 the house was sold and the respondent's solicitors paid to the applicant $120,000 together with his legal costs of $35,000.

[48] In the boxes delivered to her home, the respondent found financial statements for the trust dating from 2013. By letter dated 31 July 2019 the respondent's solicitors

provided those documents to the applicant's solicitors. They advised that the respondent's enquiries regarding obtaining the requested documentation for the trust were continuing, and that now that she had been appointed director of the trustee company she would try to obtain the documents from the Australian Taxation Office. They also provided further information about the assets of the trust. By letter dated 26 August 2019 the respondent's solicitors provided to the applicant's solicitors the financial reports of the trust for the years ending 2014 to 2017 inclusive.

[49] In the financial statements for the trust under "Current Liabilities, Financial Liabilities, Unsecured" is an entry "Loans by beneficiaries". That sum started at approximately $455,000 in 2013 and had increased to approximately $472,000 by 2017.

[50] In response to queries raised, by letter dated 17 September 2019 the respondent's solicitors advised the applicant's solicitors that:

> "Our client instructed that she has no knowledge of the meaning or intention of the "loan to Beneficiaries" in the Financial Statements for the Crowley Family Discretionary Trust. Our client further instructs that she has no information, documentation or sources of information regarding any loans by beneficiaries to the Trust or the entity Eureka Enterprises FNQ Pty Ltd. … the Financial Statements were prepared by the accountant for the late John Crowley. That accountant has ceased business and our endeavours to communicate with that accountant to seek documentation from that accountant have not resulted in any response. Furthermore, our client, who is a pensioner has taken on the role of director of the Trustee company only recently. She has no prior knowledge of what has or has not occurred in respect to the operation of the Trustee company and the trust. We have suggested to our client that she meet with a new accountant and update the Financial Statements for the Trust. Our client can then provided updated information on the financial status of the Trust and our client can obtain advice from the accountant as to the meaning and effect of the information in the previous financial statements."

[51] By letter dated 24 September 2019 the applicant's solicitors foreshadowed bringing the subject application.

[52] The respondent took steps to finalise her obligations as executor and distribute the balance of the estate. That took some time. In October 2019 the distribution of $20,000 to Mr Hards was made. The rural property owned by the trust was listed for sale, a contract was entered in December 2019 and settlement occurred in March 2020.

[53] The net proceeds of that sale of about $420,000 were paid into the respondent's solicitors trust account to be held for the trustee. The respondent instructed her solicitors not to distribute the proceeds of that sale to avoid further litigation, and so that any potential claims made by the applicant could be resolved. The respondent's solicitors advised the applicant's solicitors that no distribution of the trust monies would be made except to pay trust expenses and would not be dispersed without adequate notice (of at least 14 days) being provided to the applicant.

[54] In December 2019 the applicant's solicitors again foreshadowed this application and also an application to the Supreme Court to remove the trustee.

[55] In April 2020 the respondent's solicitors provided the financial statements for the years 2018 and 2019.

[56] By letter dated 11 May 2020 the respondent's solicitors advised that "the likely inference" was that the item "Loans by Beneficiaries" represented the running balance of a loan to the trustee company established by funds advanced by the deceased to finance the acquisition by the trustee of the rural property. But they emphasised that "We have no supporting documentation to establish this fact. Nor does our client have any knowledge of these matters for the reasons outlined in earlier correspondence." The respondent's solicitors said "it is our client's view (by inference and without any supporting documentation or prior knowledge of our client) that the amount of $459,874.71 recorded as "Unpaid present entitlements" in the balance sheet prepared for the [trust] for the financial year ended 30 June 2019 acknowledges a present indebtedness in that amount owed by the trustee company (in its representative capacity) to the Estate of the late John Crowley." They invited "without prejudice" discussions to find a consensual resolution to any concerns the applicant had.

[57] In June 2020 the applicant again foreshadowed an application to set aside the orders.

[58] By letter dated 10 July 2020 the respondent's solicitors responded. Amongst other things, they repeated that the respondent was not aware of the fact that the financial statements produced for the trust had recorded a liability in favour of the deceased, nor the legal significance of that, and that the financial statements were not available to her at the relevant time. They emphasised that there was no separate documentation (such as a loan agreement) to establish the liability in the financial statements or its purpose, and no separate evidence available to the respondent to confirm why the liability was included in the financial statements and what purpose it had. They pointed out that the respondent in her capacity as sole director of the trustee of the trust, as well as executor of the estate, needed to act cautiously in the manner in which she dealt with the loan. They advised that it was appropriate for the trustee of the trust to seek an advisory direction from the Supreme Court under s 96 of the *Trusts Act 1973* (Qld) as to whether it would be justified as trustee in satisfying and discharging the indebtedness recorded as a loan in the financial statements. They reiterated that the respondent was open to mediation or other process to resolve the dispute to avoid significant legal costs.

[59] On 8 September 2020 the applicant filed the application to set aside the final orders.

[60] The respondent deposes that "if this is a loan" from the deceased to the trust, then the loan "if potentially recoverable" is a loan to the estate and an estate asset. The respondent has no personal knowledge of, nor documentation to establish, what the entry means. The former accountant who prepared the return is not communicating with the respondent's solicitors and no further documents can be located.

[61] The respondent deposes that she does not know as a fact that the entry "Loan from Beneficiaries" is a loan from the deceased to the trust. She makes the concession that it "probably is", given what is known of how the deceased came into money from a lottery win, his management of the property himself and the absence of involvement from any other party. The respondent has no other source of knowledge for this concession. The respondent understands that the loan in the

financial statements is one which "if enforceable" would be payable from the trust to the estate.

[62] The respondent wishes to do the "correct thing" with this obligation and fulfil her legal duties. She remains "uncertain if there is a loan which should be lawfully repaid from the trust". She states that at no stage has she said that she would not, as trustee, make a distribution to the applicant from the proceeds of sale of the trust property. I infer that there remains the possibility that will occur.

[63] The respondent's counsel submits that the "loans by beneficiaries" adds nothing to the estate unless the debt is a lawfully enforceable chose in action. He emphasises the qualified nature of the respondent's evidence about this entry and the uncertainty expressed by her as to whether the loan would be repaid.

[64] He further submits that the loan, if it exists, is a statute barred debt. That is said to be because where moneys are lent on terms that the loan was repayable on demand, the consequential debt and the associated cause of action arose instantaneously with the need for any demand, and the limitation period is taken to run from the date of the advance.[17] Here the loan appears to have been advanced in 2012, so the limitation period of six years would have expired by 2018.

[65] The respondent's counsel submits that, absent any written acknowledgement of the debt, the presumption is that the limitation period expired in 2018.

[66] Section 35(3) of the *Limitation of Actions Act 1974* (Qld) provides that "[w]here a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to the personal estate of a deceased person … and the person liable or accountable therefor acknowledges the claim …, the right shall be deemed to have accrued on and not before the date of the acknowledgment". Every acknowledgement under s 35 must be in writing and signed by the person making it, and "shall be made to the person … whose title or claim is being acknowledged": s 36.

[67] There is a declaration in the financial statements signed by the deceased as director of the trustee in July 2018. The respondent's counsel submits that because it was the deceased who signed the balance sheet it does not constitute an acknowledgement of the debt for the purposes of s 35(3) of the *Limitation of Actions Act 1974*. He relied upon *Stage Club Ltd v Millers Hotel Pty Ltd* where it was said that a balance sheet may amount to a sufficient acknowledgement of debts recorded in it, other than debts owed to the persons signing the balance sheet. [18] The respondent's counsel further submits that the declaration signed by the deceased does not constitute an acknowledgement of debt for the purposes of s 35(3) because it was not "delivered or made to the creditor". He argues that the limitation period does not extend for six years from the date of the acknowledgement, so to the extent there was a debt owing to the estate, it is now statute barred. And it was statute barred when final orders were made in May 2019.

[68] The applicant submits in his Supplementary Outline of Submissions that the debt is *not* statute barred. He submits that the line of cases referred to in *Stage Club* can be distinguished factually because this case involves a single director and shareholder

[17] *Haller v Ayre* [2005] QCA 224 [19], [26], [32].
[18] (1981) 150 CLR 535, 543.

company and the acknowledgement was signed by that person. The applicant also relies upon what he says are further acknowledgements of the debt in the 2018 and 2019 financial statements extending the limitation period. He also relies upon alleged part payments of the debt in the years ending 2013 and 2018.

Conclusion on matters alleged to be "facts"

[69] It is not necessary for the purposes of this application to determine the question of whether the alleged debt is now statute barred. The parties' competing submissions simply serve to highlight the uncertainties concerning this disputed question of law and fact.

[70] Other matters add to the uncertainty of whether the alleged debt is payable to the estate and whether it can be enforced. One is the lack of any documentary evidence to establish the loan liability in the financial statements or its purpose. Another is the fact that the trustee of the trust has foreshadowed seeking an advisory direction from the Supreme Court under s 96 of the *Trusts Act 1973* as to whether it would be justified as trustee in satisfying and discharging the indebtedness recorded as a loan in the financial statements. There is also the issue of other potential beneficiaries of the discretionary trust, who include the respondent and her four adult children.

[71] When all of those matters are taken into account, the evidence relied upon by the applicant does not constitute "facts" for the purpose of *UCPR* r 668, and does not satisfy the standard which must be reached before r 668(1)(b) can be applied.

[72] Even if the evidence of the loan qualified as a new "fact" for the purposes of *UCPR* r 668, the evidence fails the fresh evidence test because the evidence is equivocal. I am not satisfied that it was or might be a fact which *entitled* the applicant to a different order. That is because of the uncertainties referred to.

[73] Even if the debt were accepted as validly payable to the estate, it cannot be said with certainty that it would have *entitled* the applicant to an order more favourable to him than the one he received, although I accept that it may have informed a different compromise. But it is not sufficiently certain to satisfy the test of being "reasonably clear" that the fresh evidence would have produced an opposite verdict, or a result more favourable to the applicant.

[74] In conclusion, in terms of *UCPR* 668(1)(b), the applicant has not clearly established facts which were discovered after the order was made that, if discovered in time, would have entitled the applicant to an order or decision in his favour or to a different order. This ground must fail.

The application pursuant to *UCPR* r 667(2)(e)

[75] In his Supplementary Outline of Submissions, the applicant relied upon r 667(2)(e).

[76] Rule 667(2) sets out the limited statutory circumstances where an order may be set aside or varied *after* it is filed or after 7 days from the making of the order (whichever is earlier). One of those circumstances is if "the party who has the benefit of an order consents" to it being set aside: r 667(2)(e).

[77] The applicant submits that the respondent's failure to disclose the debt was an innocent misrepresentation sufficient to warrant setting aside the final orders, and

that the terms of settlement may be avoided provided the parties may be returned to the position they were in before the mediation.

[78] However, ultimately, it is in the court's discretion whether or not to exercise the power to set aside an order at all and the discretion is not exercised lightly. For the reasons set out below under "Discretionary considerations", the power under r 667(2)(e), if it applies, should not be exercised in this case.

Common mistake

[79] The applicant further submits that both parties were mistaken about a fundamental matter underlying the compromise agreement, namely the value of the estate. He argues that their mutual misapprehension about the value of the estate was a fact that went to the root of the compromise. He submitted that this is a relevant consideration to the exercise of the court's discretion to set aside the final orders, should the court be satisfied that r 668 is enlivened.

[80] For the reasons set out above relating to the uncertainty of the "loan", I do not accept that there was a common mistake about the value of the estate. But I will put that to one side for the purposes of considering this argument.

[81] The applicant's outline on this point was difficult to follow. At paragraph 21 he submitted that the applicant was not seeking a declaration that the compromise was void on the basis of common mistake. But at paragraph 35 he submitted that the agreement embodied in the terms of settlement was void. See also paragraph 38.

[82] The respondent submits that there is no basis upon which the underlying compromise might be set aside for mistake, whether at law or in equity.

[83] There is no suggestion here of unilateral mistake. At the time the parties struck their compromise, neither party was aware of the existence of the financial statements containing the entry with respect to the alleged loan. There is no suggestion that the respondent knowingly and unconscionably took advantage of a misapprehension on the applicant's part.[19]

[84] The respondent submits that, to the extent that the parties were indeed mistaken, their mistake went merely to circumstances potentially bearing upon the negotiation of their agreement. The misapprehension did not go to the contents or effect of the agreement proper. I agree.

[85] There is no evidence about whether the parties in their commercial compromise addressed the issue of whether the trust might owe any debt to the estate. No evidence was filed about the assets of the trust or the control of the trust as at the time of the mediation. The possibility that there may be a debt owed by the trust cannot be fairly be described as something that could have been foreseen. The parties, who were represented, elected to proceed with the compromise at a point when they were aware that the full financial position of the trust was not yet known. They may have done so for any number of forensic or commercial considerations, including a desire to bring the proceeding to an end, and to avoid the modest estate being further depleted by legal costs.

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[19] Applying *Taylor v Johnson* (1983) 151 CLR 422, at 432 – 433; and *Tutt v Doyle* (1997) 42 NSWLR 10, 12 and 14.

[86] Applying the Court of Appeal decision in *Australia Estates Pty Ltd v Cairns City Council,* there is no basis in equity to set aside, for common mistake, an agreement which is valid and enforceable at common law.[20] There is also no basis in this case to set aside the agreement for common mistake at common law, because the party seeking intervention cannot show the necessary element: that the non-existence of the commonly assumed state of affairs must render performance of the contract impossible.[21] In this case, the compromise has already been perfected by final orders, and performed.

[87] Therefore this ground also fails.

Discretionary considerations

[88] Even if *UCPR rr* 667 and 668 were found to apply in this case, the power to set aside the orders should not be exercised because there are powerful factors in this case that militate against it.

[89] There is a significant public interest in the finality of litigation. The consent orders reflected a compromise, made with the benefit of legal advice. The parties elected to proceed with the compromise, aware of the existence of the trust and in the knowledge that they did not have all the financial information about the trust. The final orders have since been perfected and performed. The applicant and other beneficiary have been paid their gifts under the will and the applicant's costs order has been paid, so any re-exercise of discretion under s 41 of the Act would require an account to be taken of those amounts. Re-litigating the matter would involve significant further legal costs in an estate that remains modest (even if the amount of the loan were taken into account). Significant time has elapsed between the final orders and when this application was filed. The only party seeking to set aside the order is the applicant. It is not a case of both parties joining in seeking to have the principal orders set aside. There is also a potential cohort of third parties whose interests might well be adversely affected by the re-opening of the principal proceeding. That cohort comprises the persons who stand to potentially benefit from due administration of the Crowley Family Discretionary Trust. There remains the possibility that the trustee will seek an advisory direction from the Supreme Court under s 96 of the *Trusts Act 1973* on its obligations with respect to the alleged loan, and that the applicant may receive a distribution under the trust.

[90] For those reasons, I would decline to exercise any discretion to set aside the orders.

Costs

[91] The courts have distinguished between the approach to costs at first instance in family provision proceedings, and on appeal.[22] Although this is an application to set aside final orders and not an appeal, the circumstances are analogous.

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[20] [2005] QCA 328 at [64] citing *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679.

[21] Ibid [48] and [64].

[22] *Manly v The Public Trustee of Qld* [2008] QCA 198 [41] per Daubney J (with whom McMurdo P and Mackenzie AJA agreed) where the court adopted the observation by Thomas J (as he then was) with whom McPherson ACJ and Byrne J agreed, in *Re McIntyre* [1993] 2 Qd R 383 at 388.

[92] The application was wholly unsuccessful. It did not have reasonable prospects of success. The estate is a very modest size and should not be further depleted by an order for costs out of the estate. Applicants and their advisors should not think that they can bring applications to set aside final consent orders confident in the knowledge that the estate will in all probability be obliged to pay for the exercise, or that the executor will pay their costs. What has been called the indulgent attitude of judges of first instance to unsuccessful applicants has no place in an application of this kind. A litigant has a right under the rules of court to seek orders by bringing an application, but he has no similar right to do so at the expense of the other party or estate.

[93] The respondent has been put to the expense of defending an unmeritorious application. It would, in my view, be unjust for the applicant to be relieved from the usual consequence of paying the successful respondent's costs of this application.

Orders

[94] The orders are:

1. The application is dismissed.

2. The applicant pay the respondent's costs of and incidental to the application to be assessed on the standard basis.