SUPREME COURT OF QUEENSLAND

CITATION: *Fairmont Suites and Hotels Pty Ltd v Duck Holes Creek Investments Pty Ltd & Ors* [2009] QSC 98

PARTIES:
FAIRMONT SUITES AND HOTELS PTY LTD ACN 063 677 065 ATF J F STEWART FAMILY TRUST
(applicant)
v
DUCK HOLES CREEK INVESTMENTS PTY LTD ACN 106 529 471 ATF DUCK HOLES CREEK INVESTMENT UNIT TRUST
(first respondent)
and
ADVENTURA PROPERTY HOLDINGS PTY LTD ACN 129 162 465 ATF THE PRUDENT VENTURES NO 1 TRUST
(second respondent)
and
LENTRO INVESTMENTS PTY LTD ACN 081 146 090 ATF PRUDENT VENTURES UNIT TRUST NO 4
(third respondent)
and
PRUDENT VENTURES PTY LTD ACN 108 680 557 ATF PRUDENT VENTURES UNIT TRUST NO 5
(fourth respondent)
and
PRUDENT VENTURES PTY LTD ACN 108 680 557 ATF PRUDENT VENTURES UNIT TRUST NO 6
(fifth respondent)
and
LENTRO INVESTMENTS PTY LTD ACN 081 146 090 ATF MORROW DISCRETIONARY TRUST NO 1
(sixth respondent)
and
LENTRO INVESTMENTS PTY LTD ACN 081 146 090 ATF LENTRO DISCRETIONARY TRUST NO 1
(seventh respondent)
and
SCOTT ATANASOFF AND MIRCA ATANASOFF
(eighth respondent)
and
TERENCE VICTOR LEAKE
(ninth respondent)
and
STEVEN CROFT AND ANNE CROFT ATF CROFT FAMILY SUPER FUND
(tenth respondent)
and
TILE TRENDS (WHOLESALE) PTY LTD

ACN 010 529 852 ATF INGLIS DISCRETIONARY TRUST
(eleventh respondent)
and
MARY TERESE CHATFIELD
(twelfth respondent)
and
FAIRMONT SUITES AND HOTELS PTY LTD ACN 063 677 065 ATF PRUDENT VENTURES UNIT TRUST NO 3
(thirteenth respondent)
and
PRUDENT VENTURES PTY LTD ACN 108 680 557 ATF PRUDENT VENTURES UNIT TRUST NO 7
(fourteenth respondent)
and
GUESTHOUSE SUITES PTY LTD ACN 118 144 148 ATF GUESTHOUSE SUITES UNIT TRUST
(fifteenth respondent)
and
SWISH CAR CARE PTY LTD ACN 112 375 514 ATF THE SWISH CAR CARE UNIT TRUST
(sixteenth respondent)

FILE NO:	BS 11419 of 2008
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	5 May 2009
DELIVERED AT:	Brisbane
HEARING DATE:	27 April 2009
JUDGE:	Applegarth J
ORDERS:	**1. That paragraph 2 of the order of the Deputy Registrar made on 9 March 2009 in Proceeding BS 2046/09 be vacated.** **2. That the amended application filed by leave on 27 April 2009 otherwise be dismissed.** **3. The applicant, the ninth respondent and the thirteenth respondent pay the sixth and seventh respondents' costs of and incidental to the application.**
CATCHWORDS:	PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – JUDGMENT AND OTHER MATTERS – OTHER MATTERS – application to vary a consent order based on compromise – application to vary

consent order to prevent payment – principles by which the court will exercise the power to vary a consent order made in consequence of an agreement between the parties or as an element of a compromise – whether the facts relied upon by the applicant attract the operation of *UCPR* 668 – whether the discretion under *UCPR* 668 should be exercised

EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – INTERLOCUTORY INJUNCTIONS – FREEZING ORDERS – JURISDICTION TO GRANT – where there is some risk that a future judgment may be partly unsatisfied – where compromise effected and consent order made – whether the balance of convenience and interests of justice justify a freezing order – whether a freezing order or similar order should be made

Uniform Civil Procedure Rules 1999, r 260A, r 250, r 668

Australian Broadcasting Corporation v O'Neill (2006) 227 CLR 57, cited
Alexander v Perpetual Trustees WA Ltd (2004) 216 CLR 109, cited
Barreaus Peninsula v Ambassador at Redcliffe Pty Ltd [2008] QSC 90, cited
Cardile v LED Builders Pty Ltd (1999) 198 CLR 380, cited
Fylas Pty Ltd v Vynal Pty Ltd [1992] 2 Qd R 593, applied
Harvey v Phillips (1956) 95 CLR 235, cited
H&G Group Pty Ltd v Pilot Developments Pty Ltd [2002] NSWSC 257, applied
Patterson v BTR Engineering (Aust) Ltd (1989) 18 NSWLR 319, cited
Rankin v Agen Biochemical Ltd [1999] 2 Qd R 435, applied
Rockett v The Proprietors – " The Sands" BUP 82 [2002] 1 Qd R 307; [2001] QCA 99, applied
Woods v Sheriff of Queensland (1895) 6 QLJ 163, applied

COUNSEL: J B Loel (solicitor) for the applicant, the ninth respondent and thirteenth respondent
J B Sweeney for the sixth and seventh respondents

SOLICITORS: Lillias & Loel for the applicant, ninth respondent and thirteenth respondent
Nyst Lawyers for the sixth and seventh respondents

[1] On 22 January 2009 the Court made consent orders as a consequence of the parties compromising an application for orders in relation to various trusts. Part of that compromise, reflected in paragraph 2 of the consent order made by Wilson J, was:

> "That upon termination of the contracts for sale referred to in paragraph 40 of the affidavit of James Charles Findlay Stewart sworn on 19 December 2008 the deposit monies held in the trust account of McCullough Robertson deposed to at paragraph 43 of that affidavit be paid out as follows:
> (a) $200,000 to Lillas & Loel Lawyers Trust Account; and

(b) $200,000 to Nyst Lawyers Trust Account; and
(c) the balance together with interest to John Nagel & Company Trust Account."

[2] Three of the parties that consented to those orders (the applicant, the ninth respondent and the thirteenth respondent) now seek orders pursuant to r 668 of the *Uniform Civil Procedure Rules* 1999 (Qld) (*UCPR*) that the order of Wilson J dated 22 January 2009 be varied by deleting paragraph 2 and inserting in lieu thereof the following order:

> "That of the deposit monies held in the trust account of McCullough Robertson deposed to at paragraph 13 of the affidavit of James Beresford Loel sworn on 2 April 2009 ("Loel's affidavit") namely $752,376.01, the sum of $707,119.16 together with any interest accrued on the deposit held in the name of the Applicant since the date of the trust account statements at pages 58 to 65 of exhibit "JBL-5" to Loel's affidavit be paid out to John Nagel & Company Trust Account and that the balance be paid to HMI Caloundra Pty Ltd."

I shall refer to the three applicants for this variation as "the applicants". In the alternative, the applicants seek an order that:

> "until further order of the Court Nyst Lawyers be restrained from dealing with the money to be paid to their trust account pursuant to paragraph 2 of the Order of Justice Wilson dated 22 January 2009."

[3] The application pursuant to *UCPR* 668 is opposed by the sixth and seventh respondents on the grounds that:

1. each of the applicants is not "the person against whom the order is made" and has no standing under *UCPR* 668. This is because the order did not require the applicants to do anything nor affect their rights as a unit holder in any trust in any way.

2. order 2 was a consent order based on a contract between the parties, having its genesis in "without prejudice" communications which have resulted in a concluded compromise agreement such that those communications are admissible;

3. part of the consideration for the sixth and seventh respondents agreeing to:
   (a) halt the auction of the Anchorage Motel; and

   (b) the appointment of Mr Nagle, not Vincents, as the new trustee;
   was the order for release of $200,000 of the deposit moneys to Nyst Lawyers;

4. there is no suggestion that this underlying contract could be set aside or varied on any equitable basis;[1]

5. the application under the *Trusts Act* 1973 (Qld) was for final relief and the order was final;[2]

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1 *Harvey v Phillips* (1956) 95 CLR 235 at 243-244.

2 However, the sixth and seventh respondents noted that in this context it makes no difference that a consent order is given in proceedings that are interlocutory rather than final: *Fylas Pty Ltd v Vynal Pty Ltd* [1992] 2 Qd R 593.

6. the case would need to be exceptional before the Court would exercise its discretion in favour of an applicant setting aside such a consent order;[3]

7. this case is not exceptional.

[4] Faced with these grounds of opposition to the making of an order under *UCPR* 668, the applicants seek restraining orders by way of a freezing order under *UCPR* 260A or an order pursuant to *UCPR* 250 for the preservation of property.[4]

[5] The issues for determination are:

1. whether the facts relied upon by the applicants attract the operation of *UCPR* 668;

2. if they do, whether the court should exercise its discretion under that rule;

3. whether a freezing order or similar order should be made.

The power to vary a consent order pursuant to *UCPR* 668

[6] *UCPR* 668 provides:

"**668 Matters arising after order**

(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.

(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."

[7] *UCPR* 668 is in all material respects a re-enactment of O 45 r 1 of the *Rules of the Supreme Court* 1990 (RSC).[5] In *Woods v Sheriff of Queensland*[6] Griffith CJ, with

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3 *Paino v Hofbauer* (1988) 13 NSWLR 193 at 198.

4 Orders under *UCPR* 260A or 250 were not specifically sought in the application, but submissions relying on these rules were made.

whom Harding and Real JJ concurred, explained the nature of the power to grant relief under such a rule:

> "An application for such relief is not in the nature of an appeal or rehearing; each of these is founded on the contention that the order appealed from ought not to have been made. **An application for a new order which has the effect of suspending in whole or in part the operation of a previous order starts with the assumption that that order was rightly made**. There is therefore no question of reversing or varying or rehearing the original decision or order ... If it should turn out that the application is based upon the assumption that the order, the operation of which it is desired to modify, was wrongly made, it must fail. **The only question is whether the party applying is entitled under the altered circumstances to be relieved from the operation of the order**." (emphasis added)

[8] 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".[7] The same interpretation should be given to the words "entitling" and "entitled" in *UCPR* 668.

[9] The granting of relief under *UCPR* 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. In *Fylas Pty Ltd v Vynal Pty Ltd*[8] McPherson SPJ (as his Honour then was) made the following observations in respect of consent orders or undertakings given in consequence of an agreement between the parties or as an element in such an agreement:

> "For a long time the rule has been that 'the contract of the parties is not the less a contract, and subject to the incidents of a contract, because there is superadded the command of a Judge'. See *Wentworth v. Bullen* (1829) 9 B. & C. 841, 850; 109 E.R. 313, 316, per Parke J., which was adopted and applied by Chitty J. in *Conolan v. Leyland* (1884) 17 Ch.D. 632, 638. Such an order is capable of being set aside or varied, but essentially only on grounds or for reasons, such as mistake or misrepresentation, that would enable a contract to be invalidated or varied: cf. *Mullins v. Howell* (1879) 11 Ch.D. 763; *Harvey v. Phillips* (1956) 95 C.L.R. 235, 243-244; *Rayner v. Rayner* [1968] Q.W.N. 42; *Purcell v. F.C. Trigell Ltd* [1971] 1 Q.B. 358; *General Credits Limited v. Ebsworth* [1986] 2 Qd.R. 162."

[10] In *Rockett v The Proprietors – "The Sands" BUP 82*[9] McPherson JA (with whom Williams JA and Wilson J agreed) stated:

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5 *Rockett v The Proprietors – " The Sands" BUP 82* [2002] 1 Qd R 307 at 311 [13].
6 (1895) 6 QLJ 163 at 165.
7 *Rankin v Agen Biochemical Ltd* [1999] 2 Qd R 435 at 438.
8 [1992] 2 Qd R 593 at 599.
9 (supra) at 310-311 [10].

> "Courts have only limited powers 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, as it plainly was here... 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'."

[11] In *H&G Group Pty Ltd v Pilot Developments Pty Ltd*[10] Austin J reviewed leading authorities on the power to set aside a judgment or order, including a consent order. His Honour concluded that there was some authority for the view that the Court has a discretion to vary a consent order in ways going beyond an extension of time, in an exceptional case, even though the facts of the case provide no ground for varying or setting aside the underlying contract. Austin J regarded the point as doubtful in light of the restrictive language used by the High Court in *Harvey v Phillips*[11] and in the absence of any more recent authoritative pronouncement by the High Court. I respectfully adopt his Honour's analysis of the authorities. If, which is questionable, such a power exists in the absence of grounds to invalidate or vary the underlying agreement, then exceptional circumstances would need to exist in order to set aside or vary a consent order of the kind made in this case.

Factual Background

[12] In this case the orders that were made were in the form of final orders on the applicant's Amended Originating Application.[12] The proceedings arose out of a breakdown in the relationship between Mr James Stewart (who controls the applicant) and Mr Troy Morrow (who controls the sixth and seventh respondents). Prior to the breakdown in their relationship they established a number of unit trusts under the name Prudent Ventures ("the PV Group") for various development projects. At least six corporate trustees acted as trustees, including the first, second, third, fourth, fifth, thirteenth, fourteenth, fifteenth and sixteenth respondents in these proceedings.[13] In the case of some trusts, the holders of the units are exclusively Mr Stewart's company, Fairmont Suites and Hotels Pty Ltd (the applicant) and Mr Morrow's company Lentro Investments Pty Ltd ("Lentro"). In the case of some trusts, unit holders include other persons.

[13] The submissions of the sixth and seventh respondents included the following table of unit holders:

Trust	Unit Holders
Duck Holes Creek Investments Unit Trust	• 100,000 – Inglis • 50,000 – Croft • 50,000 – Atanasoff • 50,000 – Leake • 64,100 – Fairmont Suites & Hotels Pty Ltd

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10 [2002] NSWSC 257 at [25]-[42].

11 (1956) 95 CLR 235.

12 *Fylas Pty Ltd v Vynal Pty Ltd* (supra) establishes that the principles discussed above are applicable to an application to set aside or vary an interlocutory order made in consequence of an agreement between the parties or as an element in such an agreement.

13 See Schedule of Trusts at pages 1 to 2 of the exhibit to the affidavit of Mr Loel at Court File Index (CFI) 17.

	• 64,100 – Lentro Investments Pty Ltd
Guesthouse Suites Unit Trust	• 100 – Lentro Investments Pty Ltd • 100 – Fairmont Suites & Hotels Pty Ltd
Prudent Ventures Unit Trust No 1	• 100 – Lentro Investments Pty Ltd • 100 – Fairmont Suites & Hotels Pty Ltd
Prudent Ventures Unit Trust No 4	• 50,000 – Leake • 50,000 – Atanasoff • 125,000 – Lentro Investments Pty Ltd • 125.000 – Fairmont Suites & Hotels Pty Ltd
Prudent Ventures Unit Trust No 5	• 100 – Lentro Investments Pty Ltd • 100 – Fairmont Suites & Hotels Pty Ltd
Prudent Ventures Unit Trust No 6	• 150,000 – Croft • 100,000 – Chatfield • 375,100 – Lentro Investments Pty Ltd • 375,100 – Fairmont Suites & Hotels Pty Ltd
Prudent Ventures Unit Trust No 7	• 100 – Lentro Investments Pty Ltd • 100 – Fairmont Suites & Hotels Pty Ltd
Prudent Ventures Unit Trust No 8	• 100 – Lentro Investments Pty Ltd • 100 – Fairmont Suites & Hotels Pty Ltd

The unit holders in the various trusts include the eighth, ninth, tenth, eleventh and twelfth respondents.

[14] Mr Morrow was responsible for the management and administration of the trusts. He contends that loans to and from each entity have been correctly accounted. In its affidavit material and submissions filed on 20 January 2009 before Wilson J the applicant contended that there had been "intermingling of funds without regard for the identity of the unit holders in the trusts".[14] It submitted:

> "…unless and until the accounts of ALL of the trusts are properly constituted the real position cannot be known".[15]

Its Amended Originating Application sought, amongst other things, the appointment of a new trustee to various trusts and for the new trustee to appoint a chartered accountant to prepare financial statements for each of the trusts.

[15] The application was compromised as a result of negotiations that occurred on 20 January 2009. Consent orders were made on 22 January 2009 as a consequence of the compromise agreement.

[16] The background to paragraph 2 of the consent orders is that the Prudent Ventures Unit Trust No. 5 owned a property upon which it intended to build a six storey building consisting of 42 apartments. Lentro Investments Pty Ltd as trustee for the Lentro Trust and the applicant were and are the only unit holders in the Prudent Ventures Unit Trust No. 5. The development project was sold in or about October 2007 due to an inability to obtain funding without pre-sales. As part of the sale agreement, the purchaser, HMI Caloundra Pty Ltd, agreed to sell four of the units to

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14 Applicant's submissions, CFI 19, para 14.

15 Ibid.

Lentro, four of the units to the applicant and two of the units together with management rights to Guesthouse Suites Pty Ltd (the fifteenth respondent). Contracts were entered into by Lentro, the applicant and Guesthouse. At that stage Morrow and Stewart had agreed to separate their business interests, and agreed that the applicant, Lentro and the fifteenth respondent would purchase the units. McCullough Robertson Lawyers acted in relation to the contracts.

[17] Mr Morrow deposes to the following in relation to the discussions that occurred with Mr Stewart and Mr Loel in the precincts of the Supreme Court on 20 January 2009:

> "26. …
>
> (j) Stewart asked me, words to the effect of 'are you still willing to sell your interests in the Anchorage Motor Inn at $4 million valuation'.
>
> (k) I said words to the effect, 'yes, however the sale would need to be deemed to be back dated to when you previously proposed it, and our loan account disparity be adjusted'.
>
> (l) I raised the issue of the deposit monies and said words to the effect, 'If I am to agree to the cancellation of the auction and the appointment of Nagel in the place of Vincents, I want you to agree that the deposit monies can come to Lentro without you interfering'.
>
> (m) Stewart suggested that we both take $200,000.00 out of the deposit monies held in the trust account of McCullough and the balance to remain with the new Trustee, together with the deposit monies for Guesthouse until such time as everyone was satisfied regarding the financial accounting for the various unit Trusts. We both agreed that the Trustee would receive sufficient funds to extinguish liabilities of PV Group entities.
>
> (n) The meeting concluded and Loel informed me that he would prepare Consent Orders reflecting the agreement reached.
>
> 27. Following the meeting, I telephoned my lawyer, Jane Hale ("Hale"), and informed her of what was discussed at the meeting, and what had been agreed. Hale informed me that she would contact Loel in relation to the Consent Orders.
>
> 28. I agreed to the Consent Order being made, in particular the removing of the Anchorage Motor Inn from public auction and the appointment of John Nagel as Trustee on the basis that the deposit monies held by McCullough were released to me immediately. I would not have agreed to the restraint of sale of the property, or abandonment of my application to have Vincents appointed to the Trusts if the deposit monies were not

> going to be released to me, as Lentro needs the money to pay outstanding debts."

[18] Paragraph 1 of the consent orders was that:

> "Upon the applicant, by its Solicitor, giving the usual undertaking as to damages, the fifth respondent be restrained from proceeding with the public auction listed to proceed on 23 January 2009 of the property known as Anchorage Hotel[16] (more particularly described as Lot 180 on Crown Plan CG638, County of Canning Parish of Bribie being the land contained in Title Reference 15998097."

[19] Paragraph 2 of the consent orders was, as appears in paragraph 1 of these reasons:

> "That upon termination of the contracts for sale referred to in paragraph 40 of the affidavit of James Charles Findlay Stewart sworn on 19 December 2008 the deposit monies held in the trust account of McCullough Robertson deposed to at paragraph 43 of that affidavit be paid out as follows:
>
> (a) $200,000 to Lillas & Loel Lawyers Trust Account; and
>
> (b) $200,000 to Nyst Lawyers Trust Account; and
>
> (c) the balance together with interest to John Nagel & Company Trust Account."

Paragraph 3 of the consent orders required the applicant, the seventh respondent and the fifteenth respondent to immediately take steps to terminate the contracts.

[20] Other orders provided for the removal of existing trustees and the appointment of Mr John Nagle, a solicitor, as trustee of various trusts. Paragraph 17 of the consent orders provided for Mr Andrew Fleischer of Wardle Partners Accountant to be appointed by the trustee to prepare various financial statements, tax returns and reports. Paragraph 18 provided:

> "Upon the receipt by the Trustee of the financial statements, tax returns and reports from Wardle Partners the Trustee shall provide copies of them to the unit holders and beneficiaries of the Trusts, respectively."

Matters that are alleged to be facts for the purpose of *UCPR* 668

[21] The applicants point to certain events that have occurred since the order was made on 20 January 2009.

Deputy Registrar's order of 9 March 2009

[22] On 9 March 2009, the Deputy Registrar made an order in Supreme Court proceedings BS 2046/09 that terminated the Contracts ("the Registrar's Order"). However, due to an oversight on the part of the applicant, the terms of the order was not carefully considered when the Registrar's Order was made. As a result there are said to be inconsistencies between it and the earlier order, and McCullough Robertson took the view that it could not make the payments

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16 Elsewhere in the material the relevant premises are described as the Anchorage Motor Inn or the Anchorage Motel.

as provided for in paragraph 2 of the Order made in these proceedings on 22 January 2009.

[23] The apparent inconsistencies between the order made on 20 January 2009 and the order made on 9 March 2009 do not justify a variation of the consent orders. Instead, they warrant an order being made that paragraph 2 of the Registrar's order be vacated. There was no opposition to such an order being made, and I shall make it.

Mortgagee's actions

[24] On 18 February 2009, LM Investment Management Pty Ltd ("LMI"), the first mortgagee of the real property owned by the fifth respondent, issued Notices of Demand ("the Mortgagee Demand") to the applicant, the fifth respondent and a number of entities associated with Mr Stewart, all of whom have guaranteed repayment of the mortgage debt to LMI ("the Guarantor Entities"). The Guarantor Entities did not or were not able to make payment in accordance with the Mortgagee Demand. On 4 March 2009, LMI issued a Notice of Exercise of Power of Sale ("the Notice"). Despite being asked to consent to an order that paragraph 2 of the Order be varied to allow for payment of all arrears to LMI to prevent the Mortgagee from selling the property, the seventh respondent declined to do so. Mr Stewart was not aware until soon after 18 February 2009 that LMI intended to enter into possession of the asset of the fifth respondent. LMI have refused offers to bring the arrears up to date and intends to proceed to exercise their power of sale.

[25] The applicants submit that this Court and they could not have known or foreseen that the mortgagee would seek to exercise its rights against the guarantors and issue the Notice. The factual basis for this submission is unclear. It appears that the parties did not address the issue in their commercial compromise. The possibility that mortgage payments would not be made and the mortgagee would issue notices cannot be fairly described as something that could not have been foreseen. In any event, it is not a matter which is submitted would result in the compromise agreement being set aside or varied. The mortgagee's action, whilst post-dating the relevant order, are not facts which justify the Court exercising its discretion to set aside or vary the consent orders that were made.

Draft interim accounts

[26] On 6 March 2009 Wardle Partners produced draft interim accounts. The extent to which these draft accounts differ from accounts that were exhibited to the applicant's December 2008 affidavits is a matter in dispute. The applicant contends that the draft accounts disclose significant debts due by the fourth respondent that were not previously known to the applicant or the ninth respondent. The applicant asserted in solicitor's correspondence that if monies were distributed in accordance with the consent orders the Prudent Ventures Unit Trust No. 5 (of which the fourth respondent is trustee) will be unable to repay loans to various other trusts that appear in the draft accounts. This matter is disputed by the seventh and eighth respondents. The sixth and seventh respondents submit that:

> "It is evident from the March 2008 balance sheet that PV-5 will be able to repay the $192,918 loans it owes to trusts in which the 8th to 11th respondents have an interest from the money provided to Mr Nagle. Whether money which PV-5 owes the Morrow/Stewart

> entities can [be] repaid after a full wind up of all the trusts remains to be seen."

[27] The applicant submits that to allow the monies to be paid out in accordance with the order would put assets that are available to meet creditors of the fourth respondent beyond the control of the trustee for recovery purposes.

[28] The possibility that the fourth respondent might have liabilities to other trusts is a matter that was under consideration when the compromise was reached in January 2009. In an affidavit that was sworn and filed on 19 December 2008 Mr Stewart asserted that the refunded deposits should be paid to the fourth respondent and swore:-

> "It is likely, once the accounts are finalised [that] the monies will be required to repay loans made by other trusts that are parties to these proceedings."[17]

[29] Mr Stewart exhibited to his December 2008 affidavit an adjusted balance sheet for the Prudent Ventures Unit Trust No. 5 prepared by Wardell Partners[18] which disclosed loans to and from related parties including the various trusts that are parties to these proceedings. That adjusted balance sheet disclosed that the Prudent Ventures Unit Trust No. 5 had net assets of -$382,229.64. The March 2009 draft accounts report a similar deficiency, namely -$380,851.50. The loans to and from the other trusts in the original balance sheet total $383,179.03, whereas in the March 2009 draft accounts they total $192,918.11.

[30] Three significant matters emerge from a comparison between the balance sheets, and reference to Mr Stewart's December affidavit. The first is that an apprehension that the Prudent Ventures Unit Trust No. 5 had a deficiency of assets against liabilities is nothing new: a deficiency in the order of $380,000 appears in both balance sheets. The second is that the extent of loans made to other Prudent Ventures Unit Trusts is largely unchanged. The third is that the net amount that is said in the March 2009 draft balance sheet to be owed to other trusts and the Croft Superannuation Fund of $192,918.11 is less than the amount which paragraph 2(c) of the consent order envisages being paid to the trustee. In short, there is not a substantial difference between the position advanced by the applicant prior to the compromise and consent orders which were made in January 2009 and the position advanced on this application. On both occasions there were allegations of intermingling of funds by way of loans made between trusts and the balance sheet of the Prudent Ventures Unit Trust No. 5 recorded a substantial excess of liabilities over assets, including liabilities owed to unit holders.[19] On both occasions concern was expressed about the ability of the fourth respondent to meet all of its liabilities if the funds held by McCullough Robertson were paid out to the parties entitled to the deposit monies, rather than preserved for the benefit of the fourth respondent. Rather than put the matter to the test by contesting these matters in January 2009 Mr Stewart, entities associated with him and the other parties that consented to the order of 22 January 2009 chose to compromise.

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17 CFI 13, para 41.

18 Page 310 of Exhibit JSF5-2, CFI 13.

19 Described as Morrow and Stewart in the balance sheet but possibly referring to entities associated with them.

[31] For the purpose of the application under *UCPR* 668 it is important to recall that the consent orders, including orders that contemplated the preparation of accounts by Wardle Partners, were made in reliance upon allegations of intermingling of funds and a submission that unless and until the accounts of all the trusts were properly constituted, the real position could not be known. The draft accounts produced on 6 March 2009 provide a provisional view of the extent of various loan accounts and these draft accounts are subject to revision in the light of additional information which Mr Morrow has undertaken to provide. One of the apparent purposes of the compromise that was reflected in the consent orders was that an accountant would prepare financial statements. In reaching that compromise, and in consenting to the orders that were made, the parties agreed to the payments referred to in paragraph 2 of the consent order in circumstances where there was a risk that either provisional or final financial statements might show that one or more of the trusts was unable to meet all or part of its liabilities.

[32] The applicants further submit that the agreement reached authorised the payment of monies in apparent breach of the terms of the Prudent Ventures Unit Trust No. 5. Clause 26 of the relevant trust deed provides in relation to the termination of the trust that:-

> "Payment of debts
>
> *26.4 The Trustee shall pay out the debts and liabilities relating to this Trust.*
>
> Distributions in specie or in cash
>
> *26.5 The Trustee shall as soon as practicable distribute in specie or in cash the investment assets of the Trust Fund to the Unit Holders in proportion to their holdings until the assets of the Trust Fund have been completely distributed PROVIDED ALWAYS that the Trustee shall retain full provision for all costs, disbursements, commissions, brokerage, fees, claims, advertising costs and demands incurred or expected by the Trustee in the liquidation of the Trust Fund.*
>
> Provision for liabilities
>
> …
>
> *26.7 Every distribution under the provisions of clause 26.5 shall be made only to Unit Holders upon production of their Unit Certificates accompanied by a request for payment in such form as the trustee shall require."*

The applicants submit that there is no evidence that any of these provisions have been complied with, and that the fifteenth respondent was not ever a unit holder in the fourth respondent.

[33] These provisions apply once the trustee determines that the trust be wound up. Disputed questions of fact exist as to whether the agreement reached by the parties would breach the terms of the trust deed because these provisions have not been complied with. In any case, the beneficiaries of the relevant trust consented to the orders being made and consented to any alleged breach of trust arising from non-compliance with those provisions.

Inactivity by the trustee appointed by the Court

[34] The final matter which has arisen since the making of the order and which was not known at the time was the fact that the new trustee, Mr Nagel, has been unable to attend to the matters required of him due to the size of the task. His affidavit filed on 22 April 2009 stated that he lacks the necessary support staff and does not have the capacity to carry out his duties as trustee. On Tuesday, 27 April 2009 upon the hearing of the application I made orders by consent that Mr Nagel be removed as trustee and that Mr James Nicholas Conomos, a solicitor, be appointed in his place.

The application pursuant to *UCPR* 668

[35] A threshold issue arises as to whether *UCPR* 668 applies in that none of the applicants is a person "against whom" the order was made. There is substantial merit in this point. It can be argued that the orders were made in the applicants' favour, and not against them. However, paragraph 2 of the orders arguably affected the rights of the ninth defendant as a unit holder. I shall deal with the substance of the argument in relation to *UCPR* 668 without deciding whether the orders were made "against" him and the other applicants.

[36] The "facts" relied upon by the applicants do not provide grounds to render the compromise that was reflected in the consent order void or voidable, or entitle the applicants to equitable relief against its enforcement. The orders sought in the Amended Originating Application sought to remedy alleged misconduct in the administration of trusts and the intermingling of trust funds by, amongst other things, the appointment of a trustee and for the trustee to appoint an accountant to prepare financial statements. As part of a commercial compromise the parties agreed to orders which restrained a public auction of the Anchorage Motor Inn from proceeding, and which provided for the termination of certain contracts, whereupon deposit monies held in the trust account of McCullough Robertson would be paid out in accordance with paragraph 2 of the consent orders. The Amended Originating Application was compromised on the basis that an accountant would prepare financial statements which would be made available to the unit holders and beneficiaries of the trusts. The March 2009 draft accounts were prepared as part of a process that the parties contemplated would be undertaken to assist the trustee and others to ascertain the state of the loan accounts of various entities. The possibility existed at the time the compromise was reached and at the time the consent orders were made that the financial statements would call into question whether certain entities had sufficient assets to extinguish their liabilities.

[37] The applicants contend that the March 2009 draft accounts disclosed for the first time the extent of intermingling of the assets of the various trusts. The sixth and seventh respondents submit that the large volume of accounting material provided by Mr Morrow to those accountants in 2008 permitted the applicants to ascertain these matters, and that there is nothing new or particularly different between the March 2009 draft accounts and the accounts that were exhibited to the applicant's affidavit material in December 2008. There is substantial merit in the sixth and seventh respondents' submissions that there is nothing particularly new in the March 2009 draft accounts. However, to the extent that the March 2009 draft accounts constitute new material, and could not have been constructed before the compromise and consent orders of January 2009, they report on matters that the parties should have contemplated when they compromised matters and consented to

orders on 22 January 2009. The draft accounts provide a provisional view of the extent of each trust's assets and liabilities. As the applicant submitted in January 2009, unless and until the accounts of all of the trusts are properly constituted the real position cannot be known. The draft accounts permit the parties to form views about the prospects of the liabilities of the entities being met. Incidentally, no view is expressed by the accountant who prepared the accounts on the issue of recoverability. The outcome of the process of preparing accounts may induce the trustee to take steps to recover loans owed by one trust to another.

[38] The parties compromised their positions in circumstances in which they must be taken to have appreciated that the carrying into effect of the orders and the preparation of financial statements would provide a basis upon which all parties would be in a better position to ascertain the financial position of each entity and the extent of the "intermingling of funds" of which the applicant complained in those proceedings. The matter was compromised on the basis of important commercial considerations and on the basis that, amongst other things, upon the contemplated termination of certain contracts of sale McCullough Robertson would pay $200,000 to the trust account of the solicitors for the sixth and seventh respondents, Nyst Lawyers.

[39] Mr Morrow swears, and there is no reason not to accept his evidence, that he agreed to the consent order being made on the basis that these deposit monies would be released, and that he would not have agreed to the restraint on the sale of the Anchorage Motor Inn or the other terms of settlement if the deposit monies were not going to be released, since Lentro needs the money to pay outstanding debts. Mr Morrow's evidence is that as a result of a dispute between Mr Stewart and himself, Lentro as trustee of the Lentro Trust, has incurred significant liabilities including legal fees and it has other outstanding taxation liabilities.

[40] In terms of *UCPR* 668(1)(a), I conclude that the applicants have not established facts which arose after the order of 22 January 2009 "entitling" any of them to be relieved from it. The applicants have not established grounds that would entitle them to be relieved from the order as a matter of right or on the favourable exercise of a judicial discretion.

[41] In terms of *UCPR* 668(1)(b), the applicants have not clearly established facts which were "discovered" after the order was made that, if discovered in time, would have entitled the applicants to an order or decision in their favour or to a different order. Arguably, the applicants would not have consented to the orders in the terms that they did and, possibly, a different order would have been made, including the appointment of a trustee other than Mr Nagel. However, it is not apparent what compromise, if any, would have been reached if certain facts had been discovered in time. Accordingly, it cannot be concluded with any confidence that a different order would not have released the deposit monies in accordance with paragraph 2 of the draft order.

[42] For present purposes, I shall assume in the applicants' favour that the discovery of the extent of loans, as disclosed in the March 2009 draft accounts, would not have led to a consent order providing for the release of the deposit monies. I shall assume that a different order would have been made essentially reflecting the relief sought in the Amended Originating Application. That relief was for the removal of various entities as trustees, the appointment of a new trustee, the new trustee to

appoint an accountant to prepare financial statements, tax returns and reports and for those documents to be provided with a view to the trustee taking steps to recover any money or property of the trusts held by other trusts or third parties. The Amended Originating Application did not seek to restrain parties from being paid the deposit monies to which they would be entitled upon the termination of contracts of sale, and I am not persuaded that the applicants would have been entitled to such an order. The applicants' submissions do not adequately address, let alone persuade me, that "facts", if discovered in time, would have entitled them to orders beyond that sought in the Amended Originating Order. In particular, I am not persuaded that any different order would have restrained the sale by auction of the Anchorage Motor Inn, or restrained Lentro from recovering deposit monies to which it was entitled upon the termination of the contracts to purchase units.

[43] On the doubtful assumption that the applicants satisfy the threshold requirements of *UCPR* 668(1)(b) an issue arises as to whether the Court, in its discretion, should vary the order in the terms requested. I consider that it is inappropriate to do so in circumstances in which the consent orders reflected a compromise, no grounds exist to render the compromise void or voidable or to vary it, no exceptional circumstances are shown and the evidence is that the compromise would not have been reached, and the consent order would not have been made, if a term had not been included for the relevant deposit monies to be released in accordance with paragraph 2 of that order.

[44] The parties that consented to the order should be required to abide by it. The course proposed by the applicants would serve to undermine a compromise for which valuable consideration was given and undermine the efficacy of orders that were made by consent as a consequence of that compromise. Such a course is inconsistent with the interest in finality in litigation.

[45] I decline to make the variation to paragraph 2 of the consent order pursuant to *UCPR* 668.

Application for freezing and other orders

[46] The applicants seek as an alternative to relief under *UCPR* 668 a restraining order either under *UCPR* 260A (a freezing order) or an order under *UCPR* 250 for the preservation of property.

[47] The granting of a freezing order is discretionary. As a general rule an applicant needs to establish two things:[20]

(a) a prima facie cause of action against the respondent; and

(b) a danger that, by reason of the respondent's absconding, or of assets being removed out of the jurisdiction or disposed of within the jurisdiction or otherwise dealt with in some fashion, the applicant if he succeeds will not be able to have its judgment satisfied.

UCPR 260A(1) provides that the Court may make a freezing order "for the purpose of preventing the frustration or inhibition of the Court's process by seeking to meet a

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[20] *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 at 321-322; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 400-401; *Barreaus Peninsula v Ambassador at Redcliffe Pty Ltd* [2008] QSC 90 at [74]-[75].

danger that a judgment or prospective judgment of the Court will be wholly or partly unsatisfied". The principles governing the granting of interlocutory injunctions are relevant to the discretion to make freezing orders.[21]

[48] The applicants submit that they have "strongly arguable cases" for payment out to them. In the case of the applicant (and the thirteenth respondent) the sum of $334,056.13 is said to be owed by the fourth respondent. In the case of the ninth respondent the sum of $81,147.42 is said to be owed by the third respondent from the $108,431.12 that is said to be owed to it by the fourth respondent. In addition, the fourth respondent is said to owe the fifth respondent $77,497.80 and, absent the freezing of the monies due to be paid pursuant to the consent order, it is said to have no prospect of recovery. The existence of these claims is in dispute.

[49] The sixth and seventh respondents submit that there is no reason to suppose that any claims as between the applicant and Lentro will not be met out of an orderly realisation of assets. They submit that there is insufficient credible evidence of an inability to pay debts and that, on the contrary, evidence concerning the value of assets including the Anchorage Motor Inn and the extent of liabilities does not provide a basis for a finding that there is a real risk that any judgment will be unsatisfied. The sixth and seventh respondents further submit that it is evident from the March 2008 balance sheet that the Prudent Ventures Trust No. 5 will be able to repay the $192,918 in loans that it owes to trusts in which the eighth to eleventh respondents have an interest from the money that will be provided to the trustee pursuant to subparagraph 2(c) of the consent orders.

[50] As to the claim that the applicant (and the thirteenth respondent) is owed $334,056.13 by the fourth respondent, this figure appears in both the March 2009 draft accounts and in the balance sheet that was before the court in January,[22] and so there is nothing new about this claim.

[51] The restraint by way of a freezing order or preservation of property order is sought on the basis that the monies held by McCullough Robertson are owned by the fourth respondent and are "its sole asset".[23] The contention that the fourth respondent owns the deposit money is distinctly controversial. Relevantly, precisely the same contention is made by the applicants in this regard as was made in the applicant's January submissions.[24] There is a strong, competing argument that the purchase of units by the applicant, Lentro and the fifteenth respondent was not "an artifice of Mr Stewart and Mr Morrow to suit their own purposes", as the applicants contend, but an arrangement which imposed obligations upon, and conferred rights upon, the parties to the contracts, including, in the case of Lentro, the right to a refund of deposit monies paid under the relevant contracts. If this is so, then the fourth respondent has no proprietary interest in the deposit monies, and the court should be reluctant to restrain payment to Lentro of the $200,000 which the applicants now seek to restrain. This is especially the case when the payment was the subject of a consent order which was made in the light of submissions which are effectively recycled in the present application.

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21 Ibid [2008] QSC 90 at [74]-[75].

22 Affidavit of Mr Stewart, CFI 13, filed 19 December 2008, Exhibit p 310.

23 Applicant's submissions paras 36 to 38, 59.

24 CFI 19, paras 26 to 28.

[52] The claim of the ninth respondent that he is owned $81,147.42 by the third respondent is contentious. Again, the claim that he is entitled to receive a distribution, and the contention that he "traded" his interest in the trust, were agitated in the material and submissions that were before the court in January 2009, and identical submissions are made in support of the new application.[25]

[53] There is nothing new in the contention that the fourth respondent owes the fifth respondent $77,497.80. The same entry appears in the March 2009 draft accounts as appears in the balance sheet that was before the Court in January.

[54] There is a risk that claimants against the fourth respondent for repayment of loans will not be paid due to a deficiency in its net assets. But this risk was apparent on the basis of the balance sheet that was in evidence before the consent order was made on 22 January 2009, and the risk is ameliorated to some extent by paragraph 2(c) of the consent order which provides for the balance of deposit monies to be paid to the trustee.

[55] More generally, the sixth and seventh respondents submit that regard should be had to the substantial assets held by the fifth respondent (the trustee of the Prudent Ventures Unit Trust No. 6), which according to the March 2009 draft accounts has net assets in excess of $1,000,000.[26] Its principal asset is the Anchorage Motor Inn, which is recorded in the balance sheet as having a value of $2,600,692, based upon its contract price of $2,500,000. The sixth and seventh respondents contend that it has a value of $3,500,000, however, in the absence of independent valuation evidence I shall have regard to the value given to it in the balance sheet.

[56] I accept the submission of the sixth and seventh respondents that that applicants have not established that it is probable that the realisation of the assets held by all of the various entities will be inadequate to meet claims, including the claims of minority unit owners. Significantly, the accountants who have had responsibility for the preparation of accounts and who have been in possession of substantial material bearing upon the assets and liabilities of the various entities have not given evidence on the issue of recoverability when it might have been expected that the applicants would call such evidence in support of their claim for a freezing order or similar order.

[57] On the material before me, and in the absence of sworn, independent accounting evidence concerning the realisation of assets and the repayment of loans, I conclude that there is some risk that a future judgment may be partly unsatisfied, and that there is a real risk of the monies that are due to be paid pursuant to paragraph 2 of the order being dissipated. However, there is a general lack of credible evidence that the realisation of the assets of the various trusts will be insufficient to meet foreshadowed claims, or that a restraint on the payment of the $200,000 to be held in the trust account of Nyst Lawyers is appropriate to meet a claim in respect of which one or more of the applicants has a prima facie claim.

[58] I proceed on the basis that each applicant or one of the trusts in which it is a unit holder has an arguable claim and that there is some risk that a judgment in its favour

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25 Compare paras 10 and 11 of the January submissions, CFI 19 with paras 32 and 33 of the applicants' submissions on this application.

26 Affidavit of James Loel filed 16 April 2009; CFI 26, JBL-5, page 12.

on that claim will be unsatisfied. The critical issue is whether the balance of convenience and the interests of justice justify a freezing order which would prevent Nyst Lawyers from dealing with the money to be paid into their trust account pursuant to paragraph 2 of the orders made on 22 January 2009. In substance, the restraint sought by the applicants does not seek to preserve the status quo pending trial.[27] It seeks to disturb it, being the position that prevails under the compromise agreement, which entitles Lentro to payment of the sum which the applicants now seek to restrain. The applicants did not apply for freezing orders of the kind now sought when the matter came before the Court in January. Instead, they sought more limited orders and settled that application as part of a commercial compromise which provided for the payment of $200,000 to Nyst Lawyers Trust Account upon the termination of relevant contracts of sale. Against the background that I have earlier described in connection with the application under *UCPR* 668, I consider that it would be inequitable and inappropriate to frustrate that compromise being carried out. The compromise was made in circumstances in which there was an alleged intermingling of funds. The applicants chose to compromise the application on the basis of orders that would facilitate the production of financial statements which would enable, amongst others, the trustee to ascertain the true financial position and, at that time, take appropriate action. Final accounts have yet to be produced.

[59] Critically, the commercial compromise involved terms by which the fifth respondent was restrained from proceeding with a public auction and agreement was reached concerning the deposit monies referred to in paragraph 2 of the order. As previously noted, that compromise would not have been reached if provision had not been made for the payment of $200,000 to Nyst Lawyers Trust Account in accordance with paragraph 2(b) of the consent orders.

[60] In those circumstances, I decline, as a matter of discretion, to make a freezing order or similar order, including a preservation order under *UCPR* 250.

[61] The appropriate course, in the circumstances, is to permit the compromise to be performed and the consent orders complied with in accordance with their terms. It would be inequitable to the sixth and seventh respondents to do otherwise. They agreed to the compromise and consent orders in anticipation of the deposit monies being paid to them. They have been prejudiced by the delay in payment and will be further prejudiced if the payment is not forthcoming. The evidence is that they require the payment to meet their liabilities.

[62] For completeness, I mention that the sixth and seventh respondents disputed that the applicant had standing, since Mr Nagel had not asserted any claim against the sixth or seventh respondent and had not refused to institute proceedings.[28] Given Mr Nagel's inactivity as trustee, I am not prepared to reject the claim for a freezing order or similar order at the instance of a beneficiary on the grounds of standing.

[63] In summary, the applicants have raised arguable claims and shown that there is some risk that a future judgment may be unsatisfied. However, the March 2009 draft accounts and the other evidence does not provide a strong basis to conclude that the realisation of the assets of the various trusts will be insufficient to meet possible claims. Paragraph 2(c) of the consent orders provides the trustee with a

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27 *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at 82 [65].

28 *Alexander v Perpetual Trustees WA Ltd* (2004) 216 CLR 109 at 129 [55].

source of funds to repay loans. I decline to restrain the payment referred to in paragraph 2(b) of the consent orders as a matter of discretion. It is inequitable and inappropriate to frustrate a commercial compromise being carried out in conformity with orders of this Court to which the applicants consented. The applicants have not established grounds to set aside or vary the compromise that resulted in the consent order.

[64] The applicants have failed to satisfy me that I should exercise my discretion to restrain the carrying out of one part of an order which embodies a binding agreement.

Other matters

[65] As indicated earlier in these reasons, the order of the Deputy Registrar made on 9 March 2008 as a result of what is said to be an oversight on the part of the applicant prevented the payment as provided in paragraph 2 of the consent order of 22 January 2009 being made. The parties are agreed that an order should be made that paragraph 2 of the order of the Deputy Registrar made on 9 March 2009 in Proceeding BS 2046 of 2009 be vacated.

[66] On 27 April 2009 I made orders, by consent, that Mr Nagel be removed as trustee of various trusts and that Mr Conomos be appointed as trustee of those trusts. Consequential directions may be necessary for Mr Conomos to be named as the party in lieu of the previous trustee. This may require him to be identified as the first, second, third, fourth, fifth, fourteenth, fifteenth and sixteenth respondent as trustee for various trusts. However, the present proceedings are effectively at an end, with final orders having been made on 22 January 2009, and those further directions may be unnecessary.

Orders

[67] Subject to further submissions on the question of costs and whether it is necessary to order Mr Conomos be made a party to the current proceedings, the orders of the Court will be:

1. That paragraph 2 of the order of the Deputy Registrar made on 9 March 2009 in Proceeding BS 2046/09 be vacated.

2. That the amended application filed by leave on 27 April 2009 otherwise be dismissed.

3. The applicant, the ninth respondent and the thirteenth respondent pay the sixth and seventh respondents' costs of and incidental to the application.