SUPREME COURT OF QUEENSLAND

CITATION:	*AMA v CDK & Ors* [2009] QSC 287
PARTIES:	**AMA** (applicant) **v** **CDK** (first respondent) **S HOLDINGS PTY LTD AS TRUSTEE FOR THE S HOLDINGS TRUST** (second respondent) and **CDK AS TRUSTEE FOR THE C TRUST** (third respondent) and **S INVESTMENT PTY LTD AS TRUSTEE FOR THE S INVESTMENT TRUST** (fourth respondent)
FILE NO/S:	BS 10180 of 2006
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	11 September 2009
DELIVERED AT:	Brisbane
HEARING DATE:	21 August 2009
JUDGE:	Applegarth J
ORDER:	**1. The application is dismissed.** **2. The applicant pay the costs of the second and fourth respondents of and incidental to the application to be assessed.** **3. The applicant pay CL's costs of and incidental to the application to be assessed.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – JURISDICTION AND GENERALLY – SETTING ASIDE JUDGMENTS – where the applicant applies to vary or set aside orders – where there is substantial delay in making the application – whether grounds exist to set aside orders under *Uniform Civil Procedure Rules* 1999 (Qld) r 667(2) or r 668 or in the exercise of the court's inherent jurisdiction – whether the orders were obtained "in the absence of" the applicant in circumstances in which she was represented by counsel and solicitors – whether the orders

were obtained by fraud – whether the "slip rule" applies – whether new facts have arisen or been discovered since the making of the orders that entitle the application to have the orders set aside

Uniform Civil Procedure Rules, r 667(1), r 667(2), r 668

CDK & Ors v AMA [2009] QSC 190, cited
Commonwealth Bank of Australia v Quade (1991) 178 CLR 134, cited
Emanuel Management Pty Ltd v Foster's Brewing Group Ltd [2000] QSC 430, cited
IVI Pty Ltd v Baycrown Pty Ltd [2007] 1 Qd R 428, applied
Monroe Schneider Associates (Inc) v No 1 Raberem Pty Ltd (1992) 37 FCR 234, applied
Spoule v Long [2001] 2 Qd R 335, cited
Rankin v Agen Biomedical Ltd [1999] 2 Qd R 435, cited
Wentworth v Rogers (No 5) (1986) 6 NSWLR 534, applied
Wentworth v Wentworth [1999] NSWSC 638, applied
WMJ Attractions Pty Ltd v Ireland [2008] QSC 167, cited

COUNSEL: The applicant represented herself
N R Delaney (*sol*) for the second and fourth respondent
G Handran for the non-party, CL

SOLICITORS: The applicant represented herself
Lillas & Loel Lawyers for the second and fourth respondent
Proctor Phair Lawyers for the non-party, CL

[1] The applicant seeks a variety of orders in connection with the enforcement of orders made in her favour in October 2007 in de facto property proceedings against the respondents. The first is to set aside a costs order made by Lyons J on 26 November 2008 ("the costs order"). The costs order was:

> "That the applicant and the respondents bear their own costs of the application, and the applicant pay the costs of [CL][1] on a standard basis, to be assessed."

The company CL, in whose favour the costs order was made, is not a party to the principal proceedings, but appeared on 26 November 2008 because its interests were affected by an ex parte order that the applicant obtained on 24 November 2008. As a result of its appearance and submissions on 26 November 2008, and with the effective concession of the applicant's counsel that day, CL obtained the benefit of an additional order which became paragraph 9 of the orders made on 26 November 2008. The applicant also seeks an order that this order be discharged. The application to set aside these orders is opposed by CL and by the second and fourth respondents.

[2] The first and third respondents, and the trustee in bankruptcy of the first respondent, were notified of the hearing of the application but did not appear at the application. No application for leave to proceed against the first respondent, who became

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[1] Initials have been used to identify the parties, various witnesses and entities because of the provisions governing publication found in the *Property Law Act* 1974 (Qld) s 343.

bankrupt on 24 June 2009, was made pursuant to the *Uniform Civil Procedure Rules* 1999 (Qld) (*UCPR*) r 72.

[3] The application to set aside the costs order is made pursuant to rules 667(2)(a), (b), (c), (d) and (f) and r 668(1)(a) and (b) of the *UCPR*. Despite written submissions on behalf of CL and on behalf of the second and fourth respondents pointing out the limited scope under the rules upon which the applicant relies to set aside the costs order, the applicant pressed her case at the hearing that she was entitled to set aside the costs order under each of these rules. She also seeks to invoke the court's "inherent power to vary or set aside". Despite seeking to invoke these various rules and the court's inherent jurisdiction, the applicant's affidavit material and her submissions are, in many respects, an impermissible attempt to appeal against the costs order and the ninth order made on 26 November 2008.

Background

[4] A brief account of the background to the hearing on 26 November 2008 is necessary before addressing each of the rules that the applicant seeks to invoke.

[5] On 26 October 2007 Mackenzie J made orders under Pt 19 of the *Property Law Act* 1974 (Qld) by way of a final property adjustment. The orders included an order that the first respondent, CDK, pay to the applicant the sum of $3,500,000 on or before 1 June 2008. The first respondent failed to comply with this order, and protracted enforcement proceedings commenced. Orders were made on 23 September 2008 that the first respondent and entities associated with him, including the second, third and fourth respondents, take steps to obtain the funds required to meet the judgment debt of $3.5 million. The respondents sought to refinance in order, amongst other things, to meet the judgment debt. Their attempts to do so are the subject of a recent judgment of P Lyons J.[2] The second respondent entered into a contract with EH to borrow approximately $30 million. It was a precondition of the loan that the borrower provide insurance in respect of the funds to be advanced. The second respondent applied to CL for an advance of $1,075,000 for a term of one month that was described as having been made "for the purposes of paying an application fee or capital protection insurance" in connection with the second respondent securing funds of approximately $30 million from EH.[3] The EH facility was to be used to repay amounts owing to CL and otherwise used to refinance the existing indebtedness of the second respondent. Unsurprisingly, CL sought to secure its position by the registration of mortgages, and negotiations occurred for this purpose. Consent orders were made on 28 October 2008 which envisaged that of the $1,075,000 to be borrowed from CL an amount in the order of $275,000 was to be applied by CL on account of fees, charges and interest and an amount in the order of $800,000 was to effect the purchase of a "Capital Protection Insurance Policy underwritten by Lloyds Bank of London". To further protect its interests, CL advised the second respondent that it wished the loan from EH to be deposited with its bankers, St George Bank Limited, rather than the National Australia Bank and, for this purpose CL opened a new account with the St George Bank with the first respondent and a director of CL being the joint signatories on the account.[4]

[6] On 20 November 2008 consent orders were made which essentially provided that in the event of the funds being advanced by EH not being paid to and deposited to a

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2 *CDK & Ors v AMA* [2009] QSC 190.

3 Affidavit of Mr Clarke, sworn 25 November 2008; Court file index ('CFI') 120, para 7.

4 Affidavit of Mr Clarke, para 27.

certain National Australia Bank account the respondents would, as soon as they became aware of it, immediately notify the solicitors for the applicant of the details of the account to which the funds were being deposited.

[7] On 21 November 2009 the applicant ascertained from the National Australia Bank that the funds had yet to be received into the account and also ascertained that CL had been given a signing authority on the St George account. The applicant's solicitors ascertained from inquiries with CL's solicitors that arrangements had been made for a joint signatory arrangement, and on the basis of an apprehension that the EH loan funds were destined for an account for which CL was a joint signatory, the applicant made an urgent application before Lyons J. This application was made without notice to CL, or at least without any adequate notice to CL, and the order of 24 November 2008 describes the hearing as ex parte. Ex parte orders were made extending the orders made on 20 November 2008 to CL.

[8] On 26 November 2008 the matter came back before Lyons J, at which time the respondents and CL were each represented by counsel. The first respondent objected to an order that he deliver up his passport and this order was deleted. CL objected to the terms of the orders made ex parte on 24 November 2008 on the basis that they could be construed as granting the applicant priority over CL in respect of payment from the expected loan funds should there be insufficient funds to satisfy the applicant's debt and CL's debt. CL also raised the fact that the applicant had not disclosed to the court on 20 November 2008 or on 24 November 2008 certain matters which were said to be material to the orders made and argued that the applicant's non-disclosure justified the discharge of the earlier orders which were apt to confer a priority on the applicant in respect of the funds.

[9] The hearing on 26 November 2008 was a protracted one. Counsel for CL articulated legitimate concerns that the orders proposed by the applicant would defeat its interests if insufficient funds were received in order to pay both the applicant and CL. To accommodate this matter counsel for the applicant proposed an order to the effect that in the event the applicant was not paid $3,914,466 and CL was not paid the monies owed to it then all the monies would be frozen.[5] After Lyons J indicated that this was an appropriate order, counsel for the applicant said that he would reduce it to a minute, circulate it and email it to the court.

[10] CL sought its costs on the basis of there having earlier been non-disclosure of material facts and sought those costs on an indemnity basis. Counsel for the applicant noted that the court had not discharged the orders earlier made against CL "irrespective of whatever view your Honour might have had about the conduct on Monday". The applicant's counsel submitted that CL had not been put to any extra cost "even if one accepts there was a lack of candour in the ex parte (application)". In the alternative, he submitted that if anyone should bear the costs of CL having to appear it should be the respondents because of their lack of disclosure. The respondents submitted that there should be no order as to costs and that the court's concern about CL's position might be accommodated by the contractual relationship between CL and the respondents. Counsel for CL pointed out that there was no evidence of that arrangement and that it was not clear that CL's costs would be covered by any ordinary costs recovery clause in a mortgage. After hearing argument Lyons J concluded that the parties should bear their own costs of the

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5 Transcript of hearing, 26 November 2008 1-44 ll 10-20.

application, but that the applicant should pay the costs of CL on a standard basis. An earlier costs order made on 24 November 2008 was vacated.

[11] The solicitors for the applicant attended to formulation of a draft order to accord with the orders made by Lyons J on 26 November 2008. This draft order was circulated[6] and contained as paragraph 8 a costs order in the terms ordered by Lyons J and as paragraph 9 an order in the terms that the applicant's counsel had indicated would be included in the order. These are the two orders which the applicant now applies to set aside.

[12] The applicant was not personally in court when these orders were made on the evening of 26 November 2008. However, she became aware of the orders, including the order for costs that was made against her in CL's favour. At the time she did not think that there was anything untoward about the orders that had been made and the costs order that was made against her was treated as "immaterial because I was shortly to be in receipt of three and a half million dollars".[7]

Delay in making the application

[13] The present application was filed on 17 July 2009, and appears to have been prompted by a costs statement delivered by CL's solicitors in the amount of $12,624.65 on 24 June 2009 in respect of the costs order made in CL's favour and a request to the applicant's solicitors to select a costs assessor.

[14] The applicant's submissions refer to rule 667(1), whereas the amended application does not. *UCPR* r 667(1) provides that the court may vary or set aside an order before the earlier of the following:

(a) the filing of the order; or

(b) the end of seven days after the making of the order.

The applicant cites *WMJ Attractions Pty Ltd v Ireland*[8] for the proposition that the time in r 667(1)(b) can be extended, however in that case no order had been filed. In this matter, the order of 26 November 2008 was filed on 28 November 2008, and therefore r 667(1) does not apply.

[15] Rule 667(2) confers a discretionary power to set aside an order at any time if one or more of the circumstances listed in 667(2) is established. The discretion to exercise the power may be influenced by the applicant's delay in bringing the application. A delay which prejudices the interests of a party, for example a party which has acted to its detriment on the basis of the order by taking steps to enforce it and incurred costs in doing so, is a matter which should be taken into account in the discretion to extend time under *UCPR* r 667. The adequacy or otherwise of the applicant's explanation for the delay is another factor.

[16] The applicant's explanation for her delay is unsatisfactory. To the extent that the applicant relies upon the contents of the transcript of the hearing on 26 November 2008, she says that she did not obtain a copy of the transcript until recently because "there didn't seem to be anything untoward about the advances that were being made by CL or the events that were happening".[9] However, this does not provide

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6 Exhibit 1.
7 Transcript 21 August 2008, 1-16 l12.
8 [2008] QSC 167 at 4.
9 Transcript 21 August 2008, 1-23 ll14-16.

an adequate explanation for her delay in making the present application. She and her former lawyers were aware of the matters that transpired on 26 November 2008 and if they needed to obtain a copy of the transcript they could have done so much earlier. In addition, the applicant along with her legal representatives was engaged in hearings before P Lyons J in April 2009 which dealt with the issue of fundraising, including the role of CL. If the applicant or her advisors had concerns that grounds existed to set aside either the costs order made on 26 November 2008 or paragraph 9 of those orders then the application should have been brought much earlier than it was.

[17] The applicant's delay, the prejudice to CL in acting on the basis of orders made several months ago and the interests in there being finality in litigation disincline me to exercise the discretionary power under r 667(2).

[18] If the application had substantial merit, for example, if the applicant had established that the orders in question had been obtained by fraud, then there would have been a justification for granting relief under r 667(2), notwithstanding the absence of an adequate explanation for the delay and the prejudice suffered by CL in acting on the basis of an order which was made several months ago. However, for the reasons that follow, I do not consider that the application to vary or set aside the orders is meritorious.

The applicant's attempt to appeal or re-argue the merits of the costs order

[19] The applicant's affidavit and her submissions assert that the costs order was made because of a misapprehension of the facts.[10] These submissions are without merit. However, I do not propose to address submissions that seek to effectively appeal against the merits of the costs order and to argue that a different order should have been made in the circumstances. The applications under *UCPR* 667(2) and 668, and the applicant's attempt to invoke the inherent jurisdiction of the court, do not provide an occasion for the applicant to appeal against the costs order, or to re-litigate issues that were argued or could have been argued on 26 November 2008.[11] It is inappropriate to permit the applicant to agitate arguments which, in effect, seek to appeal against the order for costs in circumstances in which the applicant did not apply for leave to appeal against the costs order within time. It is also inappropriate to permit the applicant to raise matters that were argued or might have been argued on 26 November 2008. Such a course is inconsistent with the public interest in the finality of litigation.

Rule 667(2)(a) – absence of a party

[20] The matter was mentioned before Lyons J shortly before 11.00 am on 26 November 2008. It resumed at 3.02 pm. The applicant left the court at 4.30 pm due to family commitments. The matter was stood down at 5.09 pm to allow Lyons J to read the material. Reasons were subsequently given and submissions on costs were made. The court adjourned at 6.04 pm. The applicant's argument that the orders were made in her absence is without merit. Her personal absence after 4.30 pm does not mean that the orders which she seeks to set aside were made "in the absence of a party" since she was represented throughout the hearing by counsel and solicitors.[12]

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10 See for instance, Outline of Submissions of the Applicant, para 9 and para 5 of her affidavit sworn 12 August 2009 filed 19 August 2009 (CFI 256).

11 *Wentworth v Wentworth* [1999] NSWSC 638 at [15].

12 Cf *Spoule v Long* [2001] 2 Qd R 335 in which there was a "physical absence" of the applicant either personally or by a legal representative.

Rule 667(2)(b) – order obtained by fraud

[21] The parties are agreed concerning the principles that apply in determining whether an order is obtained by fraud for the purpose of r 667(2)(b) or in the exercise of the court's inherent jurisdiction. They each cite the following principles:

(a) the evidence involving fraud must be newly discovered since trial;

(b) the evidence could not have been found at the time of trial by using reasonable diligence;

(c) the evidence was so material that it would probably have affected the outcome; and

(d) if there was perjury, the evidence was so strong that it would be decisive at a hearing.[13]

[22] The allegation of fraud must be clearly proved.[14] In *Wentworth v Rogers (No. 5)*[15] Kirby P (with whom Hope and Samuels JA agreed) stated the following principles:

1. particulars of the fraud claim must be exactly given and the allegations must be established by the strict proof which such a charge requires;

2. it must be shown by the party asserting that a judgment was procured by fraud, that there has been a new discovery of something material, in a sense that fresh facts have been found which, by themselves or in combination with previously known facts, would provide a reason for setting aside the judgment;

3. mere suspicion of fraud, raised by fresh facts later discovered, will not be sufficient to secure relief;

4. although perjury by the successful party or a witness or witnesses may, if later discovered, warrant the setting aside of a judgment on the ground that it was procured by fraud, and although there may be exceptional cases where proof of perjury would suffice, without more, to warrant relief of this kind, the mere allegation, or even the proof, of perjury will not normally be sufficient to attract such drastic and exceptional relief as the setting aside of a judgment;

5. it must be shown by admissible evidence that the successful party was responsible for the fraud which taints the judgment under challenge;

6. the burden of establishing the components necessary to warrant the drastic step of setting aside a judgment, allegedly affected by fraud or other relevant taint, lies on the party impugning the judgment.

Kirby P summarised the matter as follows:

> "In summary, he or she must establish that the case is based on newly discovered facts; that the facts are material and such as to make it reasonably probable that the case will succeed; that they go beyond mere allegation of perjury on the part of witnesses at the trial; and that the opposing party who took advantage of the

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13 *Monroe Schneider Associates (Inc) v No. 1 Raberem Pty Ltd* (1992) 37 FCR 234 at 241.

14 *Emanuel Management Pty Ltd v Foster's Brewing Group Ltd* [2000] QSC 430.

15 (1986) 6 NSWLR 534 at 538-539.

> judgment is shown, by admissible evidence, to have been responsible for the fraud in such a way as to render inequitable that such party should take the benefit of the judgment."[16]

[23] The applicant's oral submissions at the hearing served to focus the applicant's allegations of fraud upon three matters:

(a) the removal of CL as a signatory from the relevant bank accounts;

(b) the securing of what was said to be a priority by virtue of paragraph 9 of the orders;

(c) the fact that the sums advanced by CL did not procure the anticipated capital protection insurance, and that $400,000 of the funds advanced by CL appears to have been misappropriated.

[24] The possibility that CL would not remain as a signatory on the "destination account" was a matter raised at the hearing on 26 November 2008 by paragraph 11 of the respondents' submissions. The matter having been raised, counsel for CL stated that he did not have any instructions about that matter and could not advance any submissions in relation to it. As matters transpired, steps were taken on 28 November for CL to no longer remain as an authorised signature on the St George bank account. No case of fraud is established in relation to this matter. The court was made aware of the possibility that CL would cease to be a signatory.

[25] The issue of CL being a signatory is also raised by the applicant as a matter which is said to justify setting aside the orders and requiring cost orders to be made against the respondents. It should be noted that during the costs argument on 26 November 2008 a submission was made by the applicant's counsel to the effect that the respondents should be ordered to pay costs because the intended transmission of funds to an account in which CL was a joint-signatory had not been earlier disclosed, and that if it had been there would have been no necessity for the hearings. The applicant was aware of CL's status as a signatory on 21 November 2008, prior to the application made on 24 November. If matters in relation to CS and the arrangement for it to be a joint signatory had been disclosed by the respondents on an earlier occasion then it is likely that the applicant would not have been content with such arrangements and would have brought an application similar to the application that was brought on 24 November and renewed on 26 November 2008.

[26] The suggestion that CL procured the order made in paragraph 9 of the orders on 26 November 2008 by fraud is without merit. CL raised a legitimate concern about the continuing operation of the orders made on 24 November 2008 in the event that the amounts received from EH were insufficient to pay both the applicant and it. CL's legitimate concern in this regard was accommodated by the suggestion made by the applicant's counsel that became paragraph 9 of the orders.

[27] A related aspect of alleged fraud relies upon the fact that at the hearing on 26 November 2008, and in the context of the prejudice that CL would face if the orders were continued and something less than the expected amount was received, counsel for CL stated:

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16 Ibid at 539.

> "We're owed, I think, 1.3 and there is a – I think there's a success fee of some sort in the facility agreement, also interest. The facility was only for one month."

The applicant submits that the court was misled by this statement into the belief that the $1,075,000 provided for in the loan facility had already been advanced. The evidence before the court in the form of Mr Clarke's affidavit was that CL advanced the loan sum in reliance upon the applicant, by its lawyers, agreeing to consent orders on 28 October 2008.[17] The evidence before the court and the statement of CL's counsel that I have quoted was not that the whole sum of $1,075,000 had been advanced to the second respondent, or deployed in purchasing Capital Protection Insurance. As the order made by Daubney J on 28 October 2008 made clear, an amount in the order of $275,000 was to be applied by CL on account of fees, charges and interest. The evidence does not establish that CL was not owed in the order of $1,300,000 as at 26 November 2008. Interest on the facility of $1,075,000 was at either a "higher rate" of 15 per cent per month or a "lower rate" of 10 per cent per month.

[28] The applicant places particular reliance on subsequent developments in which it appears that $400,000 of the $800,000 set aside for the insurance payment was disbursed. This sum may have been misappropriated. The recent judgment of P Lyons J[18] suggests that the sum of $800,000 had been credited to the account of CL with the St George Bank for the required insurance and was to remain there until the EH loan proceeded. None of this is inconsistent with the proposition that CL made available pursuant to the loan facility the sum of $800,000 for use in procuring the insurance and that the balance of the advance of $1,075,000, together with interest, was due and owing to CL.

[29] The applicant has failed to establish that the court was misled by what was said about the amount that was owed to CL. The applicant has not proven by satisfactory evidence that the orders were obtained by fraud.

[30] More generally, the applicant places reliance upon subsequent events in which, as noted, the sums advanced by CL were not in fact used to purchase a Capital Protection Insurance Policy, as evidence that a fraud was perpetrated and that the sums in question were paid to the respondents or an agent on behalf of the respondents, rather than for their intended purpose. The applicant suspects that parties have colluded to defraud her and to divert the funds. However, the applicant's suspicion and allegations are insufficient. The evidence that she relies upon does not prove that the orders were obtained by fraud, or that the court was misled by the statement that CL was owed $1.3 million as at 26 November 2008 in respect of the $1,075,000 which was the subject of the loan facility, together with interest.

Rule 667(2)(c) - order for an injunction

[31] The amended application relies upon this subrule on the basis that paragraph 9 of the orders was in the nature of an injunction. That order was in the nature of an injunction which restrained certain payments upon the contingency that the applicant was not paid the sum of $3,914,466 and CL was not paid the sum secured. However, no proper basis has been established to set aside that order.

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17 Affidavit of Mr Clarke, para 15.

18 [2009] QSC 190 at [41]-[44].

Rule 667(2)(d) – the slip rule

[32] The applicant's written submissions sought to invoke the slip rule in respect of the costs order. However, on the hearing of the application the applicant accepted that no one suggested to her, nor could she suggest, that there was some slip and that Lyons J did not intend that the applicant should pay CL's costs of the hearing on 26 November 2008.[19] This concession was properly made. Consideration of the argument and, specifically the argument as to costs, disclosed a basis upon which CL should be paid those costs. The applicant's legal representatives who drew up the order did not apprehend that any other order was intended, nor could they in the circumstances. CL was entitled to complain about the non-disclosure of matters at the ex parte hearing on 24 November 2008 and succeeded at the hearing on 26 November 2008 at least to the extent of having order number 9 made so as to protect its interests. No basis for invoking the "slip rule" is established.

Rule 667(2)(f) – judgment for specific performance

[33] The applicant sought to invoke this rule but there is no judgment for specific performance.

Rule 668 – matters arising after order

[34] 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
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> (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."[20]

[35] In such a case the court has a power to stay enforcement of the order or give other appropriate relief, including an order to set aside or vary the orders.[21]

[36] While it is appropriate to apply an expansive view of the words "entitling" or "entitled" in r 668(1) as extending to cases in which relief depends on a favourable exercise of discretion,[22] the circumstances in which courts will permit a final order to be set aside are well-established and the exercise of the discretion under r 668 is affected by the principle protecting the finality of judgments.[23] An obvious circumstance in which the discretion given by r 668 may be exercised is when the new facts arise or are discovered after an order is made that "would not have been made had those facts then been known or existed".[24] The applicant makes the general submission that the evidence set out in her affidavit material supports the submission that "if the matters had been discovered in time (or disclosed properly by the respondents and CL)" she would have been entitled to an order for costs in her favour and in all probability to orders reflecting "the true state of affairs in relation to the CL advances". The applicant points to a number of matters that have

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19 Transcript 21 August 2009, 1-14 l10 to 1-5 l5.

20 Rule 668(1).

21 Rule 668(2) and (3).

22 *Rankin v Agen Biomedical Ltd* [1999] 2 Qd R 435 at 437-8.

23 *IVI Pty Ltd v Baycrown Pty Ltd* [2007] 1 Qd R 428 at 438-440 [12]-[18] per Jerrard JA; at 451 to 462 [66]-[107] per Wilson J, Mackenzie J agreeing with the interpretation of r 668 discussed in the separate reasons for judgment of Jerrard JA and Wilson J.

24 Ibid at 438 [13].

arisen since the orders of 26 November 2008 were made, such as the bankruptcy of the first respondent, the respondents' inability to obtain refinance sufficient to pay her and the decision of P Lyons J to allow the respondents further time to pay. However, none of these matters entitle her to be relieved from the costs order made in favour of CL or from paragraph 9 of the order made on 26 November 2008. She has not established facts that, if discovered in time, "would have entitled" her to a different order. She has not made out a case involving "fresh evidence" in circumstances in which it is reasonably clear that the fresh evidence would have produced an opposite result.[25] The applicant has not established that evidence was not available at the hearing because of some fraud on the part of CL or the respondents. At its highest, the applicant has raised substantial arguments that the respondents failed or neglected prior to 24 November 2008 to make proper disclosure of details in relation to arrangements with CL and the intended destination of funds into a St George Bank account over which CL was a joint signatory. However, the facts in relation to those matters were the subject of evidence on 26 November 2008. If they had been disclosed earlier it is likely that the applicant would have sought an extension of orders to CL, and upon receiving notice of such an application, CL would have sought the kind of protective order that was made in its favour by paragraph 9 of the orders that were in fact made on 26 November 2008. The respondent's alleged failure to earlier provide disclosure was not a matter which was only discovered after the order was made on 26 November 2008. It was a matter known on that date and it was the basis upon which the applicant sought ex parte orders on 24 November 2008 and a continuation of those orders on 26 November 2008.

[37] Circumstances have changed since the order was made on 26 November 2008. However, changed circumstances and the fact that the anticipated loan from EH did not eventuate do not provide a basis to set aside orders pursuant to r 668(1)(a). The applicant has not established that she discovered facts after 26 November 2008 that, if discovered in time, would have entitled her to a different order to those made in paragraphs 8 and 9 of the orders of 26 November 2008. The application is so far as it relies upon *UCPR* r 668 should be dismissed.

Promissory and equitable estoppel

[38] The applicant's written submissions make contentions in relation to promissory and equitable estoppel which fall outside the scope of her application. The propositions of law are borrowed from CL's submissions of 26 November 2008. The submissions do not explain how an estoppel of any kind operates to justify an order setting aside the orders that the applicant seeks to set aside.

Other relief

[39] The application seeks other relief including orders that the respondents disclose certain documents. The intent is that inquiry should be made into the transactions between CL and the respondents and that the respondents provide the applicant with:

> "full particulars of the actions they have taken to recover any funds that have been provided to any party pursuant to any advance provided to the respondents or any third party consequent upon the

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[25] *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134; *IVI Pty Ltd v Baycrown Pty Ltd* (supra) at 461 [104].

> securities granted in favour of CL over the assets of the respondents".

I decline to make such orders. No entitlement to such orders has been established. If the applicant wished to investigate these matters then the occasion to do so was the hearing before P Lyons J in April and June 2009 which addressed the respondent's attempts to raise funds including the funds that were advanced by CL.

Conclusion

[40] The applicant has not established a basis under the rules of court that she seeks to invoke or the inherent jurisdiction of the court to set aside the costs order that was made against her and in favour of CL on 26 November 2008 or paragraph 9 of the orders made that day. The applicant's speculation and suspicion of fraud and collusion fall short of the proof required to set aside an order on the basis that it has been obtained by fraud or some other misconduct.

[41] A substantial part of the applicant's case on the present application stems from a grievance that the respondents should have earlier informed her of CL's requirement to secure the loan from EL by having it deposited into an account with the St George Bank to which CL was a joint signatory. If the respondents had made earlier disclosure of this matter then it is probable that the applicant would have sought orders of the kind that she sought against the respondents and CL on 24 November 2006 and that CL would have obtained an order in the same or similar terms to paragraph 9 of the order that was made on 26 November 2008. A substantial reason for CL to obtain a costs order against the applicant on 26 November 2008 was CL's allegation of a material non-disclosure by the applicant at an ex parte hearing on 24 November 2008.

[42] I decline to make the orders sought in the amended application.

[43] The orders of the court will be:

1. Application dismissed.

2. The applicant pay the costs of the second and fourth respondents of and incidental to the application to be assessed.

3. The applicant pay CL's costs of and incidental to the application to be assessed.

[44] The second and fourth respondents seek their costs to be capped at $10,000 pursuant to r 687. The basis for fixing costs in that quantum should be addressed in an affidavit and short written submissions within seven days if the second and fourth respondents wish the court to fix costs in that or any other amount.