SUPREME COURT OF QUEENSLAND

CITATION:	*180 Capital Finance Pty Ltd v Coomer & Anor* [2010] QSC 116
PARTIES:	**180 CAPITAL FINANCE PTY LTD ACN 110 294 767** **(plaintiff/respondent)** **AND** **RONALD JAMES COOMER** **(first defendant/ first applicant)** **AND** **PETRINA MARIA COOMER** **(second defendant/ second applicant)**
FILE NO/S:	BS974 of 2008
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 April 2010
DELIVERED AT:	Brisbane
HEARING DATE:	2, 23 November 2009
JUDGE:	Atkinson J
ORDER:	**The application is dismissed.**
CATCHWORDS:	PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – SUMMARY JUDGMENT – APPLICATION TO SET ASIDE OR STAY – where applicants applied to stay or set aside judgment on the basis that facts were discovered after the order was made that would have led to an order in the applicants' favour or to a different order – whether applicants discovered facts after the order was made that would have led to an order in the applicants' favour or to a different order *Uniform Civil Procedure Rules* 1999 r 668(1)(b) *IVI Pty Ltd v Baycrown Pty Ltd* [2007] 1 Qd R 428; [2006] QCA 461, cited *Woods v Sheriff of Queensland* (1895) 6 QLJ 163, cited *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 135; [1991] HCA 61, cited

COUNSEL: The applicants appeared for themselves
J W Peden for the respondent

SOLICITORS: The applicants appeared on their own behalf
Reardon & Associates (Brisbane) acting as Town Agent for
Yates Beaggi Lawyers (Sydney) for the respondent

[1] The defendants, Ronald James Coomer and Petrina Maria Coomer, applied to set aside or stay a summary judgment given in this court on 29 July 2008.

[2] The judgment had been given for part of the relief sought in a claim which was filed by the plaintiff, 180 Capital Finance Pty Ltd ("180 Capital"). The relief sought in the claim was:

> "1. An order that the defendants pay the plaintiff the sum of $175,742.89 together with any further:
>
> (a) Costs and expenses (as defined herein) incurred; and
>
> (b) Interest accruing from 7 January 2008 on all outstanding amounts at the rate of 8 per cent per month,
>
> Up to and including the date of entry of judgment in these proceedings.
>
> 2. Recovery of possession of the whole of the land comprised in:
>
> (a) Certificate of Title Reference 14556170 (Lot 712 in registered plan 125020) being the land situated at and known as 8 Jude Street, Bracken Ridge in the State of Queensland; and
>
> (b) Certificate of Title Reference 16303025 (Lot 1 in Building Unit Plan 4969) being the land situated at and known as 1/81 Nicklin Way, Warana in the State of Queensland."

[3] On 4 July 2008 the plaintiff filed an application for summary judgment in respect of those two paragraphs of the claim. The defendants, who were legally represented, did not oppose the grant of summary judgment but disputed the amount for which summary judgment should be entered. On 29 July 2008 Mullins J ordered that judgment be given in favour of the plaintiff against Mr and Mrs Coomer in respect of paragraph 2 of the claim being recovery of possession of the land but otherwise dismissed the application. It was this judgment that the defendants, who represented themselves on the application heard before me, sought to have set aside or stayed.

[4] The defendants' application was made under Rule 668 of the *Uniform Civil Procedure Rules* 1999 ("UCPR") which 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."

[5] Rule 668 applies only if either r 668(1)(a) or r 668(1)(b) is satisfied, that is (a) facts **arise** after an order was made entitling the person against whom the order was made to be relieved from it; or (b) facts **are discovered** after an order was made that, if discovered in time, would have entitled the person against whom an order was made to an order or decision in the person's favour or to a different order. The first situation concerns facts that happen after the order and the second concerns facts that occurred before the order but not discovered until after the order.

[6] This case concerned r 668(1)(b) of the UCPR, facts which were said to have occurred prior to the order which were not discovered until after the order was made. Mr Coomer asserted that those facts showed that the defendants did not owe any money to the plaintiff at the time that judgment for recovery of possession of the land was given and therefore the judgment for recovery of possession should be set aside or stayed.

[7] What test is to be applied by the court to r 668(1)(b)? The rule is not a substitute for an appeal but rather assumes that the order was correct on the facts as then known.[1] There is a public interest in the finality of judgments and so an order, once made, is usually final unless successfully appealed against.[2] This rule operates in conjunction with that general rule.

[8] Rule 668(1)'s immediate predecessor was O 45 r 1 of the *Rules of the Supreme Court* 1901. Its predecessor was O 41 r 22 of the rules introduced by the *Judicature Act* 1876. That rule replaced the bill of review, a chancery practice whereby judges had the power to review and discharge an order made in chambers,[3] and the common law writ of *audita querela* whereby a defendant could obtain relief against

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1 *IVI Pty Ltd v Baycrown Pty Ltd* [2007] 1 Qd R 428 at 439; [2006] QCA 461.

2 *AMIEU v Mudginberri* (1986) 65 ALR 683 at 691 quoted by Thomas J in *Breen v Lambert*, unreported, SC No 4547 of 1988, 16 August 1991 and Wilson J in *IVI Pty Ltd v Baycrown Pty Ltd* at 454.

3 *Woods v Sheriff of Queensland* (1895) 6 QLJ 163 at 165.

execution of a judgment if, after final judgment had been given in an action, new facts arose entitling the defendant to that relief.[4]

[9] There are two requirements which must be met before r 668(1)(b) of the UCPR can operate. These requirements are similar to the principles applied when a party seeks to rely on fresh evidence on a civil appeal. The first is that it is reasonably clear that if the evidence had been available at the first hearing and had been adduced, an opposite result would have been produced.[5] The second requirement is that the fresh evidence could not have been adduced at the hearing by the defeated party with reasonable diligence.[6]

[10] The High Court referred to these twin requirements in *Commonwealth Bank of Australia v Quade*:[7]

> "In cases where all that is involved is the discovery by the unsuccessful party of fresh evidence, *Orr v Holmes* (1948) 76 CLR 632 and *Greater Wollongong Corporation v Cowan* (1955) 93 CLR 435 at 444 establish that the reconciliation of 'the demands of justice' and the 'policy' that there be an end to litigation at least prima facie (or 'generally' (see *McDonald v McDonald* (1965) 113 CLR 529 at 532-533)) dictate that the successful party should be deprived of the verdict in his favour only if the unsuccessful party persuades the appellate court that there was no lack of reasonable diligence on his part and that it is reasonably clear that the fresh evidence would have produced an opposite verdict. Such a stringent rule in that ordinary class of case is supported by considerations of both justice and public interest. Considerations of justice support it in that it would be unfair to the successful party if he were to be deprived of a verdict obtained after a trial on the merits and be subjected to the expense, inconvenience and uncertainty of a further trial merely because some relevant evidence had, without fault on his part, been unavailable to the unsuccessful party at the time of the trial. Considerations of public interest support it in that it is desirable in the public interest that there be finality in litigation in other than the truly exceptional case. If all that was necessary to procure the setting aside of a regularly obtained verdict was that the unsuccessful party show that fresh evidence which might have affected the outcome of the trial has become available after the trial, the verdicts of the courts would be of a provisional character only, being subject to the discovery of further relevant evidence."

[11] The public interest in finality in litigation is particularly important after a trial on the merits. That does not apply with equal force in this case where there was a summary determination of the question as to recovery of possession of the land.

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4 *Woods v Sheriff of Queensland* at 165.

5 *IVI Pty Ltd v Baycrown Pty Ltd* at 428 quoting *Wollongong Corporation v Cowan* (1955) 93 CLR 435 at 444.

6 *IVI v Baycrown* at 439-440 quoting *Harrison v Schipp* (2002) 54 NSWLR 612 at 617 [14].

7 (1991) 178 CLR 134 at 141-142; [1991] HCA 61.

Newly discovered facts

[12] The fresh evidence relied upon by the defendants is described in paragraphs 3 and 4 of the defendants' submissions as:

> "3. However, following that decision, [by Mullins J on 29 July 2008], new information was finally made available (refer to Exhibit A to Affidavit of RJ Coomer filed by 2/11/2009).
>
> 4. The new information finally enabled the First and Second Defendants to calculate their true liability to the Plaintiff and the conclusion was (refer to paragraph 12 of the Amended Defence of the First and Second Defendants) that 180 Group was really the debtor to the First and Second Defendants. (For details refer to Exhibit D to Affidavit of RJ Coomer filed 2/11/2009)."

[13] The fresh evidence referred to in paragraph 3 is Exhibit A to Mr Coomer's affidavit which was filed by leave on 2 November 2009. In that affidavit Mr Coomer asserts that he discovered the information contained in Exhibit A on 25 November 2008. Exhibit A is a document prepared by the defendants. Page 1 is in the following format:

180 Capital Finance Pty Ltd

Tax Invoice

RONALD JAMES & PETRINA MARIA COOMER
19 CONNORS RD
QLD 4740

Date: 25/11/2008

Principal Advance	
Principal Advance 10/10/2005	200,000.00
Establishment Fee	
Establishment Fee 10/10/2005	11,000.00
Costs and Disbursements	
Legal Fees 28/10/2005 – Pateman	5,124.96
Legal Fees 10/11/2005 – Pateman	1,386.35
Legal Fees 14/11/2005 – Pateman	4,023.36
Interest Payable	**$27,313.64**
Total Payable	**$248,848.31**
Payments	
Payment 16/01/2006	248,848.31
Sub-Total	**$248,848.31**
TOTAL Outstanding	**$0.00**

TERMS: As per signed Offer of Short Term Finance

BANK DETAILS

Bank:	Westpac Banking Corporation
Account Name:	180 Capital Pty Ltd.
BSB:	032-003
Account Number:	347305

[14] Page 2 of Exhibit A is in the following terms:

180 Corporate Pty Ltd
A.B.N. 21 102 333 111

Tax Invoice

RONALD JAMES & PETRINA MARIA COOMER
19 CONNORS RD
QLD 4740

Date: 25/11/2008

180 Corporate Engagement Fee	
Engagement Fee 03/08/2005	38,500.00
Costs and Disbursements	
Legal Fees 25/08/2005	1,439.22
Legal Fees 30/12/2005	402.60
Interest Payable	**$0.00**
Total Payable	**$40,341.82**
Payments	
Payment 16/01/2006	40,341.82
Sub-Total	**$40,341.82**
TOTAL Outstanding	**$0.00**

TERMS: As per signed Offer of Short Term Finance

BANK DETAILS

Bank:	Westpac Banking Corporation
Account Name:	180 Corporate Pty Ltd.
BSB:	032-003
Account Number:	317843

[15] In paragraph 4 of their submissions, the defendants refer to a calculation of their true liability to the plaintiff as set out in paragraph 12 of the Amended Defence. The Amended Defence and Counterclaim was filed on 25 September 2009. Paragraph 12 is in the following terms:

> "12. The First and Second Defendants calculated earlier this year that the 180 Group owes them $23,419.29 when the following are taken into account:
>
> (a) the costs of unnecessarily lodging and removing of caveats after Jayson Littlefield advised that 180 could not assist MSL and the First and Second Defendants in the available timeframe
>
> (b) incorrect interest calculations on the first loan
>
> (c) legal fees for which the First and Second Defendants have never received any paperwork
>
> (d) charging for services that 180 Group did not provide and
>
> (e) penalty interest because 180 Capital has not applied the overpayment on the first loan to the amount owing on the second loan."

[16] The way in which the figure of $23,841.29 was calculated is said to be set out in the Exhibit D to the affidavit of Mr Coomer filed by leave on 2 November 2009. Exhibit D is described in paragraphs 13 and 14 of Mr Coomer's affidavit as "a spreadsheet that has been prepared by [Mr and Mrs Coomer] based on the information finally supplied by 180 Group. The spreadsheet details the amounts that 180 Group and their lawyers have charged and what we believe should have been charged based on the documentation we have." Mr Coomer deposed that he had inserted a comment beside each line to show his reasoning. The spreadsheet shows a difference of $23,813.64 between what Mr Coomer says the plaintiff claims and what Mr Coomer said he and his wife owe the plaintiff. In other words, Mr Coomer says that the plaintiff (or what he refers to as the 180 Group) owes him $28,813.64.

[17] Mr Coomer deposed in paragraph 9 of his affidavit filed by leave on 2 November 2009 that he was unable to discover that they were not in debt to 180 Group at all but rather that 180 Group owed Mr and Mrs Coomer $23,419.29 "because both representatives of 180 Group and their lawyers said this was not relevant to the case and they were happy with how we had paid the first loan." Mr Coomer added that he and his wife had repaid a total of $293,872.53 on a loan of $200,000 for 79 days at an interest rate of four per cent per month.

[18] Mr Coomer said that he made verbal requests of 180 Group on several occasions to supply him with information on the $200,000 loan, but "never received anything." He said that during negotiations, which presumably took place after the summary judgment was given on 29 July 2008, he received emails from 180 Group with the information referred to in Exhibit A and from that he and his wife worked out that they did not owe 180 Group anything because of overcharging as detailed in the spreadsheet which is Exhibit D.

[19] It seems reasonably clear that if the defendants had evidence that they did not in fact owe any money at all to the plaintiff then judgment would not have been entered against them in favour of the plaintiff for recovery of possession of the secured land.

[20] I turn, therefore, to consider whether there is "fresh evidence" which could not have been adduced at the hearing by the defendants with reasonable diligence.

[21] Essentially the defendants' argument is based on the following. They borrowed $200,000 from the plaintiff on 10 October 2005. They argue, and it is accepted by the plaintiff, that they repaid all monies owing under that loan. The defendants, however, say that approximately $40,000 was wrongly paid to another corporate entity, 180 Corporate Pty Ltd. The plaintiff on the other hand says that those monies were correctly appropriated to 180 Corporate Pty Ltd. The parties also agree that there was a second loan by the plaintiff to the defendants on 27 February 2006 in the amount of $100,000. Both parties agree that the repayments under that loan have been $58,371.27 on 13 June 2006; $5,870 on 30 June 2006; $1,000 on 8 November 2007; and $2,832.40 on 13 November 2008. The plaintiff asserts that this leaves a balance of $39,499.64 owing on the principal of the loan together with interest whilst the defendants assert that, if the $40,000 which they said was wrongly paid to 180 Corporate Pty Ltd is taken into account together with other figures that they say are over payments, they have paid all that is owing to the plaintiff and indeed are owed money. The gravamen of their complaint is regarding the fee of $40,341.82 paid to 180 Corporate Pty Ltd. None of the other amounts disputed in Exhibit D is sufficient to have any effect on the outcome of this application.

[22] The principal problem for the defendants in relying upon this argument is that the defendants' assertion that those monies were wrongfully appropriated to 180 Corporate Pty Ltd is not fresh evidence. This was well known to the defendants prior to judgment being entered on 29 July 2008 and so does not meet the requirement that it is fresh evidence which could not have been adduced at the hearing by the defeated party with reasonable diligence. Indeed, as Mr Coomer deposes in paragraph 60 of an affidavit filed by him on 18 September 2009, on 25 July 2008 his solicitors sent a letter of demand to 180 Corporate Pty Ltd for $40,341.82 for repayment of services not provided.

[23] Mr Coomer has known since the time when he took out the first loan on 10 October 2005 that the payout figure on that loan from 180 Capital Finance Pty Ltd, the plaintiff herein, would include repayment of the capital of $200,000 plus the establishment fee, legal fees and interest. Exhibit C to Mr Coomer's affidavit filed on 18 September 2009 is a copy of the contract between the defendants and 180 Corporate Pty Ltd signed by Mr and Mrs Coomer on 3 August 2005, setting out the terms upon which they engaged 180 Corporate Pty Ltd to provide consultancy services. Mr and Mrs Coomer have known since 3 August 2005 that they had agreed to pay 180 Corporate Pty Ltd $38,500 for consultancy services plus any disbursements and out of pocket expenses reasonably incurred.

[24] On 16 January 2006, the plaintiff received $251,680.71 in full and final payment in respect of the loan by it to the defendants of $200,000 and on the same date 180 Corporate Pty Ltd received from the defendants the sum of $40,341.82 representing the full and final payment in respect of the consultancy agreement. These figures were set out in an email sent to Mr and Mrs Coomer's solicitors on 12 January 2006 setting out the figures for settlement. The amount of $251, 680.71 owing under the

loan agreement comprises the principal sum of $200, 000 that was loaned to Mr and Mrs Coomer, together with interest, establishment fee and legal fees. The amount of $40, 341.82 owing under the consultancy agreement comprises an engagement fee of $38, 500 and legal fees. Contrary to Mr Coomer's assertion in his affidavit filed by leave on 2 November 2009, Mr and Mrs Coomer did not pay $293, 872.53 on the loan of $200, 000.

[25] The solicitors acting for Mr and Mrs Coomer delivered cheques for $251,680.71 made out to 180 Capital Finance Pty Ltd; $40,341.82 made out to 180 Corporate Pty Ltd and $1,850 made out to Pateman Legal and Corporate Services in accordance with the information sent to those solicitors by solicitors acting on behalf of the plaintiff and 180 Corporate Pty Ltd on 12 January 2006. Both Mr and Mrs Coomer then knew all of the relevant information contained in Exhibit A to the affidavit of Mr Coomer filed by leave on 2 November 2009 which is said to be fresh evidence. It does not assist the application made by Mr and Mrs Coomer that they were given the documents contained in Exhibit A after the hearing before Mullins J as they knew the information contained in those documents prior to that hearing.

[26] The defendants applied to reopen their case on 23 November 2009. None of the evidence led or submissions made on that occasion would lead to a different result.

[27] As there is no evidence which comes within the description of facts discovered after the order was made which, if discovered in time, would have entitled the person against whom the order was made to an order or decision in the person's favour, the precondition under which orders can be made under r 668 of the UCPR has not been satisfied and the application must be dismissed.

[28] I will hear submissions as to costs and consequential orders.