SUPREME COURT OF QUEENSLAND

CITATION:	*Wilson Four Pty Ltd v Sihota & Anor* [2014] QSC 257
PARTIES:	**WILSON FOUR PTY LTD ACN 144 846 417** (plaintiff) v **TARSEM SINGH SIHOTA and HARBANS KAUR SIHOTA** (defendants)
FILE NO:	BS9705/13
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	16 October 2014
DELIVERED AT:	Brisbane
HEARING DATE:	11 September 2014
JUDGE:	Jackson J
ORDERS:	**The order of the Court is that:** **1. The parties are directed to make submissions as to the orders that should be made consequent upon these reasons within seven days.** **2. The costs of the hearing on 11 September 2014 be costs in the application.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER THE UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – JUDGMENTS AND ORDERS – OTHER MATTERS – where the plaintiff sought orders pursuant to s 185 of the *Property Law Act* 1974 – where the parties agreed to consent orders which imposed obligations upon each party to facilitate the removal of the encroachment upon the plaintiff's land – where the plaintiff now seeks to amend the claim on the basis that the agreement underlying the consent orders has been terminated for the defendants' repudiation – whether the consent order should be set aside – whether a consent order may be set aside on the basis of breach or repudiation of the underlying agreement – whether this issue should be determined in fresh proceedings *Property Law Act* 1974 (Qld), s 184, s 185 *Uniform Civil Procedure Rules* (Qld), r 377, r 668 *Chavez v Moreton Bay Regional Council* [2010] 2 Qd R 299,

considered
D'Orta-Ekenaike v Victoria Legal Aid (2005) 223 CLR 1, cited
Eastman v The Queen (2000) 203 CLR 1, cited
Grierson v The King (1938) 60 CLR 431, cited
Harvey v Phillips (1956) 95 CLR 235, considered
Huddersfield Banking Co Ltd v Henry Lister & Son Ltd (1895) 2 Ch 273, cited
McDermott v Black (1940) 63 CLR 161, cited
McDonald v Dennys Lascelles Limited (1933) 48 CLR 457, cited
McVey v St Vincent's Hospital (Melbourne) Ltd [2005] VSCA 233, cited
Paino v Hofbauer (1988) 13 NSWLR 193, considered
Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589, cited
Rockett v The Proprietors – "The Sands" Building Units Plan No 82 [2002] 1 Qd R 307, considered
Sunbird Plaza Pty Ltd v Maloney (1987-1988) 166 CLR 245, cited

COUNSEL: P Roney QC for the plaintiff
K Fleming QC and for the defendants

SOLICITORS: Macfie Curlewis Spiro for the plaintiff
Wilson Lawyers for the defendants

[1] **Jackson J**: The parties are in dispute about whether leave of the Court can or should be granted to the plaintiff to amend its claim under *Uniform Civil Procedure Rules* 1999 ("UCPR"), r 377. The dispute stems from an order of the court made on 29 April 2014. It ordered, inter alia:

> "2. By consent, by way of relief pursuant to section 185 of the *Property Law Act*:
>
> (a) That the Plaintiff by itself, its servants, agents or contractors do all such things as may be necessary to identify and remove any encroachment upon the Defendants' land more particularly described in par 3 of the Statement of Claim, caused by the presence upon the Defendants' land of any concrete footing or part thereof along the southern boundary of the Defendants' land;
>
> (b) That the Defendants do such things as may be reasonably necessary to facilitate access by the Plaintiff, its servants, agents or contractors to identify or remove the said encroachments;
>
> (c) That upon the removal of the encroachments, the Plaintiff restore the Defendants' land to the condition in which it existed prior to its attendance to remove the

encroachments, and notify the Defendants upon completion of those works.

3. The parties have liberty to apply on 3 days notice in writing." ("the consent order")

[2] The consent order was made in some form of compromise of the plaintiff's claim, as it then was, for:

> "1. **Orders as may be deemed just with respect to the grant of an easement, or easements in favour of the Plaintiff and the affected lots and any affected roadway in respect of the areas affected by the encroachments,** identified by reference to the geographical location of those encroachments upon the Defendants' land.
>
> 2. Such orders as may be just, if any, for the payment of compensation to the Defendants.
>
> 3. **Further and in the alternative, orders allowing or permitting the Plaintiff, by its agents to remove the encroachment upon such terms as determined to be just**.
>
> 4. Such orders as to costs of this proceeding as may be just." (emphasis added)

[3] The background to the dispute is that the plaintiff and the defendant are adjoining land owners. The plaintiff has constructed a high masonry wall or fence on its land next to the common boundary. Some of the footings for the wall encroach onto the defendants' land. Until the consent order was made, the parties were in dispute about how the encroachment should be dealt with or remedied.

[4] The plaintiff now applies to amend the claim into the following form:

> "1. Orders as may be deemed just with respect to the grant of an easement, or easements in favour of the Plaintiff and the affected lots and any affected roadway in respect of the areas affected by the encroachments, identified by reference to the geographical location of those encroachments upon the Defendants' land.
>
> 2. Such orders as may be just, if any, for the payment of compensation to the Defendants <u>associated with the grant of the easement</u>;
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> 3. [deleted]
>
> 4. <u>Damages for breach of contract.</u>
>
> <u>5.</u> Such orders as to costs of this proceeding as may be just."

[5] The amendment to the claim is proposed to be supported by adding pars 25A to 25H to the statement of claim. An amended statement of claim adding those paragraphs

was filed without leave, purportedly under UCPR r 378. There is now a further amendment to the statement of claim proposed in an exhibited draft. The prayer or claim for relief in the proposed further amended statement of claim differs from the proposed amended claim. Paragraphs (c), (d) and (e) of the proposed relief set out in the proposed further amended statement of claim are:

> "(c) an order declaring that the consent orders having contractual effect and made on 29 April 2014 have been rescinded and are set aside;
>
> (d) such orders as to costs of this proceeding as may be just including in the alternative that the Defendants pay the Plaintiffs' [sic] costs of the proceeding since 29 April 2014 on an indemnity basis or otherwise by way of damages to it for the defendants' breach of the consent orders;
>
> (e) an order for damages for breach of the consent orders having contractual effect."

[6] I will assume that the relief sought by the proposed further amended statement of claim is also the final version of the proposed amended claim, on the basis that par (c) is to be added as a new 3, par (d) replaces 5 and par (e) replaces 4.

[7] The substance of pars 25A to 25H may be summarised. The plaintiff alleges that the consent order compromised the plaintiff's claim for the relief sought in par 3 of the claim. The implication appears to be that it did not otherwise compromise the claim if the defendants did not perform the terms of the contract of compromise. The plaintiff alleges that upon the Court making the consent order, the plaintiff took steps to commence to do the acts required of it pursuant to par 2(a), but in breach of contract (and presumably of par 2(b) of the consent order), the plaintiff was prevented by the defendants from doing all the things necessary to identify and remove any encroachment on the defendants' land. It is further alleged that the defendants acted in fundamental breach of, and repudiated, the contract embodied in or evidenced by the consent order, by insisting that there was no right or entitlement on the plaintiff's part to the do the things described in the consent order without further express agreement by the defendants and without the defendants doing such things as may have been reasonably necessary to facilitate access by the plaintiff, its servants agents or contractors to identify and remove the encroachments.

[8] The plaintiff alleges that, on 8 August 2014, it elected to accept the defendants' fundamental breach of the terms of the consent order and repudiation and terminated those parts of the consent order which were of contractual effect. The plaintiff alleges that it has suffered loss and damage because of the defendants' breach.

[9] The proposed amendments to the claim have three important aspects. First, the plaintiff seeks to proceed with its claim for the grant of an easement under s 185 of the *Property Law Act* 1974 ("PLA"), apparently instead of the provision in the consent order for removal of the encroachment. Second, the plaintiff seeks to add a claim for damages for breach of the contract embodied in or evidenced by the consent order. Third, the plaintiff seeks to add a claim for indemnity costs of the proceeding.

[10] The defendants oppose the plaintiff's application to amend the claim and statement of claim for three reasons. First, they submit that the application cannot be allowed unless the consent order is set aside. Second, they submit that because the consent order operates as a contract it can only be set aside if the contract is void or can be avoided and that breach of contract is not a basis to set it aside. Third, they submit that any application to set aside the consent order should be made in a new proceeding.

[11] In response to those submissions, the plaintiff submits that, if necessary, it should be given leave to amend the application for leave to amend the claim, so as to claim an order setting aside the consent order. Second, the plaintiff submits that the contract embodied in or evidenced by the consent order is terminated for breach of contract and that the consent order can be set aside on that ground. Third, the plaintiff submits that an application to set aside the consent order may be made in the current proceeding.

[12] The questions for present resolution are not whether the plaintiff has validly terminated any contract embodied in or evidenced by the consent order or whether on that ground the consent order should be set aside, as a matter of discretion. The questions for present resolution are confined to whether the plaintiff's proposed amended claim is competent or possible in law. The parties' submissions proceeded on some assumptions that it will be necessary to identify and consider.

Damages for breach of contract

[13] At the outset, I put to one side the question of the proposed amendment to add a claim for damages for breach of contract. Unless the provisions of the consent order were not contractual terms of a contract of compromise between the parties, there is no reason in law why the plaintiff could not claim damages for breach of contract for the defendants' breach of such a contractual term. There may be a question whether such a claim should be made in a new proceeding. The proposed claim for damages for breach of contract is based on a cause of action which arose after the proceeding was started. However, that is not a bar to permitting an amendment to add such a cause of action.[1]

Must the consent order be set aside?

[14] The plaintiff does not accept that the consent order must be set aside before it can proceed upon the proposed amended claim. As the consent order recites, it is made under s 185 of the PLA. Where there is an encroachment, and application is made under s 184 of the PLA by the encroaching owner, s 185 empowers the court to make one or more orders "as it may deem just" with respect to the payment of compensation to the adjacent owner (by the encroaching owner) and the grant to the encroaching owner of rights or privileges in relation to the land (by conveyance, transfer, or lease or any easement), and the removal of the encroachment, among other things.

[15] The power under s 185 was preceded by the *Encroachment of Buildings Act* 1955, which in turn was modelled on the *Encroachment of Buildings Act* 1922 (NSW). In

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1 UCPR r 375(2).

large part, the relevant provisions of the Act of 1955 were re-enacted in Division 1 of Part 11 of the PLA.[2]

[16] Section 185 does not state that if relief is ordered, by way of a right to enter upon the adjacent owner's land and to remove an encroachment, the encroaching owner is not entitled to further relief by way of an order for an easement over the adjacent owner's land. Nevertheless, the removal of an encroachment, on the one hand, and an easement over the adjacent owner's land, authorising the encroachment to be kept in place, on the other hand, are alternatives.

[17] By proceeding on the proposed amended claim the plaintiff will seek the grant of an easement. If such an easement were granted, and compensation for it ordered, that would not bring an end to the parties' obligations contained in the consent order. The consent order would still oblige the plaintiff to remove the encroachment and would still oblige the defendants to permit that to be done. Those obligations are not only matters of contract. They are provided for by the order of the Court.

[18] The consent order was made by way of compromise of the plaintiff's original claim. It might be construed as evidencing an agreement by the plaintiff to forego a claim for an easement and to accept, in lieu thereof, an order providing for the removal of the encroachment. It appears that the plaintiff wants to challenge that view of any contract of compromise. I will return to that question.

[19] In my view, an order granting an easement to the plaintiff over the land upon which the encroachment intrudes would conflict with the consent order. That is because par 2(a) of the consent order obliges the plaintiff to remove the encroachment, whereas an easement would grant a right to the plaintiff to have the encroachment remain.

[20] In these circumstances, in my view, the plaintiff should not be permitted to proceed on the amended claim for an easement while the consent order remains on foot and undisturbed.

[21] Are there any analogous circumstances? One might be found in a judgment or order for specific performance. If a plaintiff obtains a decree for specific performance of an executory contract, the parties' obligations under the contract remain to be performed, in accordance with the provisions of the judgment or order for specific performance. Jones and Goodhart, *Specific Performance*, 2nd ed, say:

> "But the plaintiff (whether vendor or purchaser) is not entitled to put an end to the contract himself by treating the defendant's continued non-performance as repudiation of the contract and accepting the repudiation; he must apply to the court for an order discharging the contract. Although the contract continues to exist and is not merged in the order, it is the provisions of the order and not of the contract which regulate the working out or cancellation of the contract."[3] (footnotes omitted)

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2 I also recognise the assistance I have derived from O'Connor, "The Private Taking of Land: Adverse Possession, Encroachment by Buildings and Improvement Under Mistake", (2006) 33 *University of Western Australia Law Review* 31, 56-62.

3 Jones and Goodhart, *Specific Performance* (Butterworths, 2nd ed, 1996) 259.

[22] In the context of equity in Australia, the relevant cases and the underlying principle were discussed in *Sunbird Plaza Pty Ltd v Maloney*,[4] by Mason CJ who said, inter alia:

> "In the light of the existing authorities, particularly *Facey v Rawsthorne*, there being no argument challenging their correctness, we should continue to apply the proposition that rescission after an order for specific performance requires the leave of the court or, more appropriately, the vacation of the order. These authorities proceed on the footing that once a plaintiff has obtained an order for specific performance of a contract, he cannot be permitted to act inconsistently by rescinding it so long as the defendant is required by order of the court to complete the contract.
>
> The consequence is that the appellant cannot rely on having brought the contract of sale to an end by accepting a repudiation by the purchaser. And, even if the appellant might have brought the contract to an end in this way without the leave of the court or without vacating the order for specific performance, the evidence does not warrant a finding that the appellant has done so."

[23] The present context does not involve a judgment or order for specific performance. Nevertheless, in my view, the analogy is apt. Assuming that the contract is one which can be terminated in such a way as to restore the plaintiff to a right to proceed on its claim for an easement, if the plaintiff wishes to be restored to the position of a party seeking that relief, in my view, the consent order must be set aside.

[24] I also derive support for that conclusion from *Rockett v The Proprietors – "The Sands" Building Units Plan No 82*.[5] In that case, a defendant body corporate appealed from a primary judgment given against it and another defendant in the District Court for damages for defamation ("the first appeal"). It then consented to an order dismissing the first appeal. The other defendant separately appealed the primary judgment as against it and was successful. The body corporate applied to the District Court to set aside the primary judgment against it under UCPR r 668 on the ground that new facts had occurred since the judgment, being the successful appeal by the other defendant. A Judge of the District Court acceded to that application and made an order setting the original judgment against the body corporate aside ("the setting aside order"). On appeal from the setting aside order ("the second appeal"), the Court of Appeal held that the body corporate's challenge was not that the primary judgment was correct but later occurring facts justified setting it aside, which is the province of UCPR r 668. Rather, it was that the primary judgment was wrong, which could only be remedied by an order on appeal from the primary judgment. In turn, that would have required the body corporate to apply to set aside the consent order dismissing the appeal.[6]

[25] Although the consent order must be set aside before the plaintiff can proceed on the claim for the orders it wishes to pursue on the proposed amended claim, there remains a question whether on the facts alleged by the plaintiff, it is arguable that

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4 (1987-1988) 166 CLR 245, 259-260.
5 [2002] 1 Qd R 307.
6 [2002] 1 Qd R 307, 312-313.

the consent order could be set aside. To arrive at my conclusions thus far, it has not been necessary to consider the nature of the consent order. It is necessary now to turn to that question.

Final order

[26] The consent order is a final order. That is not affected by the provision for liberty to apply.[7] The power to make the order is conferred by s 185 of the PLA. In effect, the order granted the right to the plaintiff to enter upon the defendants' land to remove the encroachment and obliged the plaintiff to do so. In effect, it obliged the defendants to cooperate to facilitate that outcome.

[27] The consent order is a non-money order enforceable under Ch 20 of the UCPR, r 898.

[28] As a final order, a number of relevant principles are engaged before it can be set aside. A starting point is the statement of Gleeson CJ, Gummow, Hayne and Heydon JJ in *D'Orta-Ekenaike v Victoria Legal Aid*:[8]

> "A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances. That tenet finds reflection in the restriction upon the reopening of final orders after entry and in the rules concerning the bringing of an action to set aside a final judgment on the ground that it was procured by fraud. The tenet also finds reflection in the doctrines of res judicata and issue estoppel. Those doctrines prevent a party to a proceeding raising, in a new proceeding against a party to the original proceeding, a cause of action or issue that was finally decided in the original proceeding. It is a tenet that underpins the extension of principles of preclusion to some circumstances where the issues raised in the later proceeding could have been raised in an earlier proceeding.
>
> The principal qualification to the general principle that controversies, once quelled, may not be reopened is provided by the appellate system. But even there, the importance of finality pervades the law. Restraints on the nature and availability of appeals, rules about what points may be taken on appeal and rules about when further evidence may be called in an appeal (in particular, the so-called "fresh evidence rule") are all rules based on the need for finality." (footnotes omitted)

[29] There are specific rules of court that provide for the Court to set aside an order by way of injunction (UCPR r 667(2)) and to set aside an order, including an order that requires a person to perform an act, on the ground of matters arising after the order was made (UCPR r 668). It is in my view appropriate to identify the historical extent or source of the Court's power to set aside an order in the nature of an injunction.

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7 *Fylas Pty Ltd v Vynal Pty Ltd* [1992] 2 Qd R 593, 598.

8 (2005) 223 CLR 1, 17.

[30] Before the passage of the *Judicature Act* 1876 (Qld), the power of the Court to set aside a final order on the equitable side was by way of a bill of review. In *Grierson v The King*,[9] Dixon J said that:

> "In Chancery, rehearings, that is, appeals, were no longer admitted after enrolment of the decree, although an independent bill of review might be filed based upon apparent error or on facts newly discovered…"

[31] This description of the practice on a bill of review was expanded upon in a number of subsequent High Court cases. In *Eastman v The Queen*,[10] Gummow J said:

> "It is true that, under the procedures which had evolved in the Court of Chancery, the grounds upon which a bill of review might be brought after enrolment of the decree or order had included newly discovered matter which 'could not possibly have been used when the decree was made'. In *Graziers Association of NSW v Australian Legion of Ex-Servicemen and Women*, Jordan CJ pointed out that the right of rehearing in the Court of Chancery had involved the exercise of appellate rather than original jurisdiction. However, that system eventually was replaced by the Judicature structure including the modern Court of Appeal where, as discussed above, express provision was made respecting the receipt of further evidence." (footnotes omitted)

[32] See also *Builders Licensing Board v Sperway Construction (Syd) Pty Ltd*.[11] The equity practice was also described by Brennan J in *Port of Melbourne Authority v Anshun Pty Ltd*,[12] as follows:

> "At that time, it was necessary to obtain the leave of the court to file a bill of review to reverse a decree which had been signed and enrolled where the bill was on the ground of the discovery of some new matter-ordinarily evidence of matters which had been in issue in the suit-which 'might probably have occasioned a different determination' (Mitford's *Chancery Pleadings*, pp. 84-85; 5th ed. (1847), pp. 102, 103). The granting of leave was discretionary (*Wilson v. Webb*), and leave would be refused if the new matter could have been discovered with 'reasonably active diligence' (*Young v. Keighly*). Unless the court gave leave to file a bill of review to permit the parties to reopen the issues concluded by the decree, the rule of res judicata put an end 'to every point which properly belonged to the subject of litigation'. The Vice-Chancellor does not assert the existence of a power to stay a proceeding upon a cause of action which has not merged in a decree. He expresses no exception to the operation of the rule of res judicata, though he refers to the possibility of reversing a judgment by a bill of review and

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9 (1938) 60 CLR 431, 436.
10 (2000) 203 CLR 1, 63 [189].
11 (1976) 135 CLR 616, 626-627.
12 (1981) 147 CLR 589, 613.

> thereby removing the foundation upon which the rule operates." (footnotes omitted)

[33] There is another detailed discussion of the practice in the Court of Appeal of New South Wales in *Harrison v Schipp*.[13]

[34] It was this state of the law that preceded the reforms introduced by the Judicature Acts. It was also referred to by Griffith CJ in the Full Court of this Court in *Woods v Sheriff of Queensland*,[14] in a passage which, as McPherson J explained in *KGK Constructions Pty Ltd v East Coast Earthmoving Pty Ltd*,[15] foreshadowed the rules of court peculiar to Queensland in the *Rules of the Supreme Court* 1900 (Qld), Order 45,[16] now embodied in UCPR r 668 (and to an extent r 667).

[35] I will return to UCPR r 668.

The terms of the contract and consent orders

[36] There is also a significant body of case law as to whether a consent order can be set aside. In the circumstances of this case, in my view, the first question is whether the alleged contract of compromise, which the consent order embodies or evidences, operates as an accord and satisfaction or an accord executory. The distinction between the two was drawn in the now classical passage from Dixon J's reasons for judgment in *McDermott v Black*:

> "The essence of accord and satisfaction is the acceptance by the plaintiff of something in place of his cause of action. What he takes is a matter depending on his own consent or agreement. It may be a promise or contract or it may be the act or thing promised. But, whatever it is, until it is provided and accepted the cause of action remains alive and unimpaired. The accord is the agreement or consent to accept the satisfaction. Until the satisfaction is given the accord remains executory and cannot bar the claim. The distinction between an accord executory and an accord and satisfaction remains as valid and as important as ever. An accord executory neither extinguishes the old cause of action nor affords a new one…
> …of accord and satisfaction there are two cases, one where the making of the agreement itself is what is stipulated for, and the other, where it is the doing of the things promised by the agreement. The distinction depends on what exactly is agreed to be taken in place of the existing cause of action or claim. An executory promise or series of promises given in consideration of the abandonment of the claim may be accepted in substitution or satisfaction of the existing liability. Or, on the other hand, promises may be given by the party liable that he will satisfy the claim by doing an act, making over a thing or paying an ascertained sum of money and the other party may agree to accept, not the promise, but the act, thing or money in satisfaction of his claim. If the agreement is to accept the promise in satisfaction, the discharge of the liability is immediate; if the

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13 (2002) 54 NSWLR 612, 616-624.
14 (1895) 6 QLJ 163, 165.
15 [1985] 2 Qd R 13, 19-20.
16 Sir Samuel Griffith is acknowledged to have been the draftsman of those rules.

> performance, then there is no discharge unless and until the promise is performed."[17]

[37] There is authority for the existence of a further distinction between an accord and satisfaction and an accord and conditional satisfaction,[18] but it is not necessary to consider it in this case. It should be borne in mind that the focus is not, per se, on the categories of accord executory or accord and satisfaction. They are the expression of the conclusion of the effect of the contract. The focus must be on the agreement made by the parties.

[38] If the contract of compromise in the present case was an accord and satisfaction, on the terms of the consent order, the plaintiff is not able to rely on the defendants' non-performance of those terms as the basis to terminate the contract for fundamental breach or a repudiation, so as to restore the parties to their former rights. That is because, if the parties agreed to accept the rights under the compromise as the satisfaction for their former rights, the former rights were given up for the rights under the contract. Thus, if the contract was an accord and satisfaction, termination for breach or repudiation by the plaintiff will not resurrect the compromised right to an easement. Termination operates to discharge the parties from their executory or unperformed obligations. It does not rescind the contract, ab initio, as if it was never made.

[39] It might be thought that the terms of the consent order are an indication that the plaintiff's claim was compromised by giving up its rights, if any, otherwise. The differences between accord and satisfaction and accord executory are discussed in Foskett, *The Law and Practice of Compromise*, 7 ed, Ch 8. In particular, the learned author says:

> "Generally speaking, therefore, an agreement of compromise will discharge all original claims and counterclaims unless it expressly provides for their revival in the event of breach. Where a party wishes to be able to revive his original claim in the event of the other party's failure to comply with his obligations under the compromise, he would be well-advised to insist that a term to that effect should be incorporated. Any judgment or order made reflecting an agreement of this nature would need to be drafted so as to give effect to this intention."[19] (footnotes omitted)

[40] That an order made contemplates further working out does not necessarily militate against the conclusion that the compromise was intended to be final. The focus must be on what the parties agreed.[20] The parties in the present case did not argue this question on the hearing of the application for leave to amend the claim. It would be an error for me to engage upon the question further at this point, where the parties have not tendered the issue for decision yet, as *Alford v Ebbage*[21] shows.

Setting aside a consent order for breach of contract

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17 (1940) 63 CLR 161, 183-5.

18 The principles were recently discussed in *Scaffidi v Perpetual Trustees Victoria Ltd* (2011) 42 WAR 59 67-9 [26]-[33].

19 At [8-07].

20 *Blue Moon Grill Pty Ltd v Yorkey's Knob Boating Club Inc* [2006] QCA 253, [20]-[32].

21 [2003] 1 Qd R 343.

[41] The second question is whether, in the circumstances, the consent order can be set aside for breach of contract. This question may overlap with the previous question, but I proceed to consider it separately.

[42] There are numerous cases that deal with the operation of a consent order as a contract. A convenient starting point is the leading case in the High Court of Australia: *Harvey v Phillips.*[22] In that case, judgment had not been signed or entered on the compromise of the plaintiff's claim for damages for personal injuries for medical negligence, when the plaintiff sought to repudiate the agreement. Nevertheless, the Court's reasons for judgment discuss the rights attaching to a consent order or judgment, by referring to a dictum of Lindley LJ in *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* as follows:

> "… nor have I the slightest doubt that a consent order can be impeached, not only on the ground of fraud but upon any grounds which invalidate the agreement it expresses in a more formal way than usual … To my mind, the only question is whether the agreement upon which the consent order was based can be invalidated or not. Of course, if that agreement cannot be invalidated the consent order is good."[23]

[43] In *Harvey*, the High Court distinctly referred to the fact that the compromise was not embodied in a consent order or judgment. They said of the circumstances as follows:

> "In such a case, at all events until the judgment or order embodying the compromise has been perfected, an authority exists in the court to refuse to give effect to or act upon the compromise and perhaps to set it aside. …"[24]

[44] It was in that context, namely one where a judgment or order had not been perfected, that the High Court made the following well known statement:

> "The question whether the compromise 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, the grounds for example such as illegality, misrepresentation, non-disclosure of a material fact where disclosure is required, duress, mistake, undue influence, abuse of confidence or the like."[25]

[45] Breach of contract was not included as one of the grounds on which it was said that a compromise might be set aside. That is perhaps not surprising. For example, where an action for damages for negligence is compromised on terms that the plaintiff will accept a sum of money in respect of the claim, and the defendant will pay that sum, it is often agreed that the sum is to be reflected in a judgment that the plaintiff recover that sum from the defendant. On the judgment being entered, the plaintiff will have no right to terminate the agreement, so as to be restored to his or

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22 (1956) 95 CLR 235.
23 (1895) 2 Ch 273, 280.
24 Ibid, 243.
25 Ibid, 243-244.

her earlier rights, merely because the defendant does not perform the "term" that the defendant pay the amount of the agreed judgment.

[46] The passage from *Harvey* extracted above has been adopted and applied in subsequent cases. One of the earliest was *Rayner v Rayner*,[26] where Lucas J held that a consent order may be set aside or varied where the underlying contract is discharged or may be rectified. Since then, *Harvey* has often been cited, or the well known statement set out above has been extracted, in subsequent cases, including *General Credits Ltd v Ebsworth*,[27] *Paino v Hofbauer*,[28] *Spies v Commonwealth Bank of Australia*,[29] *Harris v Caladine*,[30] *Fylas Pty Ltd v Vynal Pty Ltd*,[31] *Rockett v The Proprietors – "The Sands" Building Units Plan No. 82*,[32] *Lewandowski v Lovell*,[33] *Chavez v Moreton Bay Regional Council*[34] and *Nau v Kemp & Assoc Pty Ltd*.[35]

[47] None of those cases specifically refers to a contract which is terminated for breach. In my view, there is a distinction in principle between the position of a party entitled to terminate a contract for breach and a party entitled to rescind a contract for misrepresentation or undue influence or mistake.

[48] Rescission of a contract for misrepresentation, or undue influence, or mistake, operates ab initio. That is, the relief results in the parties' positions being adjusted on the footing that the contract was of no effect from the beginning. Where a consent order is made pursuant to such a contract, it can be seen that a rescission of the contract takes away the contractual foundation of the obligations reflected in the consent order. The distinction between that situation and termination for breach of contract is best made in the famous passage from Dixon J's reasons in *McDonald v Dennys Lascelles Limited*:

> "When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected. When a contract is rescinded because of matters which affect its formation, as in the case of fraud, the parties are to be rehabilitated and restored so far as may be, to the position they occupied before the contract was made. But when a contract, which is not void or voidable at law, or liable to be set aside in equity, is dissolved at the election of one party because the other has not observed an essential condition, or has committed a breach going to

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26 [1968] QWN 42, 95.
27 (1986) 2 Qd R 162, 165.
28 (1988) 13 NSWLR 193, 198.
29 (1991) 24 NSWLR 691, 696-697.
30 (1990-1991) 172 CLR 84, 104.
31 [1992] 2 Qd R 593, 599.
32 (2002) 1 Qd R 307, 310-311.
33 [2006] WASCA 54, [31]-[32].
34 [2010] 2 Qd R 299, 306-307.
35 (2010) 77 NSWLR 687, 696 [29].

> its root, the contract is determined so far as it is executory only, and the party in default is liable for damages for his breach…".[36]

[49] Thus, where a contract is terminated for fundamental or other breach or repudiation, the termination discharges the parties only from future or executory obligations under the contract. Any accrued rights at the time of termination, including accrued rights to damages for breach of contract are not avoided. If it were correct to say that a termination for breach of contract or repudiation were a basis to set aside a consent judgment reflecting the contract, the law of compromise and the principles of accord and satisfaction would be affected.

[50] As well, if the parties were generally able to set aside a judgment or consent order (other than an order for specific performance or the like) because of termination for breach of contract, the judgment or order would no longer represent a final judgment, as that concept is usually understood. A final judgment or order is treated as a resolution of the dispute which it quells. Ordinarily, it may only be set aside on appeal, or for fraud or, in Queensland, under UCPR r 668. The power to set aside a consent judgment or order on the principle of *Harvey* operates as an additional category or group of cases.

[51] None of the decided cases to date has involved setting aside a final judgment for breach of the contract embodied in the terms of a consent judgment or order. The only cases which refer to that possibility of which I am aware are *Paino* and *Chavez*. In *Paino*, McHugh JA said:

> "Nevertheless, when a party asks that a consent order based on a contract should be set aside or varied and the underlying contract could not be set aside or varied, the case would need to be exceptional before the Court would exercise its discretion in favour of an applicant. Moreover, by itself the failure of the applicant to comply with the terms of a consent order based on a contract could rarely, **if ever**, be a sufficient ground to vary the order. This is particularly so when the parties have stipulated that time for the performance of the parties' obligations was to be of the essence of the agreement."[37] (emphasis added)

[52] In *Chavez*, Keane JA referred to that passage,[38] but he also referred to the reasons of Clarke JA in *Paino* which denied that a consent order embodying a contract could be set aside without making "out a case for the setting aside of the contract or the granting of relief from the consequences of non-compliance with its terms, in his application for the variation, or setting aside, of the consent order".[39]

[53] In my view, nothing in the plaintiff's proposed amended claim and further amended statement of claim alleges a basis in fact to develop a principle that a consent order embodying a contract made in compromise of claims such as those made the present case under s 185 of the PLA may be set aside for non-performance or breach or repudiation of the contract by the defendants, as such, based on the principle of *Harvey*.

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36 (1933) 48 CLR 457, 476-477.
37 (1988) 13 NSWLR 193, 198.
38 [2010] 2 Qd R 299, 306 [33].
39 [2010] 2 Qd R 299, 307 [34].

[54] I am fortified in that view by some English cases. For example, in *Hollingsworth v Humphrey*,[40] the Court of Appeal of England and Wales considered an appeal from a Judge's refusal to lift a stay in the "*Tomlin* order"[41] form that had been made on the basis of a contract of compromise for the sale of disputed property and the division of the proceeds. The defendant failed to perform the term that the property be sold. The plaintiff applied to lift the stay and proceed to trial. Fox LJ referred to *Huddersfield*, mentioned above in *Harvey*, and continued:

> "The present case, however, is not of that kind. There was no mistake or fraud or other element **which vitiated the contract ab initio.**
> There is, however, a wider principle which is stated in *Cooper v Williams* [1963] 2 QB 567 (which is a case of a Tomlin order) where Lord Denning MR at p. 300 said:
> '…I am of the opinion that the effect of a stay is that it is not equivalent to a discontinuance or to a judgment for the plaintiffs or the defendants. It is a stay which can be and may be removed if proper grounds are shown'." (emphasis added)

[55] Accepting that in the case of a stay under a *Tomlin* order the failure of a party to perform the terms of the compromise may be proper grounds to lift the stay, in my view there is a distinction between a *Tomlin* order stay, so that the terms of a contract of compromise may be carried out, on the one hand, and a final consent judgment or order, on the other, of the kind I have discussed above.

[56] Another category of case where a final judgment or order mar be set aside is where the parties agree to such an order. In a recent helpful article: Tarrant, "Consent Orders Based on Binding Contracts"[42], the author expressed it thus:

> "In addition to the power to set aside consent orders if the underlying contract can be set aside there is also power to amend or set aside a consent order if all the parties consent. In *Permanent Trustee Co (Canberra) Ltd v Stocks & Holdings (Canberra) Pty Ltd* [(1976) 28 FLR 195] the parties compromised a contractual dispute. Judgment was consented to based on the compromise agreement. The defendant later sought to have the consent judgment set aside alleging that the solicitor acting for the defendant as the Canberra agent for Sydney principals had misunderstood his principal's instructions. The plaintiff agreed to have the consent order set aside and the issue before the court was whether there was jurisdiction to set aside a judgment based on the parties consenting to such an order. Brennan J concluded that the 'better view appears to be that the court has jurisdiction to set aside a regular judgment if the parties to the judgment consent to the court doing so'." (footnotes omitted)

[57] If the contract of compromise between the parties in the present case expressly or impliedly agreed that, in the event of non-performance, the plaintiff (or defendants) were to be restored to the position as if the consent order had not been made, that

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40 1987 WL 492267.

41 Foskett, *The Law and Practice of Compromise*, 7 ed, [9-18]-[9-22].

42 (2011-2012) 28 JCL 237.

might arguably constitute a consent to an order setting the consent order aside. This question was not argued by the parties and I express no concluded view upon it.

[58] The terms of the contract of compromise are not pleaded in full in the proposed further amended statement of claim. As previously stated, the plaintiff submits that the consent order compromised the plaintiff's claim for the relief sought in par 3 of the claim and the implication appears to be that it did not otherwise compromise the claim unless the agreement was performed by the defendants. But the proposed further amended statement of claim does not allege enough, in my view, to support an order setting aside the consent order, having regard to the discussion of relevant principles set out above, based on the principle in *Harvey* or an agreement to set aside the consent order.

UCPR 668

[59] UCPR 668 provides:

> "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."

[60] In the present case the plaintiff submits that r 668 empowers the Court to set aside the consent order. I have mentioned the origin of r 668 above. The predecessor rule, O 45 r 1, was brought into focus by the judgment in *KGK* in 1984 also mentioned above. Since then, there have been a number of cases which have considered O 45 r 1 or r 668, including the following Court of Appeal decisions: *Stubberfield v Brisbane City Council*,[43] *Rankin v Agen Biomedical Ltd*,[44] *Rockett v The Proprietors – "The Sands" Building Units Plan No 82*,[45] *IVI Pty Ltd v Baycrown Pty Ltd*,[46] and *Mbuzi v Favell*.[47] None of those cases is analogous to the

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43 [1996] QCA 184.
44 [1999] 2 Qd R 435.
45 [2002] 1 Qd R 307.
46 [2007] 1 Qd R 428.
47 [2007] QCA 393.

present case. A case involving an application to stay an order for specific performance under the former O 45 was *Breen v Lambert*.[48]

[61] There is no doubt that under r 688(1)(a) the power exists to set aside a final order. In my view, it is at least arguable that the power under r 668(1)(a) may extend, in an appropriate case, to setting aside a consent order where that order is a final order. That possibility is not excluded by the circumstances that the power under r 668(1)(a) is a discretionary power or that it has been exercised, to date, in circumstances which are informed by the procedures previously described, and having regard to the principles embodied in the tenet expressed in *D'Orta* set out above.

[62] Accordingly, in my view, the plaintiff's application to amend the claim to claim an order to set aside the consent order and for other relief is not one which should be refused at this stage on the ground that the proposed further amended statement of claim would disclose no reasonable cause of action or is an abuse of process.[49]

Separate proceeding to set aside the consent order

[63] The remaining question is whether an application to set aside the consent order must be brought in a separate proceeding.

[64] Referring to the case before them, the High Court in *Harvey* said:

> "Judgment has not in fact been signed or entered, so we were informed. Had judgment been signed it may be doubted whether it was open to the plaintiff to attack it by making an application to the Full Court in the action to set aside the judgment and compromise."[50]

[65] A number of other cases say that a separate proceeding is the way it should be done or must be done.[51] Those cases are not just concerned with the circumstance that the judgment or order to be set aside is a consent order. In general, a proceeding to set aside a final judgment or order is one that should be brought by a separate proceeding. There is more than one possible reason why that view might be taken. One is that the cause of action in the original proceeding merged in the challenged judgment or order, so the Judge who gave judgment in the original proceeding is functus officio. Second, it has been said that if the basis for the challenge requires the determination of a substantial question of fact it is inappropriate that the challenge should be brought by way of motion or summary application on affidavit.

[66] In *Rayner*, Lucas J also held the judgment or order made by consent cannot be set aside or varied by a proceeding in the action in which it was made, but only in a fresh action instituted for the purpose and relying on one of the considerations mentioned in the passage quoted from *Harvey*.[52]

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48 [1992] QCA 144.

49 Compare UCPR r 171, *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, 129-130 and *Batistatos v Road and Traffic Authority of NSW* (2006) 226 CLR 256, 265-267 [9]-[14], which are relevant to inform whether the proposed amendments should be refused.

50 (1956) 95 CLR 235, 242.

51 *Spann v Starwell Pty Ltd* [1984] 1 Qd R 29, 35; *Department of Communities (Child Safety Services) v CAR* [2010] QCA 105, [19]; *Spies v Commonwealth Bank of Australia* (1991) 24 NSWLR 691, 697 and 699-701.

52 [1968] QWN 42, 95.

[67] The subject was discussed recently in *McVey v St Vincent's Hospital (Melbourne) Ltd*:[53]

> "The bringing of a separate proceeding has been held to be the appropriate means to seek to set aside a perfected judgment. Whether that is so in all cases has been doubted, but in the present case even if there was an arguable case for setting aside the judgment under one or other of the exceptional grounds identified by Brennan J, and discussed above (which, as I have said, is not the case, in any event), this Court could not resolve the questions of fact which would need to be addressed, nor would it be appropriate to refer the case back to the County Court because the only relevant proceeding (which remains dismissed) is that of the applicant against St Vincent's, and in which State Trustees was not a party." (footnotes omitted)

[68] In Queensland, r 668 provides for an application to stay the enforcement of an order or give other appropriate relief on the ground of facts arising after an order has been made. On such an application the Court may set aside or vary the order. That may be done by an application made in the original proceeding supported by affidavit material setting out the matters necessary.

[69] In my view, under the UCPR, there is no procedural bar, as a matter of law, against bringing an application to set aside a consent judgment or order in the original proceeding. If the judgment or order is set aside, any question of "merger" is answered. That a challenge is started by an application in the original proceeding does not dictate the method of proceeding on the application. The Court may direct that the application is to proceed as if started by claim with pleadings and thereby engaging the other provisions of the UCPR which apply to a proceeding started by claim. It may be that as a matter of discretion the Court would direct a fresh proceeding to be started in an appropriate case. But it is not, in my view, a matter of the Court's power to entertain the application.

[70] For those reasons, in my view, the defendants' objections to the plaintiff's application to set aside the consent order and to amend the claim are not such that those applications should be dismissed summarily. As stated at the beginning of these reasons, the question remains whether in the circumstances the consent order made on 29 April 2014 should be set aside.

[71] I will hear the parties on the orders that should be made consequent upon these reasons and any further directions.

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53 [2005] VSCA 233, [53].