SUPREME COURT OF QUEENSLAND

CITATION:	*Amos v Wiltshire* [2016] QCA 77
PARTIES:	**EDWARD AMOS** (applicant/respondent) **v** **CHRISTOPHER WILTSHIRE** (respondent/appellant)
FILE NO/S:	Appeal No 4199 of 2010 DC No 1527 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Application to Reopen (Civil)
ORIGINATING COURT:	District Court at Brisbane – [2010] QDC 138
DELIVERED ON:	Orders delivered ex tempore 28 August 2015 Reasons delivered 1 April 2016
DELIVERED AT:	Brisbane
HEARING DATE:	25 August 2015
JUDGES:	Fraser and Gotterson and Philippides JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Delivered ex tempore on 28 August 2015:** **1. The application filed by the applicant on 2 August 2012 is dismissed.** **2. The application filed by the applicant on 24 August 2015 is dismissed.** **3. The applicant is to pay the respondent's costs of each of those applications, including costs reserved by orders of this Court and by order of Martin J made on 29 August 2014, on the indemnity basis.** **4. The applicant is to pay to the respondent the sum of $200,288.90, being the claim, costs and interest to today, together with interest on the sum of $133,390.28 pursuant to s 59(3) of the *Civil Proceedings Act* 2011 (Qld), such interest to be calculated from 28 August 2015 until the date of payment.** **5. The applicant is to pay the respondent's costs including reserved costs, if any, of and incidental to the respondent's application filed in District Court action 1527 of 2009 on 13 July 2012 for repayment of monies paid by the respondent pursuant to the order of Samios DCJ in that action, on the standard basis.**

6. The orders made on 16 May 2013 by Muir JA, save for paragraph 1(c) of those orders, are vacated.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – AMENDING, VARYING AND SETTING ASIDE JUDGMENTS AND ORDERS – ACTIONS TO REVIEW OR SET ASIDE JUDGMENT OR ORDER – where the applicant was unsuccessful on appeal and a retrial was ordered – where prior to the retrial the applicant filed an application pursuant to r 668 of the *Uniform Civil Procedure Rules* 1999 (Qld) – where the Court ordered that issues arising in that application be remitted to the Trial Division – where a judge of the Trial Division made findings against the applicant – where the applicant subsequently sought a further hearing in relation to the issues determined in the Trial Division – where the applicant alleged that facts had been discovered which would have entitled him to an order in his favour – where the 'fresh evidence' was unpersuasive and equivocal – where the 'fresh evidence' could have been discovered earlier through reasonable diligence – where the considerable delay between the determination in the Trial Division and the present application was a consequence of the applicant bringing and abandoning a number of other applications – where the Court considered it wholly inappropriate to allow the applicant further time to challenge the Court's final orders of 22 October 2010 and the determination in the Trial Division

Uniform Civil Procedure Rules 1999 (Qld), r 668(1)

IVI Pty Ltd v Baycrown Pty Ltd [2007] 1 Qd R 428; [2006] QCA 461, followed
Wiltshire v Amos [2010] QCA 294, related
Wiltshire v Amos [2014] QSC 210, related

COUNSEL: B W J Kidson for the applicant/respondent
P L O'Shea QC, with K Boulton, for the respondent/appellant

SOLICITORS: Keller Nall & Brown for the applicant/respondent
Sharma Lawyers for the respondent/appellant

[1] **FRASER JA:** The Court allowed the appeal in this matter in 2010. After subsequent litigation relating to that decision, on 28 August 2015 the Court dismissed applications filed by the respondent to the appeal and made consequential orders. These are my reasons for joining in those orders.

Background to the applications

[2] Some of the relevant background is summarised in Muir JA's reasons (with which Cullinane and Jones JJ agreed) for the decision made in 2010 to allow Mr Wiltshire's appeal[1]:

> "[1] The respondent sued a company which carried on business as a legal costs assessor ("Monsour") and two of its directors in the

[1] *Wiltshire v Amos* [2010] QCA 294.

Magistrates Court for damages for negligence in relation to a costs assessment provided by Monsour in proceedings to which the respondent was a party. The claim was dismissed on 31 August 2004 and the respondent was ordered to pay the defendants' costs on an indemnity basis assessed at $49,996. An appeal to the District Court against the Magistrate's decision, other than in relation to costs, was dismissed with costs on 17 May 2005. An appeal to the District Court against the costs order was allowed on 2 November 2006 but only to the extent that the costs award was reduced by $4,490. The respondent was ordered to pay the other parties' costs of the appeal on the standard basis ("the Costs Order").

[2] An appeal against the Costs Order was dismissed with costs by the Court of Appeal on 24 July 2007. The respondent was not ready to leave Monsour in peace. By 1 November 2007 he was alleging that the Costs Order had been procured by fraud: a somewhat unlikely fraud said to have been constituted by an erroneous statement made by Monsour's counsel to the judge who made the Costs Order in the presence of the respondent's own counsel and was not corrected by him.

[3] On 2 January 2008 the respondent commenced District Court proceeding BD 2 of 2008 by filing a claim and statement of claim claiming that the Costs Order be set aside and that the defendants pay the respondent's costs of the appeal and damages in the amount of $250,000. The claim and statement of claim were drafted by the appellant, a barrister, and provided to the respondent by the appellant in a meeting on about 6 December 2007. The respondent rendered an account dated 6 December 2007 in the sum of $1,000 for "Fee on brief-drawing and settling claim and statement of claim".

[4] The respondent met the appellant for the first time in the appellant's chambers on about 23 November 2007. The appellant was then given a bundle of documents which included the District Court judge's decision of 2 November 2006 and a letter from the respondent to the appellant dated 22 November 2007. The letter commenced:

> "As discussed briefed herewith please find the following documents for your examination and to advise if any grounds exist to overturn [the] judgment and, if so, then what are the prospects of success. Also what is the correct procedure if there are any grounds to overturn the judgment."

[5] The claim and statement of claim identified the solicitors for the respondent as Keller, Nall & Brown. Put in evidence on the trial of these proceedings, without objection by the appellant, was a "client agreement" which, on the face of it, was signed by the respondent and the respondent's solicitors on 24 December 2007. It recorded an agreement between the solicitors and the respondent that the former act on the latter's behalf in relation to the

> proceedings. It recited that, "… the client has received advice from [the appellant] that he has good prospects of success in having the said judgment [that of the District Court on 2 November 2006] set aside".
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> …
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> [6] In the proceedings, commenced in the District Court on 2 June 2009, the respondent claimed against the appellant $134,302.17 damages for negligence or breach of contract and for costs and interest. In the statement of claim it was alleged that:
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> (a) The appellant was retained directly by the respondent;
> (b) The respondent briefed the appellant to advise if there were grounds available to have the Costs Order set aside;
> (c) The appellant advised the respondent that the Costs Order had been procured by fraud of the respondent's counsel "by having made submissions which falsely asserted that the costs hearing lasted a single day but the hearing was extended and time actually engaged in court was … a total of 7 hours and 30 minutes …";
> (d) The appellant failed to exercise due skill and diligence by not ascertaining and informing the respondent that the facts were insufficient to support an allegation of fraud, that the action had no prospects of success and was likely to be summarily struck out with an award of indemnity costs against the respondent;
> (e) Had the appellant advised the respondent of the matters referred to above, the respondent would have instructed that the claim and statement of claim not be prepared;
> (f) The respondent suffered loss and damage in the sum of $114,302.17.
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> [7] The appellant, in his defence: admitted that he had been briefed directly by the respondent; denied that he had been retained to advise the respondent; alleged that the retainer was limited to drawing and settling the claim and statement of claim and alleged that the respondent would have proceeded as he did regardless of any advice given or which may have been given to him by the appellant."

[3] At the trial in the District Court the respondent gave evidence that he commenced District Court proceeding BD 2 of 2008 in reliance upon oral advice by the appellant that the respondent had good prospects of having the Costs Order set aside on the ground that it was tainted by fraud. The respondent gave evidence that he had not obtained any advice about that from Mr Tait SC. Mr Collinson, a principal of the respondent's solicitors (Keller, Nall & Brown), gave evidence that in a conversation after early December 2007 the appellant said that the respondent's prospects of success were good. The appellant challenged that evidence and the appellant gave evidence that he had advised the respondent of the difficulty of proving fraud, that the respondent's claim had very limited prospects of success, and that there was a chance of an adverse costs order on an indemnity basis.

[4] Samios DCJ was persuaded to resolve the issue against the appellant by Mr Collinson's evidence and the evidence of the costs agreement. Upon that footing, Samios DCJ

held that the appellant had breached his duty to exercise reasonable care and skill and that the respondent had suffered loss and damage as a result. Judgment was given against the appellant for $118,931.40 with costs.

[5] The appellant's appeal against that decision succeeded upon the basis of fresh evidence of documents which the respondent had not disclosed to the appellant. Of critical importance were statements in letters, in written submissions in other District Court proceedings, and (of most relevance in the present matter) in Mr Collinson's affidavits, to the effect that the respondent commenced District Court proceeding BD 2 of 2008 upon the advice of senior counsel that the Costs Order was tainted by fraud and should be set aside. In Mr Collinson's affidavits he swore to the contents of his letters dated 5 and 8 November 2007, which referred to the respondent intending to file and serve the claim and statement of claim "on the advice of Senior Counsel". In one of his affidavits Mr Collinson also swore to having "intended to file and serve [the claim and statement of claim] in the District Court on the advice of Senior Counsel". (The issue in the present matter is related to the question whether the appellant was aware of the statements to that effect in the second Collinson affidavit, which the respondent stated was in a brief held by the appellant.)

[6] Muir JA considered that the fresh evidence on its face "casts grave doubt on the respondent's contention that it was the appellant who first raised the question of fraud and that it was the appellant's advice on prospects of success that caused him to institute the proceedings", that the fresh evidence was directly relevant to reliance and causation, and that the respondent's evidence in the District Court that Mr Tait SC said nothing to him about fraud and did not advise on prospects of success was inconsistent with assertions by Mr Collinson in his correspondence and with the respondent's own senior counsel's written submissions.

[7] Muir JA referred to a conflict in the parties' affidavits upon the question whether, as the respondent contended, the appellant had always been aware of the documents which the respondent had not disclosed:

> "[36] …The respondent swore, in effect, that in late December 2007 he briefed the appellant to prepare an application to set aside a warrant of execution filed in the Magistrates Court in the Monsour proceedings and also to prepare the supporting affidavit of Mr Collinson. He also swore to the following. On or about 20 December 2007, the appellant dictated to him the grounds to be included in the application and also "the contents and exhibits to be included" in Mr Collinson's affidavit. On or about 22 February 2008 the appellant, in the respondent's presence, prepared and settled a further affidavit to be sworn by Mr Collinson in BD 2 of 2008. The appellant on that occasion used the earlier affidavit of Mr Collinson as a precedent.
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> [37] In an affidavit responding to allegations in the respondent's affidavit, the appellant denied: being briefed as alleged by the respondent; conferring at a meeting with the respondent on or about 20 December 2007 and dictating to him grounds to be included in an application to set aside the warrant of execution or dictating the contents of any affidavit for that purpose. He denied having had any part in preparing or settling Mr Collinson's affidavit of 22 February 2008 and pointed out that the affidavit appears to have been hand-typed on a manual typewriter which

> was the respondent's method of preparing such documents. He denied having seen or been given the disputed affidavits or copies of them. He explained that in preparing a draft submission to the District Court in BD 2 of 2008, he was able to refer to affidavits of Mr Collinson, not because he had seen them, but because he had been informed of their existence by the respondent.
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> [38] In an affidavit filed on the morning of the hearing of the appeal, the respondent swore that the appellant was aware of Mr Collinson's affidavit of 24 December 2007 as on or about 22 February 2008, the appellant had settled and witnessed an affidavit by the respondent in BD 2 of 2008 which referred to Mr Collison's affidavit of 24 December 2007."

[8] The parties were cross-examined on their affidavits. Muir JA considered that, "[n]o doubt was cast on the appellant's evidence in cross-examination and, in particular, his evidence that he was not instructed to prepare the application to set aside the warrant of execution or any material in support of it and that he had never seen copies of the affidavits of Mr Collinson which the respondent swore had been provided to him."[2] Muir JA referred to aspects of the respondent's evidence which "cast doubt on its accuracy", and concluded that the appellant's evidence was to be preferred to the evidence of the respondent, the respondent's explanation for his failure to disclose the relevant documents was unsatisfactory, and the fresh evidence should be received.[3] In addition, Muir JA found that "it would appear that false or misleading evidence had been placed before the primary judge"[4] about aspects of the costs and expenses which the respondent claimed to have incurred as a result of the appellant's alleged negligence. Muir JA refrained from expressing concluded views upon the accuracy of the evidence given by the parties or Mr Collinson and remarked that the resolution of the probative value of that evidence and its bearing on the parties' versions was a matter for the judge who conducted the re-trial.[5]

[9] In the result on 22 October 2010, the Court, allowed the appeal, set aside the orders made in the District Court, and ordered a re-trial.

[10] Before the new trial commenced, on 2 August 2012 the respondent filed an application in the appeal for orders pursuant to r 668 of the *Uniform Civil Procedure Rules* that the Court's 22 October 2010 judgment be set aside and that it be stayed pending the determination of that application. The evidence upon which the respondent relied in support of that application was an affidavit by Ms Schiewe, who had acted as the solicitor for the appellant in his appeal against the District Court decision. Ms Schiewe's affidavit supported the respondent's evidence and contradicted the appellant's evidence.

[11] On 22 August 2012 the Court ordered that eight issues arising in that application be remitted to the Trial Division for determination by a judge of that Division and that the hearing of the appeal be adjourned to a date to be fixed. After a contested hearing in the Trial Division on 8 and 9 April 2014, Martin J published his Honour's determination with reasons on 29 August 2014. The effect of that determination may be summarised in the following terms:

> (a) Neither of the affidavits of Mr Collinson sworn on 24 December 2007 and 22 February 2008 had been in the possession of the appellant or perused

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2 [2010] QCA 294 at [39].
3 [2010] QCA 294 at [39]-[43], [49].
4 [2010] QCA 294 at [53].
5 [2010] QCA 294 at [54].

by him prior to the commencement of the preparation by himself or anyone on his behalf of any document intended to be filed or otherwise relied on in his appeal to the Court of Appeal from the District Court decision.

(b) Ms Schiewe and the respondent had not prepared or assisted in the preparation of any affidavit filed or intended to be filed in the appeal and the matters deposed to by Ms Schiewe which supported the evidence of Mr Amos were not factually correct.

(c) The matters in the affidavit sworn by the appellant in the appeal on 6 October 2010 which were the subject of evidence and consideration by Martin J were correct and there was no evidence that the appellant was aware of any factual inaccuracy in his affidavit at the time he swore it or prior to his giving oral evidence in the appeal.

[12] The respondent acknowledged that Martin J's determination established that, consistently with the appellant's evidence and inconsistently with the respondent's evidence, the appellant did not see the affidavit of Mr Collinson sworn 24 December 2007 ("the first Collinson affidavit") or the affidavit of Mr Collinson sworn 22 February 2008 ("the second Collinson affidavit") until those affidavits were shown to the appellant in the course of preparation for the 2010 appeal, and the appellant did not ever receive a duplicate junior counsel brief which included the second Collinson affidavit when retained with Mr Tate QC by the appellant in proceeding BD 2 of 2008.

[13] Martin J's determination reflected his Honour's acceptance of the appellant's version of events, which Martin J found was consistent with disinterested evidence given by two barristers, Ms Moody and Mr Tait QC. Martin J found that the evidence of Ms Schiewe "was unreliable and, in some places, unbelievable" and that the evidence of the respondent "was tailored to suit his case and he shifted ground as it became apparent to him that his statements were demonstrably untrue."[6] Martin J gave detailed and compelling reasons for those findings.[7]

[14] On 24 September 2014 the respondent filed a notice of appeal against Martin J's determination which challenged his Honour's findings of fact. That appeal was dismissed with costs by consent in April 2015.

[15] On 23 July 2015, Mr Amos filed an amended application in the form of his application of 2 August 2012 with the addition of paragraph 1A, in which the respondent sought leave to adduce additional affidavit evidence. It was that application which was listed to be heard on 25 August 2015. The respondent informed the Court that the basis of paragraph 1A had been a contention that the evidence upon which the appellant had relied in his successful appeal had been obtained in breach of an implied undertaking by him, but that the respondent abandoned that contention. Accordingly, on 25 August 2015 the Court ordered that paragraph 1A of the respondent's amended application to the Court of Appeal dated 23 July 2015 be struck out.

The respondent's applications of 2 August 2012 and 24 August 2015

[16] The respondent acknowledged that, upon the basis of Martin J's findings, the respondent's application of 2 August 2012 to set aside the Court's 2010 judgment inevitably would be dismissed, but the respondent applied for an adjournment of that application pending a further hearing contemplated by an application he had filed in the appeal[8] on 24 August 2015.

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6 [2014] QSC 210 at [29].

7 [2014] QSC 210 at [10] – [28].

8 The respondent submitted that the 24 August 2015 application had been filed in the Trial Division. In fact it was filed in the Court of Appeal in this appeal, but nothing turns upon this.

[17] The respondent's 24 August 2015 application sought a further hearing in relation to the issues determined by Martin J on 29 August 2014, directions for the conduct of the further hearing, and consequential orders. These orders were submitted to be justified by fresh evidence discovered by the respondent after Martin J's determination was published. The appellant opposed the application for an adjournment and submitted that the respondent's applications of 2 August 2012 and 24 August 2015 should be dismissed.

[18] After hearing argument on 25 August 2015, on 28 August 2015 the Court made the following orders, (in which the appellant is called "the respondent" and the respondent is called "the applicant"):

1. The application filed by the applicant on 2 August 2012 is dismissed.
2. The application filed by the applicant on 24 August 2015 is dismissed.
3. The applicant is to pay the respondent's costs of each of those applications, including costs reserved by orders of this Court and by order of Martin J made on 29 August 2014, on the indemnity basis.
4. The applicant is to pay to the respondent the sum of $200,288.90, being the claim, costs and interest to today, together with interest on the sum of $133,390.28 pursuant to s 59(3) of the *Civil Proceedings Act* 2011 (Qld), such interest to be calculated from 28 August 2015 until the date of payment.
5. The applicant is to pay the respondent's costs including reserved costs, if any, of and incidental to the respondent's application filed in District Court action 1527 of 2009 on 13 July 2012 for repayment of monies paid by the respondent pursuant to the order of Samios DCJ in that action, on the standard basis.
6. The orders made on 16 May 2013 by Muir JA, save for paragraph 1(c) of those orders, are vacated.

The basis of the respondent's application for an adjournment

[19] The 24 August 2015 application invoked r 668(1)(b) of the *Uniform Civil Procedure Rules* 1999. That rule confers powers, including powers to stay, set aside, or vary an order, if "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." The respondent contended that an adjournment should be granted because his affidavits sworn on 24 and 25 August 2015 revealed a strong case that he had recently discovered facts which would justify setting aside Martin J's determination.

[20] In the respondent's affidavit of 24 August 2015, he stated that after summary judgment was entered for the Monsour parties against the respondent in the proceeding in which the appellant had been retained by the respondent, the appellant and the respondent "exchanged several letters regarding his insistence on being paid and my dissatisfaction with the work he undertook for me and his manner of dealing with me … in or about the period mid to late 2009 to late 2010". He stated that the appellant's letters were always folded in an unorthodox manner ("the Wiltshire Method"). Because those letters related to the respondent's proceeding in the Magistrates Court against the Monsour parties, the respondent kept them in files he maintained in relation to that proceeding, which were separate from the respondent's files relating to this appeal, the application in it, and the underlying proceeding. The respondent stated that, "In or about May 2015 I was looking through the Monsour files and found a copy of a letter from McInnes Wilson [Monsour's solicitor] to my solicitors dated 19 December 2007 with handwritten notations "GPC14" at the top of the page and "178 ~~174~~ 37" in the bottom right hand corner, and folded in the Wiltshire Method ("the

Letter")." (The Letter was headed "Monsour Pty Ltd -ats- Amos" and it complained that the respondent's proceedings against Monsour were an abuse of process.)

[21] Because handwriting on the Letter included the page number in the duplicate junior counsel brief and the exhibit number in the second Collinson affidavit in that brief, the respondent concluded that the Letter had been taken by the appellant from the copy of the second affidavit of Mr Collinson in a duplicate junior counsel brief which the respondent stated that he had given to the appellant.

[22] A document examiner's report dated 17 August 2015 was exhibited to the affidavit. (The appellant did not take any point about the absence of an affidavit by the document examiner verifying his report.) The document examiner expressed opinions that there were latent writing impressions on the front and back of page 1 and on the front of page 2 of the Letter which revealed the name and address of the respondent, and the document had been folded and placed inside an envelope before the envelope was addressed. With reference to samples of the appellant's handwriting on other envelopes addressed to the respondent, the document examiner expressed opinions that "these handwritings could reasonably be taken to be the work of the same writer" and the writer of the specimen handwriting "probably" wrote the indented handwriting; in an express qualification of those opinions the document examiner referred to the poor quality reproduction of the indented handwriting and the relatively small amount of that handwriting.

[23] In the respondent's affidavit of 25 August 2015, he stated that: the Monsour files, which comprise approximately 20 archive boxes, were paper files with no means of electronic search; the respondent had no reason to search the part of the Monsour files in which he found the Letter as part of undertaking the present proceeding; he happened upon the Letter when looking through the Monsour files in May 2015 and recognised the distinctive folding; and he had been looking at the Monsour files with a view to throwing some of them out to make more space. The respondent stated that there was no covering letter with the Letter. He recalled that "while Mr Wiltshire and I were exchanging letters regarding our displeasure with each (sic) he had on occasions sent to me enclosed in those letters, and sometimes without covering letters, various documents. By way of example on one occasion he sent to me a printout from an online legal service about vexatious litigants." The respondent stated that he sought advice about the Letter and later incurred the costs of having it urgently forensically examined because of a "hunch" based on that recollection, the folding manner of the Letter, and a determination to be vindicated.

The arguments

[24] The respondent acknowledged that, in order to warrant an adjournment of the 2 August 2012 application it was necessary to demonstrate that his 24 August 2015 application had merit. The respondent submitted that the document examiner's report showed that the latter application had sufficient merit to justify an adjournment. Such an adjournment would allow a final determination of the question whether, in terms of r 668(1)(b), after Martin J's determination the respondent had discovered facts "that, if discovered in time," would have entitled him to a determination in his favour.

[25] The respondent argued that his evidence supported a finding that the appellant had taken the Letter out of a duplicate junior brief which contained the second Collinson affidavit and posted the Letter to the respondent after they had fallen out. The respondent relied upon evidence given at the hearing before Martin J by the appellant that his last involvement in the District Court matter was to finalise a written outline of submissions in early March 2008 and send them to the respondent. The respondent

did not rely upon the content of the Letter but upon an inference from the expert evidence that the appellant possessed the Letter. The respondent relied upon the circumstance that the Letter was exhibited to both Collinson affidavits, with the same exhibit number on it as appeared in the Letter; the pagination and exhibit marking on the Letter which contained the impressions of the appellant's handwriting identified it both as an exhibit to Mr Collinson's second affidavit and as two pages of the junior counsel brief. The respondent submitted that the expert evidence therefore strongly supported the respondent's evidence and, in particular, his evidence (rejected by Martin J) that the appellant held a duplicate junior brief which contained the second Collinson affidavit. The respondent submitted that if this fresh evidence had been available and adduced at the hearing before Martin J, his Honour would have accepted the consistent evidence of the respondent and rejected the appellant's evidence. The respondent submitted that the anticipated delay in prosecuting the application was relatively short, by the remitter of facts to the Trial Division the Court had recognised the need for the determination of the facts prior to the determination of the 2 August 2012 application, and it was undesirable for the Court to dispose of that application whilst there was a real possibility that the appeal judgment might need to be set aside.

[26] The appellant argued that there was no merit in the respondent's application. In considering the potential application of rule 668(1)(b) it was appropriate to have regard to the principles applicable when a party appealed on the basis of the discovery of fresh evidence: *IVI Pty Ltd v Baycrown Pty Ltd*.[9] With reference to a case cited in that decision, *Wollongong Corporation v Cowan*,[10] the appellant argued that it was not "reasonably clear" that if the evidence had been available and adduced before Martin J an opposite result would have been produced and nor had "reasonable diligence … been exercised to procure the evidence which the defeated party failed to adduce at the first trial". The appellant argued that, having regard to the history of the litigation and the importance of the principle of finality in litigation, the evidence upon which the respondent relied was insufficiently convincing to justify the court in adjourning the respondent's 2 August 2012 application.

Consideration

[27] In *IVI Pty Ltd v Baycrown Pty Ltd*,[11] the Court held that the principles applicable when a party relies upon fresh evidence in an appeal should be taken into account when deciding whether or not relief should be given under r 668(1)(b) of the *Uniform Civil Procedure Rules* 1999. Jerrard JA observed:

> "[15] Baycrown complained that the learned trial judge, who heard the *UCPR* r 668 application while the special leave application was pending, applied a test that was too limited when construing r 668. The learned judge ruled that it was relevant to have regard to the principles applicable when a party appealed and relied on fresh evidence. In the latter case the appropriate approach was described by the High Court in *Wollongong Corporation v Cowan* (1955) 93 CLR 435 in these terms:
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> 'The discovery of fresh evidence in such circumstances could rarely, if ever, be a ground for a new trial unless certain well-

9 [2007] 1 Qd R 428.
10 (1955) 93 CLR 435 at 444.
11 [2007] 1 Qd R 428.

known conditions are fulfilled. It must be reasonably clear that if the evidence had been available at the first trial and had been adduced, an opposite result would have been produced, or, if it is not reasonably clear that it would have been produced, it must have been so highly likely as to make it unreasonable to suppose the contrary. Again, reasonable diligence must have been exercised to procure the evidence which the defeated party failed to adduce at the first trial.'[12]

[16] In *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134 at 140, the joint judgment repeated that passage with apparent approval, while remarking that it was unnecessary to consider whether the somewhat obscure qualification expressed by the words 'or, if it is not reasonably clear that it would have been produced, it must have been so highly likely as to make it unreasonable to suppose the contrary' represented anything more than an illusory relaxation of the primary test, which was that it be 'reasonably clear that … an opposite result would have been produced.' I agree with Wilson J that it was appropriate for the learned trial judge to consider those principles. Doing so is supported by the decision of Handley JA in *Harrison v Schipp* (2002) 54 NSWLR 612,[13] where that court considered the availability of a Bill of Review and its nature. That action for review was the source of the power described by Griffith CJ in *Woods v Sheriff of Queensland*, and reproduced in O 45 r 1, as described by McPherson JA in *Rockett v The Proprietors – 'The Sands' BUP No 82*, and in his earlier judgment in *KGK Constructions Pty Ltd v East Coast Earthmoving Pty Ltd* [1985] 2 Qd R 13 at pp 19 to 20. The judgment in *Woods v Sheriff of Queensland* makes clear that Griffith CJ was describing relief similar to that obtainable by a Bill of Review.

[17] Handley JA wrote of that relief, in *Harrison v Schipp*:

'If the decree had been enrolled, limited relief was still available by a bill of review. Such a bill could be brought for error apparent, that is an error of law appearing in the decree itself, or, for some new matter which had arisen since the decree, or, with the prior leave of the court on discovery of new matter. On an application for leave the court had to be satisfied that the matter newly discovered was relevant and material, such as might probably have occasioned a different determination, and that it was not discoverable by due diligence before the trial.'[14] (citations omitted).

[18] It is accordingly consistent with the ultimate source of r 668 to have close regard to those described principles when asking whether facts newly arising or discovered would 'entitle' a person against whom an order had been made to be relieved from it, or to an order or decision in that person's favour. Any lesser degree of proof would not establish that the applicant was 'entitled' to

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12 (1995) 93 CLR 435 at 444.
13 [2002] NSWCA 78, 21 June 2002.
14 (2002) 54 NSWLR 612 at 617 [14].

relief from, or to a different, order. The appellant suggests otherwise in argument, relying on the decision of this Court in *Rankin v Agen Biomedical Ltd* [1999] 2 Qd R 435.[15] In that case the Court held that the words 'entitle' and 'entitled' in O 45 r 1 were capable of referring to instances in which the person seeking relief had to depend upon a favourable exercise of discretion, and claimed no absolute right to relief. That case, like *KGK Constructions Pty Ltd v East Coast Earthmoving Pty Ltd*, was one in which the applicant relied on O 45 r 1 for relief from the consequences of a self-executing order, on the basis that events subsequent to the making of the order justified resort to that rule. It was, with respect, one in which the order under appeal would have been a manifestly unjust exercise of a discretion had the facts subsequently arising or discovered been brought to the knowledge of the judge making the original order. For that reason reference to those cases does help the appellant."[16]

[28] Similarly, Wilson J said:

"[74] In *Breen v Lambert*[17] Thomas J dealt with an application to stay a judgment pursuant to O 45 r 1 based on the discovery of further facts ante-dating the trial. His Honour reviewed the old procedures in chancery and at common law. Speaking of the chancery practice and then of the common law he said at pp 22 - 23:

'Clearly then the principles protecting the finality of judgments and the refusal by courts to interfere by reason of evidence available but undiscovered before action unless such evidence could not by reasonable diligence have been discovered in time, and other related principles, are of long-standing. They are based upon the requirements of public policy which include the desirability of there being an end to litigation. Jessel M.R.'s remarks show that these principles were not swept away by the *Judicature Act*. Nor have they have (sic) been undermined by the rules introduced by the *Judicature Act* (see the schedule to the *Judicature Act* 1876, including O XLII r 22). The same may be said with respect to the abolition of the common law writs of *audita querela*.[18] The abolition of the writs by O LVII r 11 in 1876 was accompanied by recognition of the court's power to relieve against judgments on the ground of discovery of further facts, as Griffith CJ observed in *Woods v Sheriff of Queensland*.[19] The similarity between those rules and O 45 r 1 as introduced in the *Rules of the Supreme Court* 1900 (at least in the operative part that deals with the discovery of facts after judgment) and the general discretion entrusted to the court in such a situation is significant.'

Later he said at p 24:

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15 [1998] QCA 282; Appeal No 234 of 1998, 18 September 1998.
16 [2007] 1 Qd R 428 at 439-440.
17 1988 No 4547, 16 August 1991, Thomas J, unreported.
18 See *Holdsworth – A History of English Law* – 6th ed pp 224-226.
19 (1895) 6 QLJ 163 at 165.

> 'The power is however one that is not likely to be exercised, or to be used without regard to factors which have traditionally concerned the minds of judges. I acknowledge the breadth of the power, but consider that an appropriate exercise of discretion requires account to be taken of factors of the kind that influence courts of appeal in deciding whether or not to interfere with a judgment when it is alleged that relevant evidence exists which was available but not discovered before trial. The principles applied in such cases are expressed in *Fredericks v May*;[20] *Clarke v Japan Machines Australia Pty Ltd*;[21] *Hawkins v Pender Bros Pty Ltd*.[22]
>
> Although the application is couched in terms of an application for stay, or for 'other relief' it is in substance the invalidation of a judgment and such applications always require careful scrutiny. I agree with the following general observation made in *AMIEU v Mudginberri*.[23]
>
> > 'The principle that there must be an end to litigation is a powerful one. Courts should not be ready to permit unsuccessful parties to attempt to overturn judgments by raising new considerations. For that reason, it is essential that a party seeking to overturn a judgment demonstrates that he or she does so only upon the footing of matters discovered since the judgment was entered. Plainly, such evidence must be weighty …'

[75] In cases under O 45 r 1 it was established that relief was not restricted to cases of absolute entitlement to an outcome, but also was available in cases dependent upon the favourable exercise of a discretion.[24]

[76] The primary judge said,[25] correctly in my view:

> 'While it is appropriate to apply an expansive notion of 'entitlement' for the purposes of r 668, I nevertheless accept the submissions made on behalf of IVI that the principles which have been developed over the centuries to cater for the different categories of cases in which a final order may be set aside remain relevant for the purposes of the discretion under r 668 and that the distinction recognised in the authorities between what is needed to be shown in an 'ordinary case of fresh evidence' as opposed to one based on malpractice or fraud also remains pertinent.'"[26]

[29] The respondent's evidence fails the fresh evidence test both because the evidence is equivocal and because it was discoverable by reasonable diligence.

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20 (1973) 47 ALJR 362 at 368.
21 [1984] 1 Qd R 404 at 408.
22 [1990] 1 Qd R 135 at 137.
23 (1986) 65 ALR 683 at 691.
24 *KGK Constructions Pty Ltd v East Coast Earthmoving Pty Ltd* [1985] 2 Qd R 13, *Rankin v Agen Biomedical Ltd* [1999] 2 Qd R 435.
25 *IVI Pty Ltd v Baycrown Pty Ltd* [2005] QSC 330 at [21] (citations removed).
26 [2007] 1 Qd R 428 at 453-454. Mackenzie J agreed with Jerrard JA's and Wilson J's analyses.

[30] The evidence was sparse. There was no evidence about the date when the Letter was allegedly sent to the respondent, the date when the handwritten markings were added to the Letter or when they were altered, whether the markings on the Letter matched markings on the junior brief, or whether marks on the letter which are apparently consistent with holes for a ring binder were consistent with the manner in which the alleged junior brief was bound.

[31] More importantly, such evidence as was presented by the respondent was unpersuasive. The qualifications upon the document examiner's opinion appear to be significant. Furthermore, the respondent's case seems improbable. The respondent's argument is necessarily based upon an inference that the appellant extracted the Letter from the alleged junior brief in order to return that Letter to the respondent, but the respondent did not explain why the appellant would have done so rather than returning the alleged brief as a whole (which did not occur on either party's evidence). That seems very unlikely, particularly in the absence of any covering letter or note by the appellant on the Letter. The respondent's evidence about the parties' exchange of correspondence does not make it seem less improbable; the Letter does not fall within the respondent's description of that correspondence as "…letters regarding his insistence on being paid and my dissatisfaction with the work he undertook for me and his manner of dealing with me … about the period mid to late 2009 to late 2010" and "… letters regarding our displeasure with each (sic) … [for example] …a printout from an online legal service about vexatious litigants."

[32] Furthermore, the respondent's suggestion that the appellant sent the Letter to the respondent as part of a dispute between them and by way of returning part of a brief seems odd in light of the respondent's evidence that he found the Letter on his Monsour files rather than in his file relating to the appellant. (An alternative explanation for the Letter being in the appellant's possession and also, at a different time, on the respondent's file might be that the Letter alone was copied from a paginated bundle which included Collinson's second affidavit and given to the appellant, and at some unknown time the appellant subsequently sent the Letter to the respondent; but the lapse of time and the paucity of the evidence now adduced by the respondent may be such that what actually occurred could not be determined.)

[33] No challenge was made to the detailed and cogent reasons given by Martin J for his Honour's findings about the credibility and the reliability of the evidence given by Ms Schiewe and the respondent. Having regard to those findings, it does not seem at all likely that, if the evidence now adduced by the respondent had been adduced before Martin J, the findings would instead have favoured the respondent. It is far from being reasonably clear that the new evidence would have made any difference. The respondent's case in this respect was weak.

[34] Nor was I persuaded that the respondent could establish that he used reasonable diligence to discover the evidence upon which he relied. The respondent's evidence was that the Letter was on the respondent's Monsour file rather than on his file concerning the appellant, but the Collinson affidavits and exhibits (including the Letter) related to the respondent's dispute with Monsour. If the evidence which the respondent states that he discovered only after Martin J's determination is relevant, it was relevant when the appellant relied upon fresh evidence in his appeal in October 2010, it was relevant again when the respondent prepared and brought his application on 2 August 2012, and it was relevant at all times thereafter until Martin J's determination on 29 August 2014. The respondent's evidence did not explain why

the part of the Monsour files in which the Letter was contained was not searched by him earlier in circumstances in which the question whether the appellant ever possessed the Collinson affidavits had been in dispute since 2010. I concluded that if the respondent had used reasonable diligence he would have discovered then what he states that he has discovered now. In this respect, the respondent's case was very weak.

[35] Those are reasons enough to regard the respondent's 24 August 2015 application as being insufficiently meritorious to grant the adjournment which the respondent sought but there was also the lapse of a further and substantial period of time after the determination until that application was filed. That further delay was contributed to by the respondent's appeal against Martin J's determination, which he subsequently abandoned, until, at the eleventh hour, and after exploring and abandoning yet a different theory, the respondent brought the 24 August 2015 application. That history militated against the exercise of the discretion to grant an adjournment.

[36] I concluded that it was wholly inappropriate to allow the respondent further time for yet another opportunity to challenge the Court's final orders of 22 October 2010. I would have reached the same conclusion even if I had thought that the new evidence suggested a reasonable case that the respondent might have obtained a favourable determination had the new evidence been available to him; the appalling history of the litigation in this Court was such that the only appropriate response was to bring that litigation to an end.

[37] Once the adjournment was refused, an order dismissing the 2 August 2012 application was inevitable in light of Martin J's findings. That was not in issue. It inevitably followed that the 24 August 2015 application should also be dismissed.

[38] Each of the other orders set out in [18] of these reasons was uncontentious in the event that the adjournment was refused, save for the order for indemnity costs (Order 3). I considered that such an order was appropriate and should be made in the exceptional circumstances of this matter. This was not merely a case in which one party's evidence was preferred to another party's evidence. The respondent's various attempts to set aside the Court's orders of October 2010 lacked any reasonable basis, and they were premised on evidence which, on the unchallenged findings by Martin J, lacked credibility and was tailored to suit the respondent's claims.

[39] **GOTTERSON JA:** I joined in the Court's orders made on 28 August 2015 for the reasons given by Fraser JA.

[40] **PHILIPPIDES JA:** The reasons given by Fraser JA reflect my own for joining in the orders made on 28 August 2015.