SUPREME COURT OF QUEENSLAND

CITATION:	*IVI P/L v Baycrown P/L* [2006] QCA 461
PARTIES:	**IVI PTY LTD** (ACN 093 587 314) (plaintiff/respondent) **v** **BAYCROWN PTY LTD** (ACN 062 665 883) (defendant/appellant)
FILE NO/S:	Appeal No 10338 of 2005 Appeal No 2295 of 2006 SC No 9907 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeals
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	10 November 2006
DELIVERED AT:	Brisbane
HEARING DATE:	16 June 2006
JUDGES:	Jerrard JA, Mackenzie and Wilson JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. In Appeal No 10338 of 2005:** **(i) that the appeal be dismissed.** **2. In Appeal No 2295 of 2006:** **(i) that the appellant have leave to appeal;** **(ii) that the appeal be allowed;** **(iii) that the orders made on 16 February 2006 be set aside, and, in lieu thereof, that the stay be lifted and the application filed by the defendant appellant on 30 August 2005 be dismissed with costs.** **3. The appellant is to pay the respondent's costs of and incidental to both appeals to be assessed on the standard basis.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – JURISDICTION AND GENERALLY – SETTING ASIDE JUDGMENTS – where, at trial, the court ordered specific performance of a contract for the sale of land – where the appellant claimed that facts were discovered after the order was made which, had they been discovered before the order was made, would have entitled it to a different order

– where the newly discovered facts were that the respondent acted as agent of an undisclosed principal in buying the land under the contract, and the respondent's solicitors disclosed draft witness statements to another witness – where the appellant applied under *UCPR* r 668 to the trial judge to have the judgment set aside and the matter reheard – where the trial judge partially stayed the application and otherwise dismissed it – where the appellant subsequently applied to the trial judge to lift the stay and the judge refused to do so – where the appellant seeks an order from the Court of Appeal under r 668 that the original order be set aside, and that the refusal to lift the stay be overturned – whether to set aside the original order on the ground of new facts – whether to lift the stay

PROCEDURE – DISCOVERY AND INSPECTION OF DOCUMENTS – DISCOVERY OF DOCUMENTS – GENERALLY – where the respondent signed a contract as an agent of another company – where the respondent did not disclose the agency authority in the discovery process before the original trial – whether such disclosure was required by r 18 or r 211 *UCPR* or otherwise

Uniform Civil Procedure Rules 1999 (Qld), r 18, r 211, r 668

Breen v Lambert, unreported, QSC, Thomas J, 4547/88, 16 August 1991, considered
Commonwealth Bank of Australia v Quade (1991) 178 CLR 134, considered
Daly v Public Curator [1949] QWN 1, cited
Day v Perisher Blue Pty Ltd [2005] NSWCA 110; (2005) 62 NSWLR 731, considered
Greater Wollongong City Council v Cowan (1955) 93 CLR 435, considered
Harrison v Schipp [2002] NSWCA 78; (2002) 54 NSWLR 612, cited
Keighley, Maxsted & Co v Durant [1901] AC 240, cited
KGK Constructions Pty Ltd v East Coast Earthmoving Pty Ltd [1985] 2 Qd R 13, cited
Maynegrain Pty Ltd v Compafina Bank [1982] 2 NSWLR 141, considered
McCann v Parsons (1954) 93 CLR 418, cited
Mercantile Mutual Custodians Pty Ltd v Village/Nine Network Restaurants & Bars Pty Ltd [1999] QCA 276; [2001] 1 Qd R 276, considered
Norton v Angus (1926) 38 CLR 523, cited
Pico Holdings Inc v Wave Vistas Pty Ltd [2003] QCA 204; Appeal No 3589 of 2002, 23 May 2003, cited
Rands Developments Pty Ltd v Davis (1975) 133 CLR 26, cited
Rankin v Agen Biomedical Ltd [1998] QCA 282; [1999] 2 Qd R 435, cited
Re Pellick's Transfer [1987] 1 Qd R 73, considered

Rockett v The Proprietors - "The Sands" BUP No 82 [2001] QCA 99; [2002] 1 Qd R 307, cited
Siu Yin Kwan v Eastern Insurance Co Ltd [1994] 2 AC 199, cited
Re St Nazaire Co (1879) 12 Ch D 88, cited
Stubberfield v Brisbane City Council [1996] QCA 184, considered
Vickery v Woods (1952) 85 CLR 336, cited
Woods v Sheriff of Queensland (1895) 6 QLJ 163, considered
Yevad Products Pty Ltd v Brookfield [2005] FCAFC 177, cited

COUNSEL: J A Griffin QC, with S Monks, for the appellant
D J S Jackson QC, with A M Pomerenke for the respondent

SOLICITORS: Walsh & Partners for the appellant
Clayton Utz for the respondent

[1] **JERRARD JA:** In this appeal I have read the judgment of Wilson J, and agree with her reasons and proposed orders, save as to whether the respondent should have disclosed the document that Norfolk Estates executed on 23 October 2002. In giving my own reasons on that point, and generally, I adopt Wilson J's description of the evidence, pleadings, and litigation history, and add some further description.

Too little, too late

[2] As Wilson J describes, Baycrown passed up an opportunity to challenge on appeal the principal judgment against it, by reason of what it now relies on as the fresh evidence from costs statements IVI Pty Ltd ("IVI") filed when its costs of the principal proceedings were being assessed. Those very detailed documents record a charge for sending Mr Gahan his draft statement on 22 July 2004; a charge for sending Mr Moss his (own) draft statement that same day, together with extracts of Mr Gahan's statement; a charge for receiving an email from Mr Moss on 27 July 2004, in which Mr Moss suggested changes to Mr Gahan's statement; and a charge for a telephone attendance on Mr Gahan on 30 July 2004 advising he had signed his statement and would forward it by mail. There is no charge recorded for forwarding an amended draft to Mr Gahan on or after 27 July 2004 with Mr Moss' suggested amendments, or for any telephone attendance advising him - before he signed his statement - of the changes to it suggested by Mr Moss. So the fresh evidence does not unequivocally show that Mr Gahan relied on anything but his own memory and diary.

The evidence in the main proceedings

[3] The principal proceedings were brought by IVI for a declaration that a binding contract of sale dated 23 October 2002 existed between it and Baycrown, whereby Baycrown had agreed to sell IVI a particular parcel of land for $8.8 million. IVI's pleaded case was that Baycrown had offered to sell it that land at that price on 22 October 2002, and that it had given an oral acceptance of the offer on 23 October 2002, by its agent Mr Moss, to Mr Gahan, agent for Baycrown, and had repeated that acceptance in writing by email on 24 October 2002, at 3.25 pm. Baycrown's pleaded case at the start of the trial was that no acceptance of its offer had been communicated before 5.30 pm on the evening of 23 October 2002, when it withdrew the offer, by an email to IVI's solicitors. IVI's reply and answer was

those solicitors had no authority to receive the prepared withdrawal on IVI's behalf, and that those solicitors were not an agreed mode of communication between the parties. Accordingly, its case was that there had been no effective communication of the withdrawal of the offer before IVI accepted it on 24 October 2002.

[4] Mr Moss, an undischarged bankrupt, whom the evidence showed to have been the manager, and exercising the authority, of IVI, was its (and the) first witness at the trial. His evidence-in-chief described the asserted oral acceptance on 23 October 2002, but made no reference to the acceptance in writing by email on 24 October 2002. At the stage when he was called Baycrown's pleaded case was simply that it had effectively communicated notice of withdrawal of its offer on the evening of 23 October and that any purported acceptance on 24 October was ineffective. Those pleadings had made irrelevant whether or not Mr Gahan had told Mr Moss on 24 October, at about 2.00 pm, that the managing director of Baycrown, a Mr Van Asperen, had told Mr Gahan earlier on 24 October (i.e., before 3.25 pm) that Baycrown had already withdrawn its offer to sell. The thrust of the evidence at the trial, accepted by the learned trial judge, was that Baycrown's Mr Van Asperen had told its agent Mr Gahan on 24 October, and before Mr Gahan spoke with Mr Moss at about 2.00 pm that day, that Baycrown's offer had already been withdrawn the preceding evening. Mr Gahan swore an affidavit in December 2002 (made Exhibit 1 at the trial) in which he described being told by Mr Van Asperen, at about 2.00 pm on 24 October, that the offer had been withdrawn. The affidavit did not disclose what he told Mr Moss of what Mr Van Asperen had said, when he rang Mr Moss after speaking with Mr Asperen.

[5] The material before this Court does not show whether Baycrown obtained a statement or proof of evidence from Mr Gahan on that point, or at all, although Baycrown did call him. What Mr Gahan said to Mr Moss, about Mr Van Asperen's communication to Mr Gahan that the offer had been withdrawn, only arose as an issue during the cross-examination of Mr Moss at the trial. His evidence in cross-examination was to the effect that what Mr Gahan had said at about 2.00 pm on 24 October was that Mr Gahan thought Mr Van Asperen wanted to withdraw the offer, not that he had. During that cross-examination of Mr Moss, Mr Morris QC, counsel then appearing for Baycrown, was given leave to amend the pleadings, and to plead that Mr Gahan had communicated to Mr Moss on 24 October 2002 and prior to 3.25 pm that the offer had been withdrawn. That alternative way of putting Baycrown's case was a new development, which appears to have happened because IVI had made discovery (only at the start of the trial) of an email from Mr Gahan to Mr Moss, sent at about 11.00 pm on that night of 24 October, in which Mr Gahan unequivocally described having been told at about 2.00 pm on 24 October that Mr Van Asperen had withdrawn Baycrown's offer. The email did not describe what Mr Gahan had said earlier that same day to Mr Moss about that fact, which Mr Gahan knew by 2.00 pm at the latest.

[6] When Mr Gahan was called by Baycrown his oral evidence did not provide any clear support for IVI's pleaded case that it had accepted the offer on 23 October and had notified Mr Gahan of that. His evidence suggested instead that IVI was very interested in accepting, but first wanted to explore the possibility of amending a then current application for reconfiguration (subdivision) of the land. Mr Gahan's evidence about that was consistent with evidence Mr Van Asperen gave, of a voicemail message left for Mr Van Asperen by Mr Gahan on the evening of 23

October 2002, in which Mr Gahan essentially described IVI as very keen, but did not describe any unqualified acceptance of the offer.

[7] Baycrown failed to establish at the trial that the solicitors to whom it had given notice on 23 October 2002 of the revocation of its offer had any actual or ostensible authority to act as IVI's agent and to receive that information on IVI's behalf. The careful examination of the facts and the law on that point, and the ruling, made by the learned trial judge was upheld by this Court in the appeal in the principal proceedings,[1] and the attempt to challenge the judgment in the High Court was argued only on other issues. That failure by Baycrown to establish communication of withdrawal of the offer on 23 October made Mr Gahan's evidence critical to its alternative case in its amended pleading. Mr Gahan's evidence supported Mr Moss. Mr Gahan said in evidence-in-chief that he had told Mr Moss on 24 October, at about 2.00 pm, that Mr Van Asperen "was wanting" to pull out, not that he had. Unsurprisingly, Mr Gahan was not subjected to either a long or a hostile cross-examination by counsel for IVI. The learned trial judge accepted that there had been no effective communication of the withdrawal of Baycrown's offer to sell before IVI accepted it on 24 October at 3.25 pm, as the learned judge found had happened. The judge, by necessary implication, did not accept IVI's case that an unequivocal acceptance had been communicated on 23 October.

Coincidence

[8] A number of circumstances had therefore conspired to frustrate Baycrown's efforts to give timely communication of withdrawal of its offer, if the evidence given was true. IVI's faxed acceptance at 3.25 pm on 24 October communicated both that it was accepting the offer, and also that the solicitors to whom Baycrown (through its solicitors) had sent by email a notice the night before that the offer was withdrawn, were no longer IVI's solicitors. The learned trial judge held, and this Court agreed, they had only been Baycrown's solicitors for the contract in the event that one was concluded, and not otherwise. Baycrown learnt those facts too late. Next, Mr Van Asperen sent an email to Mr Gahan on the evening of 23 October 2002 advising of the withdrawal of the offer, but Mr Gahan did not read it, and had not read it by the time Mr Van Asperen spoke to him on 24 October, and said that the offer had already been withdrawn, and that Mr Gahan ought to have learnt of that fact by the email sent to him earlier. Because Mr Gahan had not read the document, he had not known of the withdrawal of the offer until speaking with Mr Van Asperen on 24 October. Although Mr Van Asperen expressly advised Mr Gahan of the withdrawal of the offer before Mr Gahan spoke to Mr Moss on the early afternoon of 24 October 2002, Mr Gahan did not do likewise, and misdescribed Mr Van Asperen's position, thus leaving it open to Mr Moss to accept the offer on IVI's behalf. Mr Moss' evidence was that he had already obtained authority from the company's directors, and the signed authority for IVI to enter into a nominee contract, and promptly did so. Finally, IVI was given an authority by the company now nominated by IVI as the ultimate purchaser (Norfolk Estates Pty Ltd) to contract on its behalf dated 23 October 2002; from the evidence of Mr Moss it can be discerned that this authority was executed, it seems, by 1.30 pm on 23 October 2002.

[9] All of those coincidences were capable of honest explanation. Mr Gahan's evidence was that after being told by Mr Van Asperen that the offer was withdrawn, and that Mr Gahan should read the email, he then telephoned Mr Moss, and for that reason –

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1 *IVI Pty Ltd v Baycrown Pty Ltd* [2005] QCA 205; Appeal No 11264 of 2004, 10 June 2005.

the manner in which he said Van Asperen had spoken to him – said only that Mr Van Asperen was "wanting" to pull out, adding that he (Mr Gahan) had to go and read the email from Mr Van Asperen. That account could be true, and the learned trial judge accepted as a fact and found that the nature of the communication to Mr Moss by Mr Gahan was not such that Mr Moss should reasonably have concluded that the offer had in fact been withdrawn. This Court on the first appeal held that conclusion could not be assailed.

Baycrown's argument

[10] Baycrown argued in this appeal that its fresh evidence pointed to collusion between Mr Moss and Mr Gahan, to withhold evidence of Mr Gahan telling Mr Moss on 24 October at 2.00 pm that the offer was already withdrawn. A finding of collusion would entitle Baycrown to a verdict in the principal proceedings if a court hearing them could conclude that Mr Gahan did tell Mr Moss at or about that time – or earlier that day – that Baycrown's offer had been withdrawn. While the possibility of collusion by Mr Gahan and Mr Moss was plain at the trial, the evidence of Mr Moss was more open to attack than the evidence of Mr Gahan. Mr Moss, for example, categorically denied ever having seen the email Mr Gahan sent him late on the night of 24 October 2002, in which Mr Gahan described having been told by Mr Van Asperen at about 2.00 pm on 24 October that the offer was withdrawn. Mr Moss swore that even IVI's solicitors preparing the trial had not shown him the document for comment, before it was produced at the trial, very late, to Baycrown's lawyers.

[11] The possibility of collusion is increased by the evidence that Mr Moss saw and amended Mr Gahan's statement, before Mr Gahan signed it. But I do not think that that makes it any more probable that Mr Gahan did say to Mr Moss on 24 October that the offer had been withdrawn, before Mr Moss had accepted it. Baycrown's new material does not go further than showing an increased possibility that collusion is the explanation of the evidence that Mr Gahan did not clearly communicate revocation of the offer to Mr Moss.

Rule 668

[12] That increased possibility does not satisfy the requirements of r 668 of the *Uniform Civil Procedure Rules 1999* (Qld) ("*UCPR*"). It provides as follows:

> "**668**(1) This rule applies if –
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> (a) facts arise after an order is made entitling the person against the whom the order is made to be relieved from it; or
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> (b) facts are discovered after an order is made that, if discovered in time, would have entitled the person against whom the order is made to an order or decision in the person's favour or to a different order.
>
> (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.
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> (3) Without limiting subrule (2), the court may do one or more of the following –
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> (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."

[13] An obvious circumstance in which the discretion given by the rule would be exercised is when new facts arise or are discovered after an interlocutory order is made, that would not have been made had those facts then been known or existed. In *Rockett & Anor v The Proprietors "The Sands" BUP No. 82* [2002] 1 Qd R 307[2] McPherson JA wrote:

> "....Rule 668 is in all material respects a re-enactment of O 45 r 1 of the *Rules of the Supreme Court* 1900. Since the decision in *KGK Constructions Pty Ltd v East Coast Earthmoving Pty Ltd* [1985] 2 Qd R 13, it has been applied in a number of cases in which relief has been sought and granted against the operation of 'self executing' orders, because of facts arising after an order was made. Little advantage is to be gained from reviewing those or other decisions because in none of them was O 45 r 1 employed to set aside a judgment as a substitute for an appeal against it on the ground that the judgment was incorrect, or that it was contrary to or inconsistent with some other decision of this or another court. Indeed there is some authority to the opposite effect: see *Stubberfield v Brisbane City Council* [1996] QCA 184, 14 June 1996, at 3, 8."[3]

[14] McPherson JA went on to describe O 45 r 1 having its origin in a power that was held by Griffith CJ, with the assent of Harding and Real JJ, in *Woods v Sheriff of Queensland* (1895) 6 QLJ 163, to have been exercised both in Chancery and at common law before the *Judicature Act 1876* (QLD). Griffith CJ's explanation of the power included that an application for that variety of relief was not in the nature of an appeal or rehearing, each of which was founded on the contention that the order appealed from ought not to have been made. Instead the application (now made under *UCPR* r 668) was for a new order which had the effect of suspending in whole or in part the operation of a previous order, and started with the assumption that the original order was correctly made. McPherson JA went on in *Rockett* (describing Sir Samuel Griffith's views):

> "His careful observations in *Woods v Sheriff of Queensland* drew a firm distinction between a claim to relief from a judgment or order that was challenged as erroneous as distinct from one that was accepted as being correct at the time it was made. It is only in the latter case that the relief may be sought under r. 668(1)(a) by reason of facts arising after the order was made or the judgment was given. Otherwise it is the procedure by way of appeal that must be resorted to. In saying this I leave out of account the possibility that r 668(1)(b) may have some operation in relation to applications for new trials on the basis of the discovery of fresh evidence. This is not a question that arises here."[4]

[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

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2 [2001] QCA 99; Appeal No 4355 of 2000, 20 March 2001.
3 [2002] 1 Qd R 307 at 311 [13].
4 [2002] 2 Qd R 307 at 312 [15].

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:

> "The discovery of fresh evidence in such circumstances could rarely, if ever, be a ground for a new trial unless certain well-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."[5]

[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,[6] 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 Griffiths 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."[7] (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 relief from, or to a different,

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5 (1955) 93 CLR 435 at 444.

6 [2002] NSWCA 78, 21 June 2002.

7 (2002) 54 NSWLR 612 at 617 [14].

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.[8] 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.

The other fresh evidence

[19] The appellant also relies, as fresh evidence which it only learnt after the trial – and also learnt before the unsuccessful appeal, in which the point was not raised – on the identity of the intended purchaser for whom IVI had been the agent when IVI entered into the contract. Baycrown complains in this appeal that IVI as plaintiff was suing in a representative capacity on behalf of its undisclosed principal, and was accordingly obliged by *UCPR* r 18 to state that representative capacity in its claim and statement of claim. IVI had not, and had sued on its own behalf, and Baycrown contends that the true purchaser's identity was deliberately withheld from its knowledge, and the Court's. Baycrown says it was disadvantaged in its defence because it did not pursue the lines of inquiry which would otherwise have been open and appropriate, as to the real purchaser's knowledge of revocation of the offer.

[20] Baycrown relies on the asserted breach of *UCPR* r 18 to avoid the statement of principle in the joint judgment in *Commonwealth Bank of Australia v Quade*, which that joint judgment held did not apply where the unavailability of evidence at a trial had resulted from a significant failure by the successful party to comply with an order for discovery of relevant documents in that party's possession or under its control. Baycrown argues that a similar principle applies where the real plaintiff's identity was not disclosed. The principle sought to be avoided was stated in these terms:

> "If all that was necessary to procure the setting aside of a regularly obtained verdict was that the unsuccessful party show that fresh evidence which might have affected the outcome of the trial has become available after the trial, the verdicts of the courts would be of a provisional character only, being subject to the discovery of further relevant evidence."[9]

[21] Baycrown's ignorance of the intended purchaser's identity adds nothing to the degree of probability that there was improper collaboration between Mr Moss and Mr Gahan about their evidence. There is no evidence that the solicitors to whom Baycrown gave notice of revocation of its offer had any instructions from Norfolk Estates, although that is certainly a matter Baycrown could have investigated had the identity been known. But the evidence disclosed that Norfolk Estates and QM Properties had the same directors, which makes it very difficult to establish that knowledge not alleged to be held by QM Properties at the relevant time could be

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8 [1998] QCA 282; Appeal No 234 of 1998, 18 September 1998.

9 (1993) 178 CLR 134 at 142.

held by Norfolk Estates at that time. The appellant conducted its case on the basis that QM Properties, which it assumed to be the real principal, did not have relevant knowledge of the revocation of the offer to sell.

Incuriosity as to the principal

[22] At the trial Baycrown established by cross-examination that IVI had no funds with which it could buy the land, and Baycrown's case was conducted on the assumption that IVI would buy the land as part of a joint venture with QM Properties Pty Ltd, a company with which Mr Moss and the directors of IVI were associated, and which would be paying for the land. Those assumptions were made because Mr Moss said in his evidence in chief that he proposed a joint venture of IVI and QM Properties. Thus there were avenues for cross-examination open at the trial as to the identity of the ultimate purchaser, which were taken up in cross-examination, but not fully. There was cross-examination which established that IVI would rely entirely for funding on a joint venturer company, QM Properties, and when Mr Moss was cross-examined on the topic one of his answers described his having bustled about on 23 October 2003 obtaining authority for IVI to be the purchaser as the nominee of another entity, which he did not name. It was open to the cross-examiner to ask for the name, but very reasonable to assume it was QM Properties. Cross-examination went as far as establishing that IVI could not have accepted Baycrown's offer on 23 October 2002 without first getting a commitment from QM Properties.

[23] It follows that at the trial Baycrown's senior counsel, not the senior counsel on the appeal, had the opportunity to explore the intended purchaser's identity, and did not for good reason; and that Baycrown understood that IVI was the agent for another entity, QM Properties, who would actually pay for the land. That answer Mr Moss gave misled the cross-examiner, on the position now disclosed by IVI. The discovery of the purchaser's identity now is something which Baycrown could only have done at the trial by not accepting the answers Mr Moss gave.

[24] I consider that the respondent should have made disclosure of the document that Mr Moss described in his cross-examination (at vol 1, p 94) as the "nominee" document, and which Mr Morris QC assumed was signed on behalf of QM Properties. That document ought to have been disclosed, because Mr Moss agreed that IVI could not have signed or accepted the contract without the commitment – inferentially given in that document – from QM Properties that it would proceed with a joint venture agreement. Whoever executed it, on the evidence of Mr Moss, having that "nominee" document executed was an essential step that IVI had to take before accepting the offer and signing the contract. It was therefore directly relevant to the respondent's pleading that it had given both oral and written notice of accepting the appellant's offer.

[25] It follows that the lesser of the tests described in *Quade* applies, but even that test, as described by the High Court, requires an appeal court to be satisfied that there was a real possibility of a different result, had the relevant document been disclosed. In this matter Mr Morris did not call at the trial for production of the document, the timely execution of which Mr Moss had asserted, and Mr Morris did not protest at its earlier non-disclosure. He simply assumed it was signed by QM Properties, and left the matter there, and so nothing really follows from the non-disclosure. The appellant's case at the trial had recognised that IVI said it accepted the offer only after getting written authority to proceed, from another company which would pay for the land. The appellant was thereafter incurious about the document at the trial.

***UCPR* r 18**

[26] I agree with Wilson J that the fact that IVI acted, it now says, as agent for an undisclosed and different principal in signing the contract does not mean that it breached *UCPR* r 18 in suing in its own name, and in not stating that it did so in a representative capacity. In *Siu v Eastern Insurance Co Ltd* [1994] 2 AC 199 the Privy Council summarised the law relating to undisclosed principals, which it said had been settled since at least the end of the eighteenth century, in these terms:

> "(1) An undisclosed principal may sue and be sued on a contract made by an agent on his behalf, acting within the scope of his actual authority.
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> (2) In entering into the contract, the agent must intend to act on the principal's behalf.
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> (3) *The agent of an undisclosed principal may also sue and be sued on the contract.* [Italics mine].
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> (4) Any defence which the third party may have against the agent is available against his principal.
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> (5) The terms of the contract may, expressly or by implication, exclude the principal's right to sue, and his liability to be sued. The contract itself, or the circumstances surrounding the contract, may show that the agent is the true and only principal."[10]

[27] That passage was cited with approval, as a summary of the law, by Mullins J relevantly giving the judgment of the Court on the point, in *Pico Holdings Inc v Wave Vistas Pty Ltd & Anor* [2003] QCA 204[11] at [69] in Her Honour's judgment; it has accordingly been applied as the law in this State. The judgment of the High Court overturning this Court's decision in *Pico Holdings v Wave Vistas* was essentially on the inferences of fact properly drawn in the case, and did not result in any questioning of the law summarised in *Siu v Eastern Insurance Co Ltd* and applied by this Court. Its application means that IVI, as agent of an undisclosed principal, was entitled to sue on the contract in its own name. It follows that it did not breach *UCPR* r 18 in doing so.

[28] This accords with the remarks of Hope JA in *Maynegrain Pty Ltd v Compafina Bank* [1982] 2 NSWLR 141 at 149 to 150, where His Honour wrote:

> "....a person may sue or be sued upon a contract although the other party to the contract did not know that the person with whom he was contracting was acting as an agent, if in fact that person was acting as agent for an undisclosed principal, unless the terms of the contract are inconsistent with the known person being an agent. Either principal or agent may sue or be sued, although the 'general rule is that the right of the principal prevails over that of his agent' and the 'right of the agent to enforce the contract is destroyed by the intervention of the principal in the exercise of his own right': *Salmond & Williams on Contracts*, 2nd ed (1945), p 423. The rights and obligations of principal and agent are not joint, but, subject to the superior right of the principal, alternative."

Transfer by direction

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10 [1994] 2 AC 199 at 207.

11 Appeal No 3589 of 2002, 23 May 2003.

[29] Finally, even had IVI signed the contract solely as principal, and without any reference to a nominee, it would have been entitled to direct Baycrown to transfer its title to any other entity IVI nominated. In *Re Pellick's Transfer* [1987] 1 Qd R 73 McPherson J (as His Honour was then) held that as a general proposition "... an ordinary contract of sale is not only to convey to the purchaser but to convey as the purchaser shall direct", citing authority, including that of Knox CJ in *Norton v Angus* (1926) 38 CLR 523 at 528, where Knox CJ wrote that it was "well settled" that "as a general rule a purchaser can insist on a conveyance to himself or his nominee provided the nominee is willing to accept the conveyance and is under no disability." McPherson J cited other authority to the same effect, including Dixon J in *Vickery v Woods* (1952) 85 CLR 336 at 343, where His Honour wrote:

> "A vendor's obligation is to execute a conveyance of the land sold to the purchaser or as he shall direct." (citing *Williams, Vendor and Purchaser* 3rd ed. (1922-1927 p 579).

and Gibbs J in *Rands Developments Pty Ltd v Davis* (1975) 133 CLR 26 at 31, where that judge wrote that "[s]peaking generally, a vendor is obliged to execute a conveyance of the land sold to the purchaser or as he shall direct."

[30] The proposition McPherson J described thus had the support of three Chief Justices of the High Court. McPherson J held that there was no basis for supposing that the procedure by way of directed transfer was not available in the case of Torrens system land, and held that it was. Because that right to direct a transfer to a nominated party would be available to IVI in any account, there is no substance in the complaint Baycrown made about the true purchaser's identity, even if Mr Moss did practise deception on Mr Morris and the Court.

Conclusion

[31] At the end of his reply Mr Griffin QC did not take the case for the appellant far enough, arguing only that the fresh evidence showed misconduct by the solicitor for the respondent. He did not argue that it made a prima facie case of collusion to give false evidence and withhold what really happened on 24 October 2002, and I agree that the evidence he adduced did not go that far. That means that the *UCPR* r 668 application is a fishing exercise, and the complaint he makes is that his client did not get to fish at the trial about Norfolk Estates Pty Ltd. The *UCPR* r 668 procedure is simply not expansive enough to allow for that, particularly after the appellant made no complaint about any of these matters on the earlier appeal.

[32] **MACKENZIE J:** There are two separate appeals which were heard together in relation to orders made by a judge of the Trial Division. The first, against a judgment delivered on 9 November 2005, depends on a number of grounds based on the premise that the respondent had failed to comply with r 18 *UCPR* by not disclosing that there was an undisclosed principal, Norfolk Estates Pty Ltd, ("Norfolk") in relation to a contract between the appellant as vendor and the respondent as purchaser. It was also contended that r 668 *UCPR* had been construed too restrictively by the trial judge. Associated with this, one of the grounds alleges that collaboration between witnesses, which, it is said, is demonstrated by a costs statement filed on 14 February 2005, requires the trial to be reopened or an enquiry into witness collaboration to be made. The second appeal relates to an order made on 16 February 2006 refusing to rescind a stay imposed by the same judge on 9 November 2005.

History of proceedings

[33] The contract had been declared to be valid on 3 December 2004 following a trial. The decisive issue at that trial was whether there was a concluded contract or whether, as the appellant contended, the offer had been effectively withdrawn before its acceptance. An appeal against the trial judge's decision was dismissed on 10 June 2005.

[34] On 30 August 2005 the appellant applied to set aside the judgment on the basis of fresh evidence, invoking r 668 *UCPR*. Allegations of collaboration between witnesses and that there had been concealment that there was an undisclosed principal were raised in that connection. The respondent brought a cross-application for an order that the appellant's application be stayed because of the existence of an (ultimately unsuccessful) application for special leave to appeal to the High Court raising issues relating to the undisclosed principal, and because of the insufficiency of evidence to permit the application to proceed. On 9 November 2005 the application by the appellant was dismissed except insofar as it concerned the grounds relating to r 18 *UCPR* and the institution of specific performance proceedings, in respect of which the application was stayed.

[35] After special leave to appeal to the High Court had been refused on 16 December 2005, an application to remove the stay was made. That was dismissed on 16 February 2006 on the ground that overlap with the issues raised in the application for special leave was only one basis for granting the stay. The concurrent basis, lack of merit in the application in that a reason for relief under r 668 *UCPR* could not be established even if the disclosure and r 18 issues were determined in Baycrown's favour, justified the stay being maintained.

[36] One of the strands of the appellant's argument relates to the sequence of events concerning the purported acceptance of the offer by Mr Moss on behalf of IVI after a conversation with Mr Gahan, a real estate agent, on the afternoon of 24 October 2002. Mr Gahan was not agent for IVI but because of his involvement in the transaction on behalf of Baycrown, an email had been sent to him by Mr Van Asperen, a director of Baycrown, on 23 October 2002 advising that Baycrown was withdrawing the offer. He said that when the matter was raised with him by Mr Van Asperen at about 11 am on 24 October 2002 he had not checked his email in the intervening period and was not aware of the contents. A similar email had been sent to Mr Martinez of Cleary Hoare Solicitors, who were held not to have authority to receive the notice of withdrawal on behalf of IVI. There was also evidence that, due to Mr Martinez's absence from the office, he did not open it until 25 October 2002. There is no evidence of actual communication of the contents of that email to anyone connected with IVI, or, for that matter, Norfolk prior to acceptance.

[37] Mr Gahan spoke to Mr Moss at about 2 pm on 24 October 2002 in what was a conversation highly relevant to the outcome on the issue of formation of a contract. The learned trial judge found as a fact that Mr Gahan did not tell Mr Moss that Baycrown had withdrawn its offer. The learned trial judge found that what Mr Gahan had said was that he thought the vendor wanted to withdraw or was thinking about pulling out of the contract. In the event, at about 3.25 pm, a fax purporting to be an acceptance of the offer was sent to Baycrown by Mr Moss on behalf of IVI. The learned trial judge held that, as the withdrawal of the offer had not been communicated to IVI, that communication was an effective acceptance.

[38] The learned trial judge's finding of fact in this regard is not assailable merely because Mr Van Asperen had advised Mr Gahan by the unread email that Baycrown had withdrawn its offer. Late on the evening of 24 October 2002 Mr Gahan had faxed Mr Moss to confirm that the conversation between Mr Gahan and Mr Van Asperen had occurred. Neither of those events is inconsistent with Mr Gahan not having told Mr Moss that the offer had been withdrawn in terms which should have been understood to that effect. Mr Moss said that the timing of the acceptance was the result of receiving information from an engineer about reconfiguration of lots, about which he had sought clarification, not his conversation with Mr Gahan. In any event, even if Mr Gahan told Mr Moss something that caused Mr Moss concern that the offer might be withdrawn, it is hardly surprising that Mr Moss then moved quickly to accept the offer he believed had not yet been withdrawn but might be. In the absence of evidence of any relevant conversation between Mr Moss and Mr Gahan subsequent to 3:25 pm on 24 October 2002, the fact that Mr Gahan saw fit to send the later fax confirming his conversation with Mr Van Asperen is capable of lending some support to the inference that Mr Gahan had not made it plain to Mr Moss that the offer had been withdrawn.

[39] However it is said that the sequence of events has to be considered in the setting of alleged collusion, which, it is said, is revealed by a costs statement delivered on behalf of IVI. I will return to this later.

Rule 668

[40] Rule 668(2) *UCPR* provides for staying of the operation of an order or giving other relief; the occasion for doing so is described in r 668(1) and extends to both facts which arise after the order is made, and facts, in existence at the time the order is made, which are discovered by a party after the order was made.

[41] In the case of facts which arise after the order is made, the question is whether they entitle a person against whom the order was made to be relieved from it (r 668(1)(a)). In the case of facts discovered after an order is made, the question is whether, if discovered in time, they would have entitled the person against whom the order has been made to either an order or a decision in the person's favour, or a different order from that made (r 668(1)(b)).

[42] In this case despite the argument to the contrary addressed by the appellant, the situation falls, if at all, within r 668(1)(b). There are no facts which arose after the order was made. Bringing an action by the respondent and Norfolk for specific performance, which necessarily involved defining the relationship of agency between them, cannot be regarded as any more than disclosure of the pre-existing fact of agency. The facts relied on are the undisclosed agency on behalf of Norfolk, and alleged collusion in relation to the evidence to be given at trial by witnesses at the original trial. That, it is said, is evidenced by the costs statement brought into existence after the order of the learned trial judge was made. But the alleged facts of agency and collusion predated the trial in which the order was made. The question therefore is whether either of those facts would have entitled the appellant to an order or decision in its favour, or to a different order. Rule 668(3) gives non-exhaustive examples of what the court may do.

[43] The interpretation and ancestry of r 668 are discussed in the reasons for judgment of Jerrard JA and Wilson J. I respectfully adopt their analysis and the conclusion they reach as to the relevant factors in exercising the power under r 668(1)(b).

Rule 18

[44] With regard to r 18 *UCPR*, the difficulty the appellant faces with respect to the argument that the respondent was required to disclose that the respondent was suing agent for Norfolk is that the weight of authority supports the conclusion that IVI was exercising an independent right to bring the proceedings in its own name (*Keighley Maxsted & Co v Durant* [1901] AC 240; *Siu v Eastern Insurance Co Ltd* [1994] 2 AC 199). In doing so, the respondent stood outside the terms of the rule because it was not suing in a representative capacity but in the exercise of its own independent right to sue. No question of primacy of the principal's right to sue arises on the facts of the case (*Maynegrain Pty Ltd v Compafina Bank* [1982] 2 NSWLR 141).

Obligation to disclose?

[45] There is an issue whether there was an obligation to disclose the document establishing the respondent's agency to enter into the contract on Norfolk's behalf and Norfolk's nomination as purchaser. The obligation of disclosure under r 211 *UCPR* is a continuing one, to disclose to another party each document directly relevant to an allegation in the pleadings, in a case where there are pleadings, unless r 212 excludes the operation of r 211.

[46] The contract named the purchaser as IVI and/or nominee. Nothing in the pleadings raises any issue with respect to the form of the contract. As the trial progressed, Mr Moss was cross-examined by the appellant's counsel, during the course of which it was established that IVI had neither the funds nor the borrowing capacity to enter into the contract and complete it itself. The cross-examination continued:

> "In fact IVI could not have signed the contract without a commitment from QM that it would go ahead with a joint venture agreement?-- Correct.
>
> Did you at some stage get such a commitment?-- yes, I did.
>
> When did you get that commitment?-- On the same day that you're talking about, that Mrs Scholten went to Melbourne.
>
> Yes?-- It happened at 1.30 p.m. and we came to agreement with Mr Russell, Mrs Scholten and myself.
>
> Yes, 1.30 p.m. you reached that – you got that commitment from them?-- Mmm. That's when the nominee was – document was drawn up."

In the passage quoted, "QM" is a reference to QM Properties Pty Ltd whose directors at material times were Mr Russell and Mr Haseler who were also the directors of Norfolk.

[47] Counsel then pursued a line of cross-examination, the purpose of which seems to have been to cast doubt upon the credibility of Moss's evidence that an agreement had actually been reached with another entity which enabled the offer to be accepted. That interpretation of the cross-examination which was one element in a concerted attack on Mr Moss's credibility seems to be supported by reference to counsel's address. Given the thrust of the attack on Mr Moss's evidence, it is not surprising that the existence of the "nominee document" and its implications were

not pursued, even though it had been mentioned in evidence. Although submissions were not addressed to Ms Scholten's evidence, she gave evidence the day after Mr Moss gave the evidence set out above. She was also cross-examined about whether IVI had the necessary funds to proceed with the contract. She said that it did not, but they had a nominee. When asked who it was she replied, after asking whether she had to name the nominee, "QM". She was then asked whether there was an agreement with QM to lend IVI the money. She said "that's the deal", which she said was done on 22 October 2002. She said there was a signed agreement.

[48] There was then an objection on the respondent's behalf on the ground that there was no pleading of issues concerning IVI being ready, willing and able to proceed. Senior counsel then appearing for the appellant said that he would not take it any further.

[49] Once again, Norfolk was not revealed as the nominee, and indeed, the impression was left that IVI had entered into an arrangement with QM. But the fact that there was evidence that there was a nominee and also of its identity was not apparently treated as being of significance. This, to my mind, demonstrates the nature of the case run below; it was one where the objective was to discredit the notion that IVI, through Mr Moss, did not know that Mr Van Asperen had withdrawn the offer before Mr Moss sent IVI's acceptance on the afternoon of 24 October 2002.

[50] If that is correct, it is difficult to see how the appellant's position would have been different if it had known that the nominee was Norfolk rather than QM. Both companies had the same directors. If there were reasonable grounds to assume that QM was the financier or nominee, and no issue was taken that the appellant should have the opportunity to explore the state of its directors' knowledge about the status of the offer, it is implausible to maintain that learning that Norfolk, which had the same directors, was actually filling that role would have caused the case to be conducted differently.

[51] It may be added that, by the end of the trial, IVI had conceded that the evidence was insufficient to establish that two pleaded oral acceptances on 23 October were more than, at best, expressions of future intentions to accept. Assuming that the document concerning agency and nomination of Norfolk as purchaser should have been disclosed, because it was relevant to an issue of whether the offer had been accepted before it was withdrawn, it is not apparent, for reasons just discussed, that it would have been used to establish facts that would have entitled Baycrown, the entity against whom the order was made, to a judgment or order in its favour or to a different order. The conduct of the case does not support the appellant's position in that regard. There is nothing that suggests that disclosure of Norfolk as nominee rather than QM would have made any material difference to the conduct of the case. Rule 668 is not enlivened in the circumstances.

Collusion

[52] With regard to collusion, Wilson J has tabulated entries relevant to the issue in her reasons for judgment. The applicant's argument was that it became apparent after judgment was given in the original trial that witnesses had collaborated prior to trial about evidence they would give, with particular focus on the issue of whether the offer had been withdrawn. Particular reliance was placed on items in the costs statement showing the following:

(a) that Mr Moss was provided with the draft statement of Mr Gahan and other witnesses and made corrections to the draft statement of Mr Gahan before he signed his statement;
(b) that Mr Moss was provided with the statement of Mr Martinez;
(c) that Mr Russell received the witnesses' statements in draft and final versions; and
(d) that Mr Martinez discussed his affidavit with Mr Moss.

[53] The sequence of events disclosed by the costs statement is that the draft statement was taken from Mr Gahan. The next day it was sent to him and to Mr Russell. An "extract of statement of Mr Gahan and Mr Moss" was sent to Mr Moss. Each of the letters also concerned disparate other matters relevant to the action. About one week later, there was a telephone attendance on Mr Moss to discuss "statements", without any elaboration about what they were. Following that, Mr Moss emailed "suggested corrections" to Mr Gahan's statements and "commenting on other statements". There is no entry in the costs statement suggesting that there was any communication by the solicitors of the "suggested corrections" to Mr Gahan before he advised of the execution of his statement. There are references in the costs statement to amended versions of Mr Martinez's statement, copies of which were sent to Mr Moss, but nothing to suggest that Mr Moss suggested any of the amendments.

[54] It was accepted on behalf of the appellant, in the Appellant's Reply Outline, that it had not produced evidence to show that the corrections which Mr Moss suggested to be made to Mr Gahan's statement were communicated to Mr Gahan, were incorporated into the statement signed by Mr Gahan or were reflected in the oral evidence given by Mr Gahan. However it was sought to support the hypothesis of collusion by reference to differences between Mr Gahan's written communication about what Mr Van Asperen had told him about withdrawal of the offer and what Mr Gahan told Mr Moss, according to his evidence in the trial, and by reference to the shortness of time between the latter conversation with Mr Gahan and the purported acceptance of the offer. Neither of these circumstances cogently supports the hypothesis for reasons given earlier.

[55] With respect to supply of the statements to Mr Russell, presumably in his capacity as director of Norfolk, the respondent's submission was that Mr Russell was not a witness and that there was no evidence that he had discussed evidence with any other witnesses. The appellant submits that, given that Norfolk was the true purchaser, it was improper for him to receive the statements, particularly in light of the "suppression … of the role of Norfolk" at the trial. For reasons that have been given with respect to the conduct of the trial, the quotation probably overstates what occurred.

[56] The further submission that because of non-compliance with r 18 *UCPR*, Norfolk's involvement was not disclosed need not be further discussed having regard to the conclusion above about the proper scope of r 18. It is then asserted that Norfolk's obtaining of statements and Mr Russell's involvement in the preparation of IVI's case demonstrated "a likelihood that Norfolk was probably equally involved at the stage when Baycrown withdrew its offer to sell, and Gahan was communicating what he had been informed by Van Asperen to Moss". If that implies that Mr Russell was probably aware that Mr Van Asperen had told Mr Gahan that the offer had been withdrawn, the submission significantly overstates what can legitimately

be inferred from the available facts. The reliance on Mr Gahan's late night fax on 24 October, after the acceptance had been sent, being sent to QM and being passed on subsequently to Mr Moss by Mr Russell the following day adds nothing to the balance, especially in the context that Mr Gahan had understood a QM company would be the nominee at the commencement of the negotiations and had engaged in discussions about the transaction which involved Mr Russell.

[57] In my view, *Day v Perisher Blue Pty Ltd* (2005) 62 NSWLR 731 is distinguishable. In that case, actual impropriety in the form of an interactive discussion between witnesses of evidence to be given was proved. In the present case, there is no evidence that discussion occurred between witnesses, or that amendments suggested by Mr Moss were brought to Mr Gahan's attention or otherwise found their way into his statement. Why it was thought appropriate to adopt the process followed in relation to the statements is not explained. However, on the material before the Court, the case made by the appellant is far less compelling than that in *Day v Perisher Blue*. In my view, the threshold for applying r 668(1)(b) has not been reached in respect of this issue.

[58] For the reasons expressed above, the appeal against the judgment delivered on 9 November 2005 fails and must be dismissed.

Stay of proceedings

[59] I agree with the reasons of Wilson J in relation to this.

Orders

[60] I agree with the orders proposed by Wilson J.

[61] **WILSON J**: These are appeals against an order partially staying and otherwise dismissing an application under r 668 of the *Uniform Civil Procedure Rules 1999* (QLD) ("*UCPR*"), and a subsequent order refusing to lift the stay. Although the second appeal was brought a little out of time, the respondent did not oppose the giving of leave to appeal, which should be given accordingly.

[62] The appellant Baycrown Pty Ltd was the vendor of certain land at Pimpama in South East Queensland. On 22 October 2002, its director Mr Van Asperen executed a contract on its behalf offering to sell the property to "IVI Pty Ltd ACN 093 587 314 as Trustee for the IVI Trust and/or Nominees". By a facsimile sent at about 3.25 pm on 24 October 2002 Mr Moss on behalf of the respondent communicated the respondent's written acceptance of the offer. However, the appellant contended that it had withdrawn the offer before acceptance. The respondent commenced a proceeding[12] which was concerned with whether there had indeed been an effectual withdrawal of the offer before acceptance. The appellant contended that the offer had been withdrawn either –

(a) by an email sent on 23 October 2002 by its solicitor to Mr Martinez of Cleary Hoare; or

(b) by an oral communication of the withdrawal by its real estate agent Mr Gahan to Mr Moss at about 2.00 pm on 24 October 2002.

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12 BS 9907 of 2002.

[63] On 3 December 2004 the trial judge found against the appellant on both grounds.[13] She found that Mr Martinez lacked authority to receive communication of the withdrawal of the offer, and that there had been no oral communication of the revocation of the offer during the conversation between Mr Gahan and Mr Moss. She declared that there was a valid contract binding on the appellant and ordered the appellant to pay the respondent's costs of the proceeding.

[64] An appeal against the trial judge's order was dismissed by the Court of Appeal on 10 June 2005[14] and the High Court dismissed an application for special leave to appeal on 16 December 2005.[15]

[65] Before the hearing of the appeal to the Court of Appeal –

(a) a costs statement prepared on behalf of the respondent was filed on 14 February 2005 and duly served on the appellant's then solicitors;

(b) the respondent and Norfolk Estates Pty Ltd ("Norfolk") commenced a proceeding for specific performance of the contract[16] on 19 April 2005, and it was revealed that the respondent was the agent of Norfolk in entering into the contract.

Application pursuant to r 668

[66] After the application for special leave was filed and before it was heard, on 30 August 2005, the appellant made an application in proceeding BS9907 of 2002 pursuant to r 668 of the *UCPR* that the judgment obtained on 3 December 2004 be set aside and that the within proceeding be reheard with the proceeding for specific performance. The respondent made a cross-application that the application be stayed.

[67] The appellant relied on three matters –

(a) the failure to reveal that Norfolk was the undisclosed principal of the respondent;

(b) the bringing of the proceeding for specific performance; and

(c) that the costs statement contained evidence supporting an inference that there was collusion between witnesses as to the evidence to be given at trial.

[68] The application and cross-application came before the trial judge on 9 November 2005, when she made an order partially staying the appellant's application and otherwise dismissing it.[17] Then on 14 February 2006 the appellant applied to have the stay lifted: the trial judge refused to do so on 16 February 2006.

[69] The appeals now before the Court of Appeal are appeals against the orders made on 9 November 2005 and 16 February 2006. The appellant sought an order that the judgment made on 3 December 2004 be set aside and that the proceedings be

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13 *IVI Pty Ltd v Baycrown Pty Ltd* [2004] QSC 430.
14 *IVI Pty Ltd v Baycrown Pty Ltd* [2005] QCA 205.
15 *Baycrown Pty Ltd v IVI Pty Ltd* [2005] HCA Trans 1021.
16 BS3203 of 2005.
17 *IVI Pty Ltd v Baycrown Pty Ltd* [2005] QSC 330.

reheard with the specific performance proceeding, or alternatively that the judgment be stayed and there be an inquiry into the collusion.

Rule 668

[70] It is instructive to consider the terms of r 668 and its place in the procedural law of this State. The rule provides –

> "**668 Matters arising after order**
>
> (1) This rule applies if—
>
> (a) facts arise after an order is made entitling the person against whom the order is made to be relieved from it; or
>
> (b) facts are discovered after an order is made that, if discovered in time, would have entitled the person against whom the order is made to an order or decision in the person's favour or to a different order.
>
> (2) On application by the person mentioned in subrule (1), the court may stay enforcement of the order against the person or give other appropriate relief.
>
> (3) Without limiting subrule (2), the court may do one or more of the following—
>
> (a) direct the proceedings to be taken, and the questions or issue of fact to be tried or decided, and the inquiries to be made, as the court considers just;
>
> (b) set aside or vary the order;
>
> (c) make an order directing entry of satisfaction of the judgment to be made."

[71] Before the commencement of the *Judicature Act 1876*, there were separate procedures at common law and in chancery for obtaining a rehearing or a new trial where further facts arose after judgment had been handed down – the writ of *audita querela* at common law and the bill of review in chancery. The bill of review procedure was abolished when the new procedure came into operation.[18]

[72] While proceedings by *audita querela* were abolished by O 41 r 22 of the *Rules of Court* made under the *Judicature Act*, the rule provided that similar relief might be obtained after judgment "upon the ground of facts which have arisen or been discovered too late to be pleaded". Order 41 r 22 of those rules was the precursor of O 45 r 1 of the *Rules of the Supreme Court* which came into effect on 1 January 1901. That provision, which was in turn the precursor of r 668 of the *UCPR*, was in the following terms –

> "ORDER 45 - RELIEF AGAINST JUDGMENTS AND ORDERS

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[18] *Woods v Sheriff of Queensland* (1895) 6 QLJ 163 at 164, *Stubberfield v Brisbane City Council* [1996] QCA 184. See also *Re St Nazaire Co* (1879) 12 Ch D 88 and *Harrison v Schipp* (2002) 54 NSWLR 612.

> Matters arising after judgment or order
>
> 1. When facts arise after the giving of a judgment or making of an order which entitle the person against whom the judgment or order is given or made to be relieved from it, or when facts are discovered after the giving of a judgment or making of an order which, if discovered in time, would have entitled the party against whom the judgment or order is given or made to a judgment or decision in the party's favour, or to a different judgment or order, the party may apply to the Court or a Judge for a stay of execution or other appropriate relief; and the Court or a Judge may grant such relief, and for that purpose may direct such proceedings to be taken, and such questions or issue of fact to be tried or determined, and such inquiries to be made, as may be just."

It is clear that O 45 r 1 was not intended as a substitute for an appeal or as a mechanism for rehearing an appeal which had already been heard and disposed of by an earlier order of the court.[19] The same is true of r 668.[20]

[73] In *Stubberfield v Brisbane City Council* McPherson JA said at 15-17 –

> "As appears from the terms of the old rule O 41 r 22, and from what was said about it by Griffith CJ in *Woods v Sheriff of Queensland,*[21] proceedings by *audita querela* were abolished by that rule; but said the Chief Justice, under the old rule 'similar relief may be obtained after judgment upon the ground of facts which have arisen or have been discovered too late to be pleaded'.
>
> The question, then, is what relief was available in proceedings by *audita querela.* Not much is to be found on the subject in modern works on procedure, and for enlightenment it is necessary to go back to the old texts and judgments. Blackstone says that *audita querela* was 'in the nature of a bill in equity', but one which in the common law courts was ordinarily commenced by writ complaining that the plaintiff was the victim of 'oppression'.[22] By plaintiff in this context was meant the plaintiff in the new proceedings commenced by writ, because the essence of the procedure was that the defendant's own claim or complaint as plaintiff in earlier proceedings had already been heard (*audita querela defendentis*), and that the judgment obtained by that party was now being enforced in a manner that was said to make it oppressive. The procedure was most often resorted to where, after judgment had been obtained against the new plaintiff and he had satisfied or agreed to satisfy it, the new defendant nevertheless proceeded to levy execution against him. See, for example, *Williams v. Roberts.*[23] This is no doubt why, in the old

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19 *Woods v Sheriff of Queensland* (1895) 6 QLJ 163 at 165, *Stubberfield v Brisbane City Council* [1996] QCA 184 at 17.

20 *Rockett v The Proprietors - "The Sands" BUP No 82* [2002] 1 Qd R 307 at 312.

21 (1895) 6 QLJ 163 at 164.

22 1 Bl.Com. 405.

23 (1850) 8 Hare 315, 68 E.R. 381.

> Rules, O 41, r 22 appeared in an Order headed 'Execution'; but the old procedure at common law was also available in cases where judgment had been obtained by fraud or surprise. See *Lush's Common Law Practice*[24] and the authorities cited there and in *Fisher's Common Law Digest.*[25]
>
> …
>
> In the context of modern court procedure, there is now much less scope for 'surprise', and it may perhaps be doubted how far it survives as a distinct category or ground for relieving against a judgment: *Isaacs v Hobhouse;*[26] *Wilson v Wilson.*[27]"

[74] In *Breen v Lambert*[28] 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 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*.[29] 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 C.J. observed in *Woods v. Sheriff of Queensland*.[30] 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 –

> "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

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24 2nd ed., at 436 note (a).
25 ed. J. Mews 1888, vol. 1, at 504-505.
26 [1919] 1 KB 398 at 406.
27 [1938] St R Qd 1 at 9-10.
28 1988 QSC4547, 16 August 1991, Thomas J, unreported.
29 see *Holdsworth – A History of English Law* – 6th ed. pp. 224-6.
30 (1895) 6 QLJ 163 at 165.

> 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*[31]; *Clarke v. Japan Machines Australia Pty Ltd.*[32]; *Hawkins v. Pender Bros. Pty. Ltd*.[33]
>
> 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 *A.M.I.E.U. v. Mudginberri.*[34]
>
> '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.[35]

[76] The primary judge said,[36] 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."

[77] On the hearing of the appeals counsel for the appellant relied on both limbs of r 668(1). Two of the facts on which they relied, the failure to reveal that Norfolk was the undisclosed principal of the respondent and collusion between witnesses, were matters arising before the trial judge's order, and in my view may only fall within the second limb. The other fact, the bringing of the proceeding for specific performance, is really a permutation of the non-disclosure of the agency relationship, and I do not regard it as a separate fact within the first limb.

The evidence

[78] The subject land was a farm in respect of which the Gold Coast City Council had apparently given development approval. Its purchase price was $8.8 million plus

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31 (1973) 47 A.L.J.R. 362 at 368.
32 [1984] 1 Qd.R. 404 at 408.
33 [1990] 1 Qd.R. 135 at 137.
34 (1986) 65 ALR 683 at 691.
35 *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.
36 *IVI Pty Ltd v Baycrown Pty Ltd* [2005] QSC 330 at [21] (citation removed).

GST. Mr Moss and the then directors of the respondent proposed to form a joint venture with QM Properties Pty Ltd ("QM") in relation to it. The directors of QM were Mr Jon Michael Haseler and Mr Ian Russell. They were also the directors of Norfolk.

[79] A draft contract was prepared naming as "buyer" the respondent "as Trustee for the IVI Trust and/or Nominees", which Mr Moss supplied to Mr Gahan on 22 October 2002. Mr Gahan passed it on to Mr Van Asperen, and there was then a series of negotiations about its terms. Late that afternoon Mr Van Asperen executed the final version on behalf of the appellant, and Mr Moss took it away for execution by the respondent. The next day, after discussion with QM representatives, Mr Moss had several conversations with Mr Van Asperen and Mr Gahan concerning reconfiguration of the lots. Late that afternoon Mr Van Asperen received a message from Mr Gahan indicating that he expected to know in the morning whether or not the respondent would go ahead with the contract. This prompted him to email both Mr Gahan and Mr Martinez purporting to withdraw the offer. Neither of them read the email that night.

[80] The trial judge found[37] that Mr Martinez was not authorised to receive communication of the revocation of the offer. Attention then focussed on a conversation between Mr Gahan and Mr Moss at about 2.00 pm on 24 October 2002.

[81] Mr Van Asperen gave evidence of two telephone calls from Mr Gahan that morning. He said that in the first of these he told Mr Gahan, "We've cancelled the contract. It was done by email last night", and that in the second he responded to an assertion by Mr Gahan, "They think they have a contract" by saying, "Well they haven't, have they?" Mr Gahan gave evidence of only one conversation: he said that he asked Mr Van Asperen about the lot reconfiguration and was told, "If you refer to an email ... it will indicate that I'm withdrawing from the contract" (*emphasis added*).

[82] Of course the critical conversation was that which followed between Mr Gahan and Mr Moss. The appellant called Mr Gahan to give oral evidence at trial: he said he told Mr Moss, "Tom Van Asperen is wanting to pull out of the contract. He's referred me to an email which I'll have to go home to see" (*emphasis added*). According to Mr Moss's oral evidence at trial, Mr Gahan said that he thought "the vendor wanted to withdraw" (*emphasis added*). The trial judge considered the circumstances in which this conversation occurred, and concluded –

> "I am not satisfied, on the basis of the evidence, that it was brought home to Mr Moss that the offer had been withdrawn or that that was the effect which Mr Gahan's communication should reasonably have had on Mr Moss. At the time Mr Moss sent the facsimile accepting the offer, he did not know what the email to which Mr Gahan had been referred actually said. It is possible that Mr Moss suspected that Mr Van Asperen was getting cold feet over the offer. However, that is not sufficient. It was equally possible, as far as Mr Moss was concerned, that it contained an ultimatum designed to force the issue of the execution of the contract by IVI. I accept the submissions made on behalf of IVI that it cannot be said that the nature of the

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37 *IVI Pty Ltd v Baycrown Pty Ltd* [2004] QSC 430 at [50].

> communications to Mr Moss by Mr Gahan was not such that Mr Moss should reasonably have concluded that the offer had in fact been withdrawn."[38]

[83] Later that afternoon Mr Moss faxed a letter accepting the appellant's offer to sell. Very late that night (at 11.21 pm) Mr Gahan sent a facsimile to Mr Moss in which he said –

> "... About 2pm today I rang Tom[39] as I had not heard from him to speak with him regarding the same matter. He then proceeded to inform me that he had withdrawn his offer via a e-mail he had sent to me late last night …" *(emphasis added.)*

That facsimile was in evidence, but the appellant's counsel did not direct Mr Gahan's attention to it. The version in the facsimile, that Mr Van Asperen had told him that the offer had been withdrawn, was different from his oral evidence that Mr Van Asperen had told him he was withdrawing from the contract. He did not say whether he had told Mr Moss that.

[84] On 7 November 2002 Mr Gahan swore an affidavit in a caveat application in the proceeding. He deposed –

> "On 24 October 2002, I spoke to Mr. Van Asperen at about 2:00pm. I had been unable to speak to him before then and relayed what I had said on his message bank, namely that IVI had accepted the transaction, was going ahead with the contract and wanted to know his response to the question concerning the reconfiguration. He asked me if I had seen my e-mails for last night. I told him that I had not seen my e-mails and don't use it. He said that if I went to look there, there would be one there for me and that he has pulled out of the contract." *(emphasis added)*

As in the facsimile sent late at night on 24 October 2002, Mr Gahan gave a version of having been told by Mr Van Asperen that he had withdrawn from the contract, but was silent about what he told Mr Moss in this regard. At trial the appellant's counsel did not direct his attention to this affidavit, which was not tendered.

Undisclosed principal

[85] Here the respondent acted for an undisclosed principal Norfolk in entering into the contract. The respondent (ie the agent) brought proceeding BS9907 of 2002 in its own name and without disclosing any agency relationship.

[86] The law permits a proceeding to be brought either by the agent in its own name or by the undisclosed principal.[40] However, as Hope JA stressed in *Maynegrain Pty Ltd v Compafina Bank*[41] –

> 'Either principal or agent may sue or be sued, although the 'general rule is that the right of the principal prevails over that of his agent' and the 'right of the agent to enforce the contract is destroyed by the

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38 *IVI Pty Ltd v Baycrown Pty Ltd* [2004] QSC 430 at [61].

39 Mr Van Asperen.

40 *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 2 AC 199 at 207, *Keighley Maxsted & Co v Durant* [1901] AC 240 at 256, *Pico Holdings Inc. v Wave Vistas Pty Ltd* [2003] QCA 204. The decision of the Court of Appeal was overturned by the High Court in *Pico Holdings Inc. v Wave Vistas Pty Ltd* (2005) 79 ALJR 825, but its reasoning on this point was not criticised.

41 [1982] 2 NSWLR 141 at 150.

> intervention of the principal in the exercise of his own right.'[42] The rights and obligations of principal and agent are not joint, but, subject to the superior right of the principal, alternative."

[87] The appellant contended that the respondent's failure to reveal that Norfolk was its undisclosed principal deprived it of the opportunity to "explore" at trial –

(i) whether Norfolk became aware of the appellant's withdrawal of offer prior to its acceptance by the respondent;

(ii) whether Cleary Hoare, as the solicitors for Norfolk or otherwise, had authority to receive the email from the appellant's solicitor withdrawing the offer;

(iii) whether any communications had passed between the respondent and Norfolk as to the withdrawal of the offer by the appellant.

Was there an obligation of disclosure?

Rule 18

[88] Counsel for the appellant submitted that the respondent ought to have revealed the existence of Norfolk as its principal in the originating process in proceeding BS 9907 of 2002. They submitted that it was obliged to do so by r 18 of the *UCPR* which is in these terms –

> "**18 Representative details required**
>
> If a person is suing or being sued in a representative capacity, the plaintiff or applicant must state the representative capacity on the originating process."

The primary judge noted the absence of direct authority on the applicability of r 18 to a case such as the present.

[89] Order 6 r 6 of the *Rules of the Supreme Court*, which was the precursor of r 18, provided –

> "**Endorsement to show representative capacity**
>
> 6. If the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, the endorsement shall show, in manner appearing by such of the forms in schedule 1 as is applicable to the case, or by any other statement to the like effect, in what capacity the plaintiff or defendant sues or is sued."

Failure so to indorse the originating process was held to be an irregularity able to be cured by amendment.[43] Parties suing or sued in a representative capacity have included trustees, executors and administrators, trustees in bankruptcy and representatives of the members of unincorporated associations.

[90] The substantive right of an agent for an undisclosed principal to sue in its own name (subject to intervention by the principal) would be defeated if the agent were bound

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42 *Salmond & Williams on Contracts*, 2nd ed (1945), p 423.

43 *Daly v Public Curator* [1949] QWN 1.

by r 18 of the *UCPR* to disclose its representative capacity in the proceeding. Rule 18 should not be interpreted as effecting such a significant change in the substantive law.

Disclosure of documents

[91] On 23 October 2002 the respondent executed a document entitled "Authority to Enter Nominee Contract" in the following terms:

"AUTHORITY TO ENTER NOMINEE CONTRACT

To

IVI ~~Trust~~ Pty Ltd ACN 093 587 314

As Trustee for the IVI Trust

Norfolk Estates Pty Ltd ACN 010 355 138 (Norfolk) hereby authorises and requests that you enter into a contract on its behalf and as its agent for the purchase of the property specified in the Schedule.

Norfolk confirms that it will accept the nomination under the contract and it will pay for the purchase price including the deposit from its funds.

Norfolk confirms that it shall be responsible for all stamp duty that as [sic] assessed on the purchase of the property and will indemnify IVI Pty Ltd for any loss or liability it may suffer as a result of any breach of contract by Norfolk that may arise from the purchase of the property.

Schedule

Lot 20 on RP894218
Lot 3 on 805478

Parish:	Pimpama
Local Government:	Gold Coast City Council
Vendor:	Baycrown Pty Ltd
Purchase Price:	$8,800,000.00 plus GST

Dated at Brisbane this 23rd day of October, 2002

Signed for and on behalf of
Norfolk Estates Pty Ltd ACN 010 355 138

By

A Person duly authorised in the regard in the presence of:

Witness."

The respondent did not disclose that document to the appellant before or during the trial.

[92] The respondent was obliged to disclose the authority only if it was "directly relevant to an allegation in issue in the pleadings".[44] As Pincus JA explained in *Mercantile Mutual Custodians Pty Ltd v Village/Nine Network Restaurants & Bars Pty Ltd*,[45] the scope of the disclosure obligation in this State is now considerably narrower than the "'train of inquiry" test which applied under O 35 of the *Rules of the Supreme Court* before the amendments which came into force on 1 May 1994:

> "At the time of the hearing below the scope of disclosure was governed, so far as relevance is concerned, by O 35 r 4(1)(b) of the *Supreme Court Rules* which restricted disclosure to documents 'directly relevant to an allegation in issue in the cause'; that was so because the writ was issued after 1 May 1994. Rule 211(1)(b) of the *Uniform Civil Procedure Rules* 1999 makes provision to the same effect as O 35 r 4(1)(b). The law in this State differs from that laid down by Brett LJ in *Compagnie Financiere du Pacifique v Peruvian Guano Co*,[46] in that if a document is not 'directly relevant' to an allegation in issue it need not be disclosed. It is not enough, to justify an order for disclosure, to hold the opinion that 'it is reasonable to suppose [that the document] contains information which **may** – not which **must** – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary'. Nor, if a document sought is not directly relevant to an allegation in issue, does it matter whether or not it 'is a document which may fairly lead [the party requiring discovery] to a train of inquiry, which may have either of these two consequences': see per Brett LJ at 63."

[93] On the hearing of these appeals counsel for the appellant submitted that the document ought to have been disclosed because it was relevant to the formation of the contract.

[94] On the hearing of the present appeals senior counsel for the respondent submitted, correctly in my view, that the authority document (ie the nominee document referred to by Mr Moss in oral evidence) was not directly relevant to any issue in dispute on the pleadings. What was in issue on the pleadings was whether the offer had been withdrawn before acceptance; the identity of the contracting parties was not in issue.

[95] Further I do not think that the case was so conducted at trial that it then became incumbent on the respondent to disclose the document.

[96] The directors of the respondent were Mr John Bjelke-Peterson and Mrs Angela Scholten. At trial Mr Moss was cross-examined by senior counsel for the appellant about what occurred on 22 and 23 October. He said that on 23 October Mr Bjelke-Peterson, Mrs Scholten and he were waiting for a "bit of paper" to come from "one of the engineers in at QM in relation to the lot reconfiguration". It arrived at about 3.00 pm that afternoon. Mrs Scholten then had to catch a plane to Melbourne, and

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44 *UCPR* r 211(1)(b).

45 [2001] 1 Qd R 276 at 282 – 283 (emphasis in original).

46 (1882) 11 QBD 55.

there was not enough time for the contract to be executed on behalf of the respondent. Mr Moss agreed with senior counsel for the appellant that the respondent did not have the $8.8 million needed to complete the purchase and that it did not have sufficient borrowing capacity. He agreed with the proposition –

> "... In fact IVI could not have signed the contract without a commitment from QM that it would go ahead with a joint venture agreement."

That commitment was obtained at about 1.30pm on 23 October when an agreement was reached by Mr Russell, Mr Scholten and him. The questions and answers went on –

> "Yes, 1.30 pm you reached that - you got that commitment from them? – Mmm, that's when the nominee was - document was drawn up.
>
> That would have been a pretty important matter from your viewpoint, wouldn't it, getting that commitment? -- Yes."

[97] Thus, the existence of a "nominee document" was mentioned in oral evidence, in the context of a discussion about the respondent's need to ensure QM's commitment to the joint venture, but it was not followed up by anyone. The identity of the purchaser was not discussed. It was never suggested that QM would be the purchaser, let alone that it would be Norfolk, the existence of which was never even mentioned. What was discussed was the involvement of QM in the development – not that QM or any other entity would be the principal at the time the contract was formed.

[98] Assuming, contrary to my view, that the authority document ought to have been disclosed, it does not follow that the respondent's failure to do so supports the appellant's application under r 668 of the *UCPR*.

[99] As the primary judge said,[47] the evidence at trial excluded even the possibility that Cleary Hoare told Norfolk of the email sent to Mr Martinez on 23 October 2002 before the offer was accepted: the evidence was that neither Mr Martinez, nor anyone else from his firm, opened the email until 25 October, the day after the offer was accepted. There is no evidence that Cleary Hoare had instructions of any type in respect of the contract from Norfolk or any company in the QM group, and given that the appellant did not know of Norfolk's existence, there could not be any suggestion of Norfolk's holding out Cleary Hoare as having ostensible authority. The primary judge correctly analysed the third matter which the appellant claimed to have been prevented from exploring as follows –

> "The third matter that it is said could have been explored had Baycrown been aware at trial of the existence of the undisclosed principal was whether Mr Gahan had informed a representative of Norfolk that Mr Van Asperen had withdrawn the offer. There was evidence that, on 24 October at 11.21 pm, that is, after the offer was accepted, Mr Gahan faxed a letter addressed to Mr Moss in which he stated that Mr Van Asperen had told him that 'he had withdrawn the offer via an email'. That fax was sent to Mr Moss c/o QM Properties' offices and it appears that Mr Russell phoned Mr Moss

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47 *IVI Pty Ltd v Baycrown Pty Ltd* [2005] QSC 330 at [29].

> about it on 25 October 2002. However, if Mr Gahan, as Baycrown's agent, had informed Norfolk of the purported revocation, then it can hardly be contended that Norfolk's existence was a fact that was not known to Baycrown, nor one that could have been discovered with reasonable diligence. In any event, no evidence was adduced by Baycrown in support of its application as to whether it had approached Mr Gahan or as to what, if any, communication he had had with Mr Russell or anyone else from Norfolk about the purported revocation of the offer. What, if anything, Mr Gahan might say about the matter is entirely speculative."[48]

[100] Thus, none of the three issues the appellant claimed it lost the opportunity to explore could have altered the conclusions correctly reached by the trial judge.

Principles relating to fresh evidence

[101] Counsel for the appellant referred this court to the High Court's decision in *Commonwealth Bank of Australia v Quade*[49] and that of the Full Court of the Federal Court in *Yevad Products Pty Ltd v Brookfield*[50] where *Quade* was applied.

[102] *Quade* was a case concerning a foreign currency loan, in which the applicant borrowers sued unsuccessfully for damages for negligent misstatements and relief under s 52 of the *Trade Practices Act 1974* (Cth). After the decision at first instance the respondent lender disclosed some documents which had been wrongly omitted from its discovery. On appeal to the Full Court of the Federal Court the applicants asked the court to receive these further documents as fresh evidence. The Full Court did so, allowed the appeal, set aside the decision below and ordered a new trial. There was a further appeal to the High Court where the only question argued was one of law – what was the appropriate test to be applied on an application for a new trial where the successful party admitted that it had failed to give proper discovery?

[103] In *Quade* the High Court referred to the earlier decision of *McCann v Parsons*[51] where Dixon CJ, Fullagar, Kitto and Taylor JJ spoke of "the overriding purpose of reconciling the demands of justice with the policy in the public interest of bringing suits to a final end", and distinguished between two different categories of "fresh evidence" cases –

(i) those where all that is involved is the discovery by the unsuccessful party of fresh evidence; and

(ii) those where the unavailability of the evidence at trial resulted from an incorrect ruling on its admissibility, or surprise, malpractice or fraud, or misconduct by the successful party such as a significant failure to comply with an order for discovery.

[104] In the first category of cases –

> "… the successful party should be deprived of the verdict in his favour only if the unsuccessful party persuades the appellate court that there was no lack of reasonable diligence on his part and that it

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48 *IVI Pty Ltd v Baycrown Pty Ltd* [2005] QSC 330 at [32].
49 (1991) 178 CLR 134.
50 [2005] FCAFC 177.
51 (1954) 93 CLR 418 at 430 – 431.

is reasonably clear that the fresh evidence would have produced an opposite verdict".[52]

[105] The test in the second category of cases cannot be comprehensively stated, but it is clearly less demanding. The High Court said –

> "The application to that category of case of the general rule that a new trial should only be ordered on the ground of fresh evidence if it is 'almost certain'[53] or 'reasonably clear'[54] that the opposite result would have been produced if the evidence had been available at the first trial would, particularly where the failure was deliberate or remains unexplained, serve neither the demands of justice in the individual case nor the public interest in the administration of justice generally. In so far as the demands of justice in the individual case are concerned, it would cast upon the innocent party an unfairly onerous burden of demonstrating to virtual certainty what would have happened in the hypothetical situation which would have existed but for the other party's misconduct. In so far as the public interest in the administration of justice generally is concerned, it would be likely to ensure to the successful party the spoils of his own default and thereby encourage, rather than to penalize, failure to comply with pre-trial orders and procedural requirements.
>
> It is neither practicable nor desirable to seek to enunciate a general rule which can be mechanically applied by an appellate court to determine whether a new trial should be ordered in a case where misconduct on the part of the successful party has had the result that relevant evidence in his possession has remained undisclosed until after the verdict. The most that can be said is that the answer to that question in such a case must depend upon the appellate court's assessment of what will best serve the interests of justice, 'either particularly in relation to the parties or generally in relation to the administration of justice'.[55] In determining whether the matter should be tried afresh, it will be necessary for the appellate court to take account of a variety of possibly competing factors, including, in addition to general considerations relating to the administration of justice, the degree of culpability of the successful party,[56] any lack of diligence on the part of the unsuccessful party and the extent of any likelihood that the result would have been different if the order had been complied with and the non-disclosed material had been made available. While it is not necessary that the appellate court be persuaded in such a case that it is 'almost certain' or 'reasonably clear' that an opposite result would have been produced, the question whether the verdict should be set aside will almost inevitably be answered in the negative if it does not appear that there is at least a real possibility that that would have been so."[57]

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52 *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134 at 141.

53 see *Orr v Holmes* (1948) 76 CLR 632 at 640.

54 see *Greater Wollongong City Council v Cowan* (1955) 93 CLR 435 at 444.

55 cf., e.g. *McDonald v McDonald* (1965) 113 CLR 529 at 533, 542.

56 cf. *Southern Cross Exploration N.L. v. Fire & All Risks Insurance Co. Ltd.* (1985) 2 NSWLR 340 at 357.

57 *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134 at 142 – 143.

[106] In my view, the present case falls within the first category identified in *Quade*, and given the limited scope of the issues at trial, I am unpersuaded that it is reasonably clear that the disclosure of the nomination document, and thus the agency, would have produced an opposite verdict. On an application under r 668 it is not enough to show that the fresh evidence relied on might or even would have led to exploration of other questions. And in this case, as the primary judge's deft analysis shows, the explorations which the appellant contends it was unable to pursue could not have assisted its case.

[107] Further, if, contrary to my view, the respondent ought to have disclosed the authority document, (ie if this is a case within the second category in *Quade*) its failure to do so would not be a basis for setting aside the judgment in the absence of a real possibility that its disclosure would have led to a different outcome. As I have endeavoured to explain, the appellant's contention is merely that it was denied an opportunity to explore certain matters; it has not demonstrated that any of these explorations had any potential to lead to a different outcome on the issue of withdrawal of the offer before its acceptance.

Collusion

[108] Insofar as Mr Gahan's oral evidence was at odds with what he had said in the late night facsimile and in his affidavit, counsel for the appellant submitted that a possible explanation for the change was collusion between Mr Gahan and Mr Moss about their evidence. They submitted that certain entries in the costs statements increased the possibility of such collusion. Those entries revealed that the then solicitors for the respondent had sent draft witness statements, including that of Mr Gahan, to Mr Moss and Mr Russell. They were as follows –

21 Jul 04	1044	Attendance preparing for, travelling to and from and conducting interview with Anthony Gahan (288 minutes) [Item 16(a)]
	1054	Drawing draft statement of Anthony Gahan (6 pages, 38 folios) [Item 2]
22 Jul 04	1076	Letter to client (Ian Russell) enclosing copy of statement of John Bjelke Petersen, draft statements of Christopher Martinez and Anthony Gahan and advising of next step to be undertaken (1 page plus 16 enclosures) [Item 17(2)]
	1099	Letter to Geoffrey Moss (cc to Ian Russell) enclosing draft statement, requesting copies of documents, extract of statement of Mr Gahan and Mr Martinez, chronology, advising of counsel engaged and request attention to amendments, execution and return of statement and documents (2 pages plus 25 enclosures) [Item 17(3)]
	1103	Letter to Anthony Gahan enclosing draft statement, extract from chronology, requesting further information and amendment/approval, execution and return of statement and advising of interim contact (1 page plus 9

		enclosures) [Item 17(2)]
27 Jul 04	1117	Telephone attendance upon Geoffrey Moss to discuss statements and further witness statement to be taken and to receive instructions to receive statements from other witnesses [Item 16(a)]
	1120	Letter by email from Geoffrey Moss attaching suggested corrections to Anthony Gahan Statement and commenting on other statements provided, confirming statement will be forwarded shortly [Item 17(2)]
30 Jul 04	1127	Letter by email from Geoffrey Moss requesting finalised statements [Item 17(1)]
	1128	Letter by email to Geoffrey Moss enclosing finalised statements as requested [Item 17(1)]
	1130	Letter by email to Geoffrey Moss advising that amended statement of Christopher Martinez received and will be forwarded as requested when engrossed [Item 17(2)]
	1134	Letter by email from Anthony Gahan advising of execution of statement to be provided by mail [Item 17(2)]
2 Aug 04	1146	Telephone attendance upon Geoffrey Moss to discuss further witness and contact details of same, to receive instructions regarding witnesses to be called and unavailability because of holidays (10 minutes) [16(a)]
	1148	Perusing suggested amendments of statement and additional comments of Christopher Martinez (5 pages, 33 folios) [Item 6]
	1152	Letter by email to Geoffrey Moss attaching amended statement of Christopher Martinez and requesting amendment/approval of statement of Geoffrey Moss [Item 17(2)]
3 Aug 04	1154	Letter by email to Christopher Martinez enclosing further amended statement, incorporating suggested changes, requesting execution and return as soon as possible and providing instructions regarding same [item 17(2)]
8 Aug 04	1177	Letter from Geoffrey Moss confirming paragraphs of suggested amendments to affidavit sent via email and enclosing letter dated 6 Oct 02 and discussion paper referred to as exhibit “GM-5” [Item 17(2)]
	1189	Attendance to consider changes to Geoffrey Moss’

		statement and his correspondence and drafting email to Geoffrey Moss (42 minutes) [Item 7(a)]
10 Aug 04	1192	Letter from Geoffrey Moss attaching letter to Cleary Hoare Solicitors (24 Oct 02) and trust receipt both delivered by hand, confirming authority for Angela Scholten, requesting confirmation of conference, and requesting update of statements of Angela and Tighe (13 pages) [Item 17(3)]
	1216	Letter to Geoffrey Moss (cc to Ian Russell) providing update of matter in respect of junior counsel, statements of Chris Tighe, Geoffrey Moss and Angela Scholten and confirmation of conference time [Item 17(3)]

[109] Counsel for the appellant pressed on this Court the decision of the New South Wales Court of Appeal in *Day v Perisher Blue Pty Ltd*.[58] On an appeal from a decision dismissing a claim for damages for personal injuries, the Court of Appeal set aside the decision and ordered a new trial. At trial it emerged that a legal practitioner acting for the defendant had held a pre-trial teleconference in which multiple witnesses had participated and discussed amongst themselves the evidence they intended to give at trial. This led to attacks on the credibility of several of the defendant's witnesses. At p 746 Sheller JA discussed the impropriety of what had occurred and its tendency seriously to undermine the process by which evidence is taken. The Court of Appeal set aside the judgment and ordered a new trial. It did this because the trial judge's reasons for judgment were deficient in not dealing with the plaintiff's written submissions that the weight of the evidence of the defendant's witnesses had to be measured in the context of this having occurred.

[110] The present case differs from *Day v Perisher Blue Pty Ltd* in at least two significant respects. First, there is no evidence of actual collusion in the present case. While the entries in the costs statement reveal that the solicitors sent the draft statements of Messrs Martinez and Gahan to Mr Russell, and extracts from those draft statements to Mr Moss, and that Mr Moss suggested "corrections" to Mr Gahan's statement, they do not reveal what the suggested corrections were, whether there was any discussion between Mr Gahan and Mr Moss about the content of Mr Gahan's statement, or whether the statement as executed by Mr Gahan included the corrections suggested by Mr Moss. There is merely some circumstantial evidence which, the appellant submits, adds to the possibility that collusion was the reason for Mr Gahan and Mr Moss's oral evidence that all Mr Gahan said was to the effect that the appellant was thinking of withdrawing from the contract. Of course, as the primary judge appreciated, there could have been reasons for Mr Gahan's having communicated with Mr Moss in the terms she found he did – for example, to keep alive his prospects of earning a healthy commission on the sale. Second, in *Day v Perisher Blue Pty Ltd* the judgment was set aside because of the trial judge's failure to address submissions put before him, while in the present case this Court is being asked to draw an inference as to the possibility of collusion, and to set aside the judgment on that ground. As the primary judge observed, more stringent considerations arising out of the need for finality of litigation apply where a judgment is sought to be set aside on the basis of fresh evidence.

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58 (2005) 62 NSWLR 731.

[111] Both before the primary judge and on these appeals counsel for the appellant disavowed any allegation of fraud. The primary judge observed that insofar as the application to set aside the judgment was based on evidence of collaboration, it was put forward solely as a case of fresh evidence. On appeal counsel sought to draw a subtle distinction between this case and a fresh evidence case, submitting that the point was not a fresh evidence point, but one of the subsequent discovery of apparent collusion between witnesses on an issue upon which the result of the case depended. Assuming such a distinction might validly be drawn in an appropriate case the revelations in the entries in the costs statement fall short of "the subsequent discovery of apparent collusion". Those entries are insufficient to raise even a real possibility that had they been discovered in time the outcome of the trial would have been different.

Subrule (1) of r 668 not satisfied

[112] None of the three matters relied on by the appellant – the failure to reveal that Norfolk was the undisclosed principal of the respondent, the bringing of the proceeding for specific performance, and the entries in the costs statement – satisfies the description in r 668(1) of –

> "facts … 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."

The appellant has not demonstrated any error of fact or law on the part of the primary judge. Accordingly, the discretion to grant relief under r 668 did not arise.

Other (earlier) opportunities to raise these matters

[113] The costs statement was served in February 2005 and the specific performance proceeding (in which the agency relationship came to light) was commenced in April 2005. The entries in the costs statement were not raised either on the appeal heard in June 2005 or on the special leave application heard in December 2005. There is no satisfactory explanation for this. The agency relationship was not raised on the appeal, although it was raised on the special leave application.

[114] Like O 45 r 1 of the *Rules of the Supreme Court*, r 668 of the *UCPR* is not intended as a substitute for an appeal or as a mechanism for rehearing an appeal which has already been determined. As I have said, the discretion to grant relief did not arise in this case. Had it done so, the appellant's conduct of the earlier appeal and of the special leave application would have been a negative factor relevant to the exercise of that discretion.

The stay granted by the primary judge

[115] The primary judge stayed the application insofar as it related to the matters concerning the non-disclosure of the agency relationship because of the pending special leave application and because of a perceived lack of merit. After the special leave application failed, she declined to lift the stay. The merits of the application were comprehensively canvassed in these appeals. In my view, the stay should now be lifted, and the application should be dismissed.

Orders

[116] I would make the following orders –

In Appeal No 10338 of 2005 -

(i) that the appeal be dismissed;

In Appeal No 2295 of 2006 -

(i) that the appellant have leave to appeal;

(ii) that the appeal be allowed;

(iii) that the orders made on 16 February 2006 be set aside, and, in lieu thereof, that the stay be lifted and the application filed by the defendant appellant on 30 August 2005 be dismissed with costs.

I would order the appellant to pay the respondent's costs of and incidental to both appeals to be assessed on the standard basis.