HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON AND EDELMAN JJ

CLONE PTY LTD APPELLANT

AND

PLAYERS PTY LTD (IN LIQUIDATION)
(RECEIVERS & MANAGERS APPOINTED) & ORS RESPONDENTS

Clone Pty Ltd v Players Pty Ltd (In Liquidation) (Receivers & Managers Appointed)
[2018] HCA 12
21 March 2018
A22/2017 & A23/2017

ORDER

Matter No A22/2017

1. *Appeal allowed.*

2. *Set aside orders 3, 4 and 5 of the Full Court of the Supreme Court of South Australia dated 8 December 2016 and, in their place, order that:*

    (a) *the appeal to the Full Court of the Supreme Court of South Australia be allowed;*

    (b) *the orders of the Supreme Court of South Australia (Hargrave AJ) dated 9 November 2015 in proceeding SCCIV-04-319 be set aside and, in their place, order that:*

        (i) *the application be refused; and*

        (ii) *the first, seventh, eighth and tenth defendants pay the plaintiff's costs; and*

(c) the first to fourth respondents pay the appellant's costs.

3. The first to fourth respondents pay the appellant's costs of the appeal to this Court.

Matter No A23/2017

1. Appeal allowed.

2. Set aside orders 3, 4 and 5 of the Full Court of the Supreme Court of South Australia dated 8 December 2016 and, in their place, order that:

(a) the appeal to the Full Court of the Supreme Court of South Australia be allowed;

(b) the orders of the Supreme Court of South Australia (Hargrave AJ) dated 9 November 2015 in proceeding SCCIV-10-819 be set aside and, in their place, order that:

(i) the action be dismissed; and

(ii) the plaintiffs pay the defendant's costs; and

(c) the first to fourth respondents pay the appellant's costs.

3. The first to fourth respondents pay the appellant's costs of the appeal to this Court.

On appeal from the Supreme Court of South Australia

Representation

B C Roberts SC with R Bonig for the appellant (instructed by Finlaysons Lawyers)

A S Bell SC with P Zappia QC for the first to fourth respondents (instructed by Griffins Lawyers)

Submitting appearance for the fifth respondent

C D Bleby SC, Solicitor-General for the State of South Australia with B L Garnaut for the sixth respondent (instructed by the Crown Solicitor (SA))

CATCHWORDS

Clone Pty Ltd v Players Pty Ltd (In Liquidation) (Receivers & Managers Appointed)

Equity – Where judgment given by Supreme Court of South Australia, as varied by Full Court of Supreme Court of South Australia – Where successful party engaged in malpractice – Where malpractice later discovered – Where perfected judgment set aside – Where no pleading or proof of fraud – Nature of court's equitable power to set aside perfected judgment – Whether equitable power extends to malpractice not amounting to fraud – Whether power to set aside perfected judgment conditional upon unsuccessful party having exercised reasonable diligence to discover fraud or malpractice.

Procedure – Perfected judgment – Rescission – Where two applications brought to set aside judgment – Where judgment set aside for malpractice – Whether proper course application in original proceeding or fresh action.

Words and phrases – "actual fraud", "causation", "equitable jurisdiction", "equitable power", "equity", "finality", "fraud", "fresh action", "malpractice", "misconduct", "new trial", "not amounting to fraud", "perfected judgment", "perfected orders", "power", "proper application", "reasonable diligence", "setting aside".

Supreme Court Act 1935 (SA), s 17(2)(a)(i).

1 KIEFEL CJ, GAGELER, KEANE, GORDON AND EDELMAN JJ. These appeals concern the equitable power of a court to set aside its own perfected judgments, namely its "formal orders ... whether in the form of a judgment strictly so-called or a decree, order or sentence"[1]. The primary judge in the Supreme Court of South Australia set aside a perfected judgment of that Court based on misconduct not amounting to fraud. An appeal to the Full Court of the Supreme Court of South Australia was dismissed by majority. The essential questions in these appeals are whether the power of a court to set aside its perfected judgment extends to each of the following circumstances: (i) misconduct by the party who succeeded at trial which does not amount to fraud; and (ii) where the unsuccessful party failed to exercise reasonable diligence to discover the fraud or misconduct during the earlier proceedings.

2 The answers to each of these questions are as follows. First, the general power of a court to set aside its perfected judgment requires actual fraud, although there are other discrete grounds to set aside a perfected judgment which were not in issue in these appeals. Secondly, it is not a precondition to the exercise of the power that the party seeking to set aside the judgment exercised reasonable diligence to attempt to discover the fraud during the earlier proceedings.

3 In their applications to set aside the Supreme Court's perfected judgment, the first to fourth respondents did not allege or prove any fraud by the appellant. Therefore the appeals must be allowed.

The dispute that gave rise to these proceedings

The background to the first trial

4 In 1994, the first respondent in these appeals, Players Pty Ltd, negotiated with the appellant, Clone Pty Ltd, an agreement to lease from Clone run-down premises in Pirie Street, Adelaide. The proposed agreement to lease was for a term of 10 years with the premises to be renovated by Players to be used as a licensed hotel and gaming premises called the Planet Hotel.

5 In the course of negotiations, Clone's agent prepared a draft agreement to lease which was provided to Clone's solicitors. Clone's solicitors advised the agent that a clause should be inserted to address what was to happen to the hotel and gaming machine licences, to be obtained by Players, at the determination of

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1 *Moller v Roy* (1975) 132 CLR 622 at 625; [1975] HCA 31.

the lease. The solicitors subsequently drafted a clause, which became cl 11(i) in the agreement to lease, as follows:

> "The Lessee will upon expiration or earlier determination of the Lease transfer to the Lessor any Liquor Licences or gaming machine Licences held in respect of the premises for NIL consideration."

6 Various changes were subsequently made to the draft agreement to lease. One alleged change, which was at the core of many years of litigation culminating in these appeals, concerned an allegation by Players that the word "NIL" in cl 11(i) had been struck through in blue pen, with the alleged result that consideration was payable under the agreement to lease.

7 In August 1994, the agreement to lease was executed by three of the directors of Players, namely Messrs Griffin, McDermott, and May, on behalf of Players and personally as guarantors. The fourth director of Players, Mr Cahill, was overseas. Messrs Griffin, Cahill, and McDermott are the second, third, and fourth respondents in the appeals in this Court, whose submissions were made jointly with those of Players. Messrs Roche and England, on behalf of Clone, executed the agreement to lease, which bore a handwritten indorsement, inserted by Clone's solicitors, that it was subject to execution by Mr Cahill. Mr Cahill never executed the agreement to lease.

8 In September 1994, the agreement to lease, or a copy of it, was sent to the Licensing Court of South Australia. In January and March 1995, respectively, the Licensing Court (i) granted Players' application for removal and transfer of a hotel licence from premises known as the Grenfell Tavern to the Planet Hotel and (ii) issued Players with a gaming machine licence for the Planet Hotel.

9 On 30 August 1994, in accordance with its usual practice, Clone's agent sent a photocopy of the agreement to lease to the solicitors for the parties and retained the original in its files. It is unclear what happened to the original of the agreement to lease. The trial judge in the original proceedings – Vanstone J – said that it may have been lost when Players was unsuccessfully attempting to obtain the signature of the fourth director and guarantor, Mr Cahill[2]. The original, rather than a copy, might also have been sent to the Licensing Court when Players applied for its hotel and gaming machine licences.

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2 *Clone Pty Ltd v Players Pty Ltd* [2005] SASC 281 at [24].

10 In March 1995, Players took possession of the premises and undertook a major refurbishment. Later that month, Clone's solicitors wrote to Mr Griffin, who represented Players in the negotiations and acted as the solicitor for Players. Clone's solicitors enclosed a draft memorandum of lease and a copy of the agreement to lease. In April 1995, Clone and Players executed the memorandum of lease with a 10-year term. The memorandum of lease contained provisions[3] consistent with cl 11(i), set out above, as well as clauses preventing Players from transferring or removing the licences.

11 During 2002, a dispute arose between Clone and Players concerning repairs to the premises. Players later alleged that during the course of this dispute, in a letter dated 30 October 2003, Clone had consented to the removal of the hotel licence and the gaming machine licence. In November 2003, Players agreed to sell the licences to Fairtown Holdings Pty Ltd for $750,000 for its use at Victoria Square, Adelaide. In December 2003, Players and Fairtown applied to the Licensing Court for the removal of the hotel licence to the Victoria Square premises. Fairtown also applied for the transfer of the hotel licence and a new gaming machine licence.

12 In March 2004, Clone commenced its original action against Players and its directors, as guarantors, in the Supreme Court of South Australia. Fairtown and its two directors were also joined as defendants in order to obtain injunctive relief to prevent further steps being taken in relation to Fairtown's applications. Further defendants included the Liquor and Gambling Commissioner, and the Licensing Court of South Australia, both of which took no active part in the proceedings and agreed to abide by the orders of the Court. Those defendants were subject to an order made on 6 July 2004 dispensing with any obligation to give discovery "[o]n the understanding that [they] will make available to the other parties their files in relation to this matter".

13 There were five main issues in the proceedings:

(1) whether Clone had consented to the removal of the hotel licence and the surrender of the gaming machine licence;

(2) if Clone had consented, the conditions of that consent and whether they had been satisfied;

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3 Clauses 7.3 and 8.8.

(3) if Clone had not consented, whether Clone was obliged to pay reasonable consideration to Players for the licences upon determination of the lease;

(4) whether Clone had validly terminated the memorandum of lease before its expiry for breach by Players, including issues concerning four notices to remedy various alleged breaches and whether those breaches had been remedied within the time stipulated; and

(5) if any breach had been committed by Players which would have entitled Clone to terminate the memorandum of lease, whether Players should be granted relief against forfeiture.

14 In relation to the third issue, Clone had three alternative submissions: (i) the agreement to lease was not binding because Mr Cahill had not signed it as a guarantor; (ii) upon execution, the memorandum of lease became the sole and exclusive embodiment of the agreement and superseded the agreement to lease; and (iii) the agreement to lease provided for "NIL" consideration. As to (iii), the issue concerned Players' claim that the memorandum of lease should be rectified to conform to an obligation in the agreement to lease to pay consideration. That obligation was said to arise because Players claimed that the word "NIL" in cl 11(i) of the agreement to lease had been struck through in blue pen. Clone's submission was that the faint line that ran through the words "for" and "NIL" had been made accidentally or mechanically, such as by a photocopying scratch or artefact on the photocopier glass or lens.

The course of the first trial

15 The trial commenced on 7 March 2005. The original agreement to lease was not discovered nor was it in evidence at the trial. Clone and Players each discovered a copy of the agreement to lease and both copies were tendered. Players did not contend that the two tendered copies had been made at a different time or by a different photocopier.

16 Each copy showed the word "NIL" with a short, straight and precise, faint line that appeared to run through the top of the letters "NI". The same straight and precise, but faint, line ran through the top of the word "for", through the letter "f", and over the top of the letters "o" and "r". If the words "for" and "NIL" had been struck through at the time of execution, and were not part of the clause, then the clause would have read as follows:

> "The Lessee will upon expiration or earlier determination of the Lease transfer to the Lessor any Liquor Licences or gaming machine Licences held in respect of the premises [*words struck out*] consideration."

17 The evidence during Clone's case about cl 11(i) of the agreement was, at best, equivocal. One witness could not recall whether the word "NIL" had been struck through. Another did not believe that it had been struck through and could not recall that it was. Clone called evidence that it could not locate an agreement to lease other than the copy it had discovered. Senior counsel for Clone also made various calls for Players to produce copies of the agreement. In response to one of those calls, senior counsel for Players said that he would check but that, as he understood it, the only copy of the agreement to lease in Players' possession was the copy that Players had discovered.

18 At the close of Clone's case, in response to Clone's calls for copies of the agreement to lease, senior counsel for Players told the Court that a copy of the agreement to lease had been filed with the Licensing Court in September 1994. He said that enquiries were being made of the Licensing Court. He added that Players was making every endeavour to find any further copies of the agreement to lease and that it was as keen to find them as Clone. He said that Players would provide anything it found to Clone.

19 On 6 April 2005, Players opened its case. Senior counsel for Players informed the Court that Players had asked the Commissioner whether there remained any files concerning Players' application for removal of the hotel licence from the Grenfell Tavern to the Planet Hotel. On the same day, Clone's instructing solicitor asked Ms Varricchio, a legal and policy officer employed by the Commissioner, to search the files of the Commissioner for any copies of the agreement to lease. Ms Varricchio replied, saying that she had located a copy of the agreement on the "Grenfell Tavern removal file" rather than the "Planet Hotel Premises File".

20 After the Court adjourned on 7 April 2005, junior counsel for Clone inspected the Grenfell Tavern removal file at the Commissioner's premises. He saw a copy of the agreement to lease. This was described as the third copy. The junior counsel noticed that, like the two tendered copies, the third copy of the agreement to lease contained a line through the word "NIL", and that it was not blue. He did not photocopy it because he thought that any copy made would be discoverable. He asked Ms Varricchio to advise him if Players' solicitors came to inspect the Commissioner's files and, if so, which files they inspected.

21 On 8 April 2005, a solicitor representing Players attended the offices of the Commissioner. The solicitor requested, and was shown, the files relating to the Planet Hotel. The solicitor did not request, and was not shown, the Grenfell Tavern removal file. Ms Varricchio reported upon the visit of Players' solicitor to the secretary of Clone's principal solicitor. This information was relayed to Clone's other solicitors and counsel.

22 On 11 April 2005, the principal solicitor for Clone gave a notice to the Commissioner to produce to the Court "all the Planet files in your possession, including files from the inception of The Planet Hotel". Ms Varricchio was unsure whether this included the Grenfell Tavern removal file. Clone's principal solicitor, via her secretary, advised the solicitor for the Commissioner that the notice required production of the Planet Hotel premises file only, and not the Grenfell Tavern removal file, which contained the third copy of the agreement to lease. However, the files delivered to the Court included files from Players' gaming machine licence application. Those files contained a fourth copy of the agreement to lease. That copy also showed the same line through the words "for" and "NIL". Clone's legal representatives were allowed to inspect the files without the notice to produce being called upon in open court.

23 A central witness who gave evidence for Players at trial was Mr Griffin, who, in addition to being one of Players' directors, was a solicitor and partner of a law firm. Mr Griffin's evidence was supported in key respects by Mr McDermott's evidence. Mr Griffin said that Clone's agent had provided him with drafts of the agreement to lease containing cl 11(i) with the words "for NIL consideration". Mr Griffin gave evidence that he did not read the draft carefully and did not notice those words. He wrote to two other directors of Players saying that "I believe [the agreement to lease] is in order". Clone's solicitors subsequently made three changes to the draft agreement, which were highlighted by Clone's agent for Mr Griffin's attention. Mr Griffin then considered the draft with the highlighted changes at the offices of Players' solicitors with Mr McDermott and Mr May. Mr Griffin said that he only then discovered the reference to "NIL consideration", which he thought had been introduced for the first time into the revised draft. His evidence was that he told the others that Clone had "tried to ... pull a swifty here, this is not the deal" and the three men agreed that Players should not agree to the change. Mr Griffin said that he struck through the word "NIL" using a pen with blue ink, the three men then initialled every page and each of the highlighted changes, and then signed as guarantors. None of the men initialled the striking through of the words "for" or "NIL". Mr Griffin also gave evidence that the Licensing Court had destroyed its relevant files, which must have been understood to include the Grenfell Tavern removal file. Senior counsel for Clone did not challenge that evidence.

The decisions of the trial judge and the Full Court in the first trial

24 After a 29-day trial, the trial judge upheld Clone's claims in relation to all of the issues set out above, except in relation to one of the breach issues. It was unnecessary to determine the fifth issue, namely whether Players was entitled to relief against forfeiture, because her Honour had found that one of the breaches of the memorandum of lease committed by Players was incapable of being remedied. Her Honour also dismissed all of Players' counterclaims. Players was ordered to deliver up the licences to Clone, declared to be liable to transfer the licences to Clone, and ordered to pay damages.

25 In relation to whether Clone was obliged to pay reasonable consideration for the licences, the trial judge upheld each of Clone's three submissions and rejected Players' submission that the lease ought to be rectified. First, the agreement to lease had been superseded by the memorandum of lease, which was not intended to reflect and incorporate the provisions of the agreement to lease. Secondly, the handwritten indorsement to the agreement to lease, inserted by Clone's solicitors, had the effect that execution by Mr Cahill, which did not occur, was a condition precedent to the agreement to lease. Thirdly, the word "NIL" had not been struck through in the agreement to lease at the time when the agreement to lease was executed by Clone. Conscious of Mr Griffin's position as a practising solicitor, the trial judge nevertheless rejected key parts of his evidence, including his evidence that he struck through the word "NIL" before the agreement to lease was executed by Clone. Her Honour gave numerous reasons for the rejection of Mr Griffin's evidence. Her Honour also rejected Mr McDermott's evidence supporting Mr Griffin's evidence.

26 The reasons why the trial judge rejected Mr Griffin's evidence included the following. First, none of the directors initialled alongside the alleged striking out of the word. This contrasted with the initialling by the directors alongside other changes to the agreement to lease and their initials at the foot of each page. Secondly, it was unlikely that a commercial solicitor, such as Mr Griffin, would have been satisfied with a provision that provided for the licences to be transferred "for consideration". There was a provision, with initialled changes, for resolving disputes about market value of plant and equipment (cl 11(j)) and another provision to resolve disputes about a rent review (cl 7) but no provision for resolving a dispute about the "consideration" for the licences. To this might be added the legal and grammatical nonsense of a clause which would have required transfer of the licences "held in respect of the premises [*words struck out*] consideration". Thirdly, as Mr Griffin acknowledged, the deletion would not have accorded with any prior agreement between the parties but Mr Griffin made no attempt to bring the alteration to the attention of any officer or agent of

Clone. Mr Griffin also made no attempt to alter other clauses that were inconsistent with representations made to him by Clone. Fourthly, Mr Griffin's complaint, which asserted, incorrectly, that Clone had attempted to "pull a swifty" by inserting the word "NIL" into the agreement, had only been communicated to Clone 10 years later. Indeed, reference to the deletion of the word "NIL" was only made obliquely in a letter from Players before its original defence was filed and Players did not include such an allegation in its original defence. Fifthly, the memorandum of lease did not contain a clause requiring any consideration to be paid. Clauses 7.3 and 8.8 of the memorandum of lease provided for the delivery up of the hotel and gaming machine licences on determination of the lease without any requirement for payment of consideration. Sixthly, there was evidence from Clone's witnesses, which her Honour accepted, that they would have seen the blue line striking through "for NIL" if it were there.

27 Players appealed to the Full Court of the Supreme Court of South Australia. The Full Court upheld the trial judge's conclusion that Clone had not consented to the removal of the hotel licence and the surrendering of the gaming machine licence. As to the third issue, concerning whether consideration was payable by Clone, the Full Court overturned the trial judge's conclusions that the agreement to lease had been superseded by the memorandum of lease and that Mr Cahill's signature as guarantor was a condition precedent. A fundamental question for Players' claim for rectification was therefore whether, at the time of execution of the agreement to lease, the word "NIL" had been struck through.

28 The Full Court upheld the conclusion of the trial judge on that point. Doyle CJ (with whom Sulan and Layton JJ agreed) described the reasons why the trial judge rejected Mr Griffin's evidence as matters having "considerable force"[4]. Doyle CJ also observed that even if Mr Griffin's evidence had been accepted, and even if cl 11(i) were to be construed so as to require payment of consideration, there was another obstacle potentially in the path of Players' claim for rectification. This obstacle involved the possibility that rectification might still be refused if Players was aware that Clone was mistaken about cl 11(i) of the agreement to lease[5].

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4 *Players Pty Ltd v Clone Pty Ltd* [2006] SASC 118 at [189].

5 *Players Pty Ltd v Clone Pty Ltd* [2006] SASC 118 at [191]-[197]. See also *Taylor v Johnson* (1983) 151 CLR 422 at 431-432; [1983] HCA 5; Kerr, *A Treatise on the Law of Fraud and Mistake as Administered in Courts of Equity*, (1868) at 345.

29 Since the Full Court also overturned the trial judge's finding in relation to one of the breaches of the lease in the first notice to remedy, the Full Court remitted the matter to the trial judge to determine Players' claim for relief against forfeiture in relation to the other breaches. That claim was subsequently rejected by the trial judge on the remitter[6].

Events after the first trial and Full Court appeal

30 After the proceedings had concluded, the Legal Practitioners Conduct Board investigated Mr Griffin's evidence at the trial. In the course of that investigation, the Board inspected the Commissioner's files and located the third and fourth copies of the agreement to lease. No action was taken against Mr Griffin. Mr Griffin was informed of the existence of the third and fourth copies of the agreement to lease.

31 At the time when Mr Griffin was informed of the existence of these copies, Players and Clone were involved in a dispute about legal costs. Mr Griffin inspected documents on a file listed on Clone's bill of costs. His purpose was to determine whether Clone's solicitors had been aware of the existence of the third and fourth copies of the agreement to lease during the trial. Mr Griffin found documents that revealed that Clone knew about the third copy of the agreement, and that the fourth copy of the agreement was contained in the file produced to the Court, but not called upon by Clone.

The proceedings to set aside the judgment from the first trial

Players' applications

32 In June 2010, Players brought two applications to set aside the judgment against it and to obtain an order for a new trial. The first application was brought in the same proceedings that had been the subject of the trial judge's perfected judgment, as amended by the Full Court. The second application was a new proceeding before a single judge of the Supreme Court to set aside the judgment. The second application was the appropriate way to proceed. Even where the separate procedure of a motion for a new trial might be concurrently available[7], if fraud is alleged then a fresh action will generally be the appropriate application

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6 *Clone Pty Ltd v Players Pty Ltd (No 2)* [2006] SASC 290.

7 *McCann v Parsons* (1954) 93 CLR 418 at 426; [1954] HCA 70.

relying upon the power to set aside a perfected judgment of any court for fraud[8]. Independent proceedings, even where the application is to set aside an appellate court's decision[9], can permit "the whole issue [to] be properly defined, fought out, and determined"[10].

33 In its applications to set aside the orders of the trial judge and Full Court, Players alleged that the judgment could be set aside on the basis of malpractice by Clone, relying upon the decision of this Court in *Commonwealth Bank of Australia v Quade*[11]. As Blue J observed in the Full Court, the misconduct which was attributed to Clone was based upon the conduct of its lawyers[12]. Players' case of malpractice was threefold. First, Players alleged that Clone had breached an obligation to discover the third copy of the agreement to lease. Secondly, Players alleged that Clone had misled the Court and had misled Players by failing to inform them of the existence of the third copy of the agreement to lease and by prosecuting a case on the false premise that the provenance of copies of the agreement to lease was unknown. Thirdly, Players alleged that Clone had breached an obligation to disclose to Players the Commissioner's production of the files to the Court under the April 2005 notice to produce.

The decisions at first instance and on appeal

34 Two of the allegations of Clone's misconduct were ultimately accepted. The allegation of failure to disclose was upheld by the primary judge, Hargrave AJ, on the basis that the third copy of the agreement to lease was

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8 *Flower v Lloyd* (1877) 6 Ch D 297 at 302; *Jonesco v Beard* [1930] AC 298 at 300-301; *McDonald v McDonald* (1965) 113 CLR 529 at 533, 535; [1965] HCA 45; *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534 at 538; *Spies v Commonwealth Bank of Australia* (1991) 24 NSWLR 691 at 699-700. See also Sheridan, "Fraud and Surprise in Legal Proceedings", (1955) 18 *Modern Law Review* 441 at 444.

9 Seton, *Forms of Judgments and Orders in the High Court of Justice and Court of Appeal*, 6th ed (1901), vol 1 at 859.

10 *Hip Foong Hong v H Neotia and Co* [1918] AC 888 at 894. See also Daniell, *The Practice of the High Court of Chancery*, 5th ed (1871), vol 2 at 1428.

11 (1991) 178 CLR 134; [1991] HCA 61.

12 *Clone Pty Ltd v Players Pty Ltd (In liquidation) (Receivers Appointed)* (2016) 127 SASR 1 at 12 [15].

within Clone's power and the failure by Clone to disclose it constituted serious malpractice[13]. The Full Court, by majority, upheld this conclusion on the basis that the third copy was in Clone's custody[14]. The allegation of misconduct by Clone misleading the trial judge, although dismissed by Hargrave AJ[15], was accepted by a majority of the Full Court[16], with one judge in the majority, Stanley J, also concluding that Clone had misled the Full Court on appeal from the trial judge[17]. However, the allegation that Clone engaged in misconduct by failing to call on the notice to produce, although accepted by Hargrave AJ[18], was found by a majority of the Full Court not to be malpractice[19].

35 Both Hargrave AJ and the majority of the Full Court (Blue and Stanley JJ, Debelle AJ dissenting) held that the misconduct was a sufficient basis to enliven a discretionary power of the Court to set aside the judgment of Vanstone J, as varied by the Full Court on appeal from her Honour's decision[20]. Hargrave AJ

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13 *Players Pty Ltd (In liquidation) (Receivers Appointed) v Clone Pty Ltd* [2015] SASC 133 at [177], [204], [240].

14 *Clone Pty Ltd v Players Pty Ltd (In liquidation) (Receivers Appointed)* (2016) 127 SASR 1 at 32 [148], 43 [197] per Blue J, Stanley J agreeing at 103 [423]-[424]. Cf at 147 [598] per Debelle AJ.

15 *Players Pty Ltd (In liquidation) (Receivers Appointed) v Clone Pty Ltd* [2015] SASC 133 at [238].

16 *Clone Pty Ltd v Players Pty Ltd (In liquidation) (Receivers Appointed)* (2016) 127 SASR 1 at 59 [261] per Blue J, Stanley J agreeing at 106 [432]. Cf at 158-159 [640] per Debelle AJ.

17 *Clone Pty Ltd v Players Pty Ltd (In liquidation) (Receivers Appointed)* (2016) 127 SASR 1 at 107-108 [436].

18 *Players Pty Ltd (In liquidation) (Receivers Appointed) v Clone Pty Ltd* [2015] SASC 133 at [241].

19 *Clone Pty Ltd v Players Pty Ltd (In liquidation) (Receivers Appointed)* (2016) 127 SASR 1 at 154 [627] per Debelle AJ, Stanley J agreeing at 103 [422].

20 *Players Pty Ltd (In liquidation) (Receivers Appointed) v Clone Pty Ltd* [2015] SASC 133 at [88]; *Clone Pty Ltd v Players Pty Ltd (In liquidation) (Receivers Appointed)* (2016) 127 SASR 1 at 43 [197], 59 [262], 72 [322] per Blue J, 112 [453]-[454], 117 [475]-[476] per Stanley J.

held that the discretion should be exercised to order a new trial[21]. By majority, the Full Court dismissed the appeal.

36 The primary judge and the Full Court considered that the principles concerning whether the Court should exercise its discretion to set aside its perfected judgment were those discussed by this Court in *Commonwealth Bank of Australia v Quade*[22]. It appears that, with some modifications in the Full Court[23], this approach had generally been urged in submissions by both Clone and Players[24]. In contrast, before the primary judge and the Full Court, the Attorney-General for South Australia intervened to submit that where an application concerns the powers of the Court to set aside its own judgment, rather than the power of an appellate court, the power is limited to circumstances of fraud or conduct analogous to fraud[25].

37 Consistently with the approach taken in *Commonwealth Bank of Australia v Quade*, two of the factors considered by Hargrave AJ and by the Full Court in deciding whether to order a new trial were (i) whether Players had itself exercised reasonable diligence to find the third and fourth copies of the agreement to lease, and (ii) whether, absent the misconduct, the result might have been different. Hargrave AJ concluded that Players had not exercised reasonable diligence, although that lack of reasonable diligence was an error of judgment in the course of the trial which fell well short of the malpractice engaged in by

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21 *Players Pty Ltd (In liquidation) (Receivers Appointed) v Clone Pty Ltd* [2015] SASC 133 at [304]-[305].

22 (1991) 178 CLR 134. See *Players Pty Ltd (In liquidation) (Receivers Appointed) v Clone Pty Ltd* [2015] SASC 133 at [81]; *Clone Pty Ltd v Players Pty Ltd (In liquidation) (Receivers Appointed)* (2016) 127 SASR 1 at 20 [79], 59 [262] per Blue J.

23 *Clone Pty Ltd v Players Pty Ltd (In liquidation) (Receivers Appointed)* (2016) 127 SASR 1 at 20 [79], 21 [88] per Blue J, 108 [437] per Stanley J.

24 *Players Pty Ltd (In liquidation) (Receivers Appointed) v Clone Pty Ltd* [2015] SASC 133 at [81].

25 *Players Pty Ltd (In liquidation) (Receivers Appointed) v Clone Pty Ltd* [2015] SASC 133 at [81]; *Clone Pty Ltd v Players Pty Ltd (In liquidation) (Receivers Appointed)* (2016) 127 SASR 1 at 22 [97], 68 [310] per Blue J.

Clone's legal team[26]. In the Full Court, a majority of the Court upheld Hargrave AJ's conclusion that Players had failed to exercise reasonable diligence in searching for a third copy of the agreement to lease[27].

38 As to whether the result might have been different if it were not for the misconduct, Clone submitted that the third copy had no real probative value. Clone submitted that the third copy might have been another copy made from the missing original at the same time as the first two. Or it might itself have been a copy of either the first copy or the second copy. In either case it would be expected that any mechanical or accidental photocopying mark would be reproduced on it. The relevance of the third copy of the agreement to lease depended upon whether an inference might be able to be drawn that the third copy was a copy of the original, made at a different time from the first and second copies, which were sent to the parties on 30 August 1994. However, identifying the genesis of the first, second, and third copies was not simple.

39 Hargrave AJ concluded only that absent Clone's misconduct there was a real possibility that the evidence of the third copy of the agreement would have led to a different result[28]. A majority of the Full Court upheld this conclusion[29], although each judge took a different view of the forensic significance of the third copy. In the majority, Blue J held that on the balance of probabilities the third copy of the agreement to lease was copied from the original[30]. Also in the majority, Stanley J held that this was only arguably the case[31]. The approach of

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26 *Players Pty Ltd (In liquidation) (Receivers Appointed) v Clone Pty Ltd* [2015] SASC 133 at [291].

27 *Clone Pty Ltd v Players Pty Ltd (In liquidation) (Receivers Appointed)* (2016) 127 SASR 1 at 61-62 [280]-[281], [285], 63 [288] per Blue J, 162-163 [649] per Debelle AJ. Cf at 111-112 [451] per Stanley J.

28 *Players Pty Ltd (In liquidation) (Receivers Appointed) v Clone Pty Ltd* [2015] SASC 133 at [242].

29 *Clone Pty Ltd v Players Pty Ltd (In liquidation) (Receivers Appointed)* (2016) 127 SASR 1 at 68 [306] per Blue J, 115 [465] per Stanley J.

30 *Clone Pty Ltd v Players Pty Ltd (In liquidation) (Receivers Appointed)* (2016) 127 SASR 1 at 50 [223]-[224].

31 *Clone Pty Ltd v Players Pty Ltd (In liquidation) (Receivers Appointed)* (2016) 127 SASR 1 at 114-115 [463].

Debelle AJ in dissent was that it was equally open to infer that the third copy of the agreement to lease was a photocopy from an earlier photocopy or a photocopy of the original and that any finding would be a matter of conjecture[32]. His Honour concluded that there was no real possibility that the result would have been different[33].

40 Debelle AJ also differed from the other members of the Full Court because his Honour considered that Players was required to prove that the result would probably have been different[34].

The grounds of appeal to this Court

41 In each of the appeals in this Court, Clone had two grounds of appeal. Clone's first ground of appeal asserted that the Supreme Court's equitable power to set aside perfected orders, outside a statutory appeal, is limited to fraud and does not extend to forms of malpractice not amounting to fraud. Aside from categories of case that were not in issue in these appeals, that submission should be accepted. It would be inconsistent with both principle and a long historical foundation to extend the general power beyond actual fraud.

42 The second ground of appeal asserted that the Supreme Court's power to set aside its perfected judgment on the ground of malpractice not amounting to fraud was conditional upon proof of various matters which essentially required that (i) but for the serious malpractice the irregularly obtained judgment would probably have been different, and (ii) the party applying to set aside the judgment had exercised reasonable diligence. The assumption underlying the second ground of appeal, reflecting Clone's submissions in the courts below, was that the approach in an original action to set aside a judgment should be similar to the approach on an appeal in a case like *Commonwealth Bank of Australia v Quade*[35], although with the discretionary factors in *Commonwealth Bank of*

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32 *Clone Pty Ltd v Players Pty Ltd (In liquidation) (Receivers Appointed)* (2016) 127 SASR 1 at 164 [655], 183 [714].

33 *Clone Pty Ltd v Players Pty Ltd (In liquidation) (Receivers Appointed)* (2016) 127 SASR 1 at 177 [695].

34 *Clone Pty Ltd v Players Pty Ltd (In liquidation) (Receivers Appointed)* (2016) 127 SASR 1 at 183 [714].

35 (1991) 178 CLR 134.

Australia v Quade treated as conditions. That approach is ahistorical and contrary to principle.

The scope of the power to set aside perfected judgments

43 Prior to the Judicature Reforms, in the Court of Chancery there were several different methods for setting aside or avoiding the effect of either enrolled decrees or perfected common law judgments. In relation to its own decrees, and apart from an appeal from the Lord Chancellor to the House of Lords[36], the Court of Chancery recognised two ways in which decrees could be set aside even when enrolled. The first was a bill of review. On a bill of review, the reviewing court had very broad powers to reverse or alter a decree. The second was an original bill. The original bill could issue without leave, to rescind or "annul" the decree on the ground of "fraud and imposition"[37].

44 The distinction between each of the equitable bills is today broadly reflected in the distinction between (i) the power of an appellate court to set aside a lower court judgment and order a new trial, and (ii) the power of a court, by an original action, to set aside a judgment (often its own) based upon fraud. The distinction, and separate requirements in each action, is justified as a matter of principle and history. It is fundamental to these appeals. Each circumstance, and its historical antecedents, is considered separately below.

The equitable and statutory powers to review a decision and order a new trial

45 The first method mentioned above for reversing or altering an enrolled decree in Chancery prior to the *Supreme Court of Judicature Act* 1873 (36 & 37 Vict c 66) was a bill of review. A bill of review could be brought in the Court of Chancery in two different categories of case[38]. One category was concerned with substantial errors of law. The other category was based upon new matter

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36 *Charles Bright & Co Ltd v Sellar* [1904] 1 KB 6 at 11; Holdsworth, *A History of English Law*, 7th ed (reprint) (1966), vol 1 at 372-373.

37 *Barnesly v Powel* (1748) 1 Ves Sen 119 at 120 [27 ER 930 at 930]. See also Cooper, *A Treatise of Pleading on the Equity Side of the High Court of Chancery*, (1809) at 96-97.

38 Mitford, *A Treatise on the Pleadings in Suits in the Court of Chancery, by English Bill*, 5th ed (1847) at 101-102.

discovered since the decree. In both cases there was a 20-year time limit[39], which probably arose from the circumstance that a bill of review was considered as being in the nature of a writ of error[40], which writ had that time limit.

46 The scope of the bill of review in relation to the first category – errors of law – was broad. Chancery did not circumscribe the nature of the error of law. It was necessary that the error appear on the face of the decree[41] but the decree was required to recite the facts and evidence upon which it was based[42].

47 The scope of the second category – new matter discovered – was even broader. It applied to any new matter discovered since the decree. However, the bill could not be filed in this second category without the leave of the court[43]. And leave, which was in the discretion of the court[44], would not be granted unless the applicant satisfied the court that (i) the failure by the applicant to discover the material prior to enrolment of the decree was not due to a lack of

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39 *Sherrington v Smith* (1704) 2 Bro PC 62 at 63 [1 ER 793 at 794]; *Smythe v Clay* (1770) 1 Bro PC 453 [1 ER 684]; Mitford, *A Treatise on the Pleadings in Suits in the Court of Chancery, by English Bill*, 5th ed (1847) at 105-106.

40 *Sherrington v Smith* (1704) 2 Bro PC 62 at 63 [1 ER 793 at 794]. See also Cooper, *A Treatise of Pleading on the Equity Side of the High Court of Chancery*, (1809) at 88.

41 *Grice v Goodwin* (1706) Prec Ch 260 [24 ER 126]; Mitford, *A Treatise on the Pleadings in Suits in the Court of Chancery, by English Bill*, 5th ed (1847) at 101.

42 Daniell, *The Practice of the High Court of Chancery*, 5th ed (1871), vol 1 at 862-863.

43 Mitford, *A Treatise on the Pleadings in Suits in the Court of Chancery, by English Bill*, 5th ed (1847) at 102.

44 *Wilson v Webb* (1788) 2 Cox 3 [30 ER 2]; Mitford, *A Treatise on the Pleadings in Suits in the Court of Chancery, by English Bill*, 5th ed (1847) at 102.

reasonable diligence[45], and (ii) the new matter is relevant[46] in the sense that it would have led to a different result[47].

48 The rehearing on a bill of review has been repeatedly described as being in, or in the nature of, appellate jurisdiction[48]. This description has been used because, although the decision of the reviewing court might sometimes involve a hearing of evidence called for the first time[49], the review would usually also involve consideration of the final decision for error based upon the materials before the original court[50]. However, the *Supreme Court of Judicature Act* completed[51] the process of establishing a formal appeal structure. Relevantly to

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45 *Ludlow v Macartney* (1719) 2 Bro PC 67 [1 ER 797]; *Young v Keighly* (1809) 16 Ves Jun 348 at 351 [33 ER 1015 at 1016]; *Bingham v Dawson* (1821) 3 Jacob 243 [37 ER 841]; Cooper, *A Treatise of Pleading on the Equity Side of the High Court of Chancery*, (1809) at 91; Story, *Commentaries on Equity Pleadings*, (1838) at 270, §414; Mitford, *A Treatise on the Pleadings in Suits in the Court of Chancery, by English Bill*, 5th ed (1847) at 102; Daniell, *The Practice of the High Court of Chancery*, 5th ed (1871), vol 2 at 1423.

46 *Bennet v Lee* (1742) 2 Atk 529 at 530 [26 ER 717 at 718].

47 *Willan v Willan* (1810) 16 Ves Jun 72 at 89-90 [33 ER 911 at 917]; Mitford, *A Treatise on the Pleadings in Suits in the Court of Chancery, by English Bill*, 5th ed (1847) at 102.

48 *In re St Nazaire Co* (1879) 12 Ch D 88; *Charles Bright & Co Ltd v Sellar* [1904] 1 KB 6 at 11; *Graziers Association of New South Wales v Australian Legion of Ex-Servicemen and Women* (1949) 49 SR (NSW) 300 at 303; *In re Barrell Enterprises* [1973] 1 WLR 19 at 24; [1972] 3 All ER 631 at 637; *Fleming v The Queen* (1998) 197 CLR 250 at 259 [20]; [1998] HCA 68; *DJL v Central Authority* (2000) 201 CLR 226 at 244 [35]; [2000] HCA 17; *Harrison v Schipp* (2002) 54 NSWLR 612 at 619-620 [27], 639 [181]; cf at 659 [288].

49 See *CDJ v VAJ* (1998) 197 CLR 172 at 201-202 [111]; [1998] HCA 67.

50 *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 174; [1926] HCA 58; *Eastman v The Queen* (2000) 203 CLR 1 at 33 [104]; [2000] HCA 29, citing *Attorney-General v Sillem* (1864) 10 HLC 704 at 724 [11 ER 1200 at 1209]. See also Story, *Commentaries on the Constitution of the United States*, 5th ed (1891), vol 2 at 539, §1761.

51 *Court of Chancery Act* 1851 (14 & 15 Vict c 83).

these appeals, the same process was completed in South Australia by 1935[52]. That formal appeal structure left no room for the continued existence of a separate appellate procedure by a bill of review. Therefore, despite some early doubts or assumptions to the contrary[53], and like the disappearance of the Chancery power to restrain the enforcement of a common law judgment[54], the bill of review did not survive the Judicature Reforms[55]. As Lindley LJ remarked after the Judicature Reforms, the decline of a separate, broad Chancery power in a bill of review was "of the utmost importance"[56]. It was replaced by a defined appellate structure, including provisions for motions for new trials to be heard by an appellate court[57], with associated restrictions including time limitations.

49 The replacement of the bill of review with a power for an appeal court to order a new trial did not narrow the scope of the power that the reviewing or appellate court could exercise. The power could still broadly be divided into two categories, although in both categories the grounds were never "completely stereotyped" and they maintained flexibility "governed by the overriding purpose of reconciling the demands of justice with the policy in the public interest of bringing suits to a final end"[58]. As to the first category, involving errors of law,

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52 *Equity Act* 1866 (30 Vict No 20); *Supreme Court Amendment Act* 1868 (32 Vict No 7); *Supreme Court Act* 1878 (41 & 42 Vict No 116); *Supreme Court Act* 1935 (SA), s 50.

53 *Flower v Lloyd* (1879) 10 Ch D 327 at 334; *In re May* (1883) 25 Ch D 231; (1885) 28 Ch D 516; *Falcke v Scottish Imperial Insurance Co* (1887) 57 LT 39 at 39-40.

54 Due to *Supreme Court of Judicature Act* 1873 (36 & 37 Vict c 66), s 24(5).

55 *In re St Nazaire Co* (1879) 12 Ch D 88 at 99-100, 100-101, 101; *Ainsworth v Wilding* [1896] 1 Ch 673 at 676-677; *In re Barrell Enterprises* [1973] 1 WLR 19 at 27; [1972] 3 All ER 631 at 639; *DJL v Central Authority* (2000) 201 CLR 226 at 244 [35]; *Harrison v Schipp* (2002) 54 NSWLR 612. Assumed in *Boswell v Coaks* (1894) 6 R 167 at 169.

56 *Preston Banking Co v William Allsup & Sons* [1895] 1 Ch 141 at 144.

57 In South Australia, *Supreme Court Act* 1878 (41 & 42 Vict No 116), s 15; *Supreme Court Act* 1935 (SA), s 48(1)(a).

58 *McCann v Parsons* (1954) 93 CLR 418 at 430-431.

in *Wollongong Corporation v Cowan*[59] Dixon CJ (with whom Williams, Webb, Kitto and Taylor JJ agreed) described the circumstances in which a new trial might be ordered as including errors of law such as misdirection, misreception of evidence, and wrongful rejection of evidence, as well as instances of "surprise, malpractice or fraud". Dixon CJ also reiterated the existence of the second category, where a new trial could be ordered by the appellate court where fresh evidence is discovered by the unsuccessful party, with the general, but not universal, requirements that (i) "reasonable diligence [was] exercised to procure the evidence which the defeated party failed to adduce at the first trial", and (ii) it is reasonably clear that the fresh evidence would have changed the result[60].

50 In *Commonwealth Bank of Australia v Quade*, this Court considered whether the general requirements that attached to the second category also applied to instances in the first category where the error of law arose from an allegation of malpractice. In that case the successful party had, by misconduct, failed to comply with an order for discovery before judgment. The Full Court of the Federal Court held that the result of the trial might have been different if discovery had been provided. The appeal was allowed and a new trial was ordered[61]. This Court dismissed the further appeal, explaining that in relation to errors of law as well as instances of surprise, malpractice, or fraud it was not necessary to conclude that the result would have been different[62]. The power to order a new trial in all these cases depended upon the appellate court's assessment, in all the circumstances, of the interests of justice[63].

51 Fundamentally, *Commonwealth Bank of Australia v Quade* concerned the circumstances in which "*an appellate court* is justified in setting aside a verdict merely on the grounds of fresh evidence"[64] (emphasis added). The statutory power to receive the further evidence in that case derived from s 27 of the

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59 (1955) 93 CLR 435 at 444; [1955] HCA 16.

60 *Wollongong Corporation v Cowan* (1955) 93 CLR 435 at 444. See also *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134 at 141.

61 *Quade v Commonwealth Bank of Australia* (1991) 27 FCR 569.

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

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

64 *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134 at 139.

Federal Court of Australia Act 1976 (Cth). The historical antecedents of that power, and the development of the principles by reference to which it was exercised, derived from the approach of equity in relation to bills of review.

The power of a court to set aside its own judgments

52 Equity had a separate, and much narrower, power which, in contrast with the broad power contained in bills of review, was not subsumed into the post-Judicature powers of the appellate court. It remains part of the equitable powers of the Supreme Court of South Australia by operation of the common provision vesting in the Supreme Court the jurisdiction of the High Court of Chancery[65]. The separate, and narrower, equitable power was by an original bill to set aside a decree even when enrolled. Prior to the *Supreme Court of Judicature Act*, the Consolidated General Orders of the High Court of Chancery 1860 maintained the Chancery distinction between this original bill and the bill of review. As the Vice-Chancellor explained in *Pearse v Dobinson (No 1)*[66], the former was a separate bill which sought to "impeach" or rescind a decree for fraud. It was distinct from the latter, which was described in the Consolidated General Orders as operating to reverse, alter or explain an enrolled decree[67].

53 The power by original bill to rescind the decree could be brought without leave[68]. Hence, the conditions for leave that attached to the bill of review based upon fresh evidence did not apply[69]. If those conditions were not to be undermined, it was necessary that the circumstances in which the original bill was available be significantly circumscribed. The original bill was commonly described as limited to fraud, although there were different species of fraud to

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65 *Supreme Court Act* 1935 (SA), s 17(2)(a)(i).

66 (1865) 13 LT 518 at 519.

67 Consolidated General Orders of the High Court of Chancery 1860 (UK), O 31 rr 9-11, esp r 9.

68 Daniell, *The Practice of the High Court of Chancery*, 5th ed (1871), vol 2 at 1428. Apart from the period 1860-1883: see Consolidated General Orders of the High Court of Chancery 1860 (UK), O 31 r 11; Gordon, "Fraud or New Evidence as Grounds for Actions to Set Aside Judgments", (1961) 77 *Law Quarterly Review* 358 at 367.

69 *Pearse v Dobinson (No 1)* (1865) 13 LT 518.

which the bill could apply. The fraud was not limited to a deceit or dishonesty by the opposing party. It extended, in the words of the Lord Chancellor of Ireland[70], to a "fraud on the court" such as where parties who were not hostile nevertheless presented their case to the court as antagonists in order to obtain orders depriving third parties of their rights[71]. In exceptional circumstances it was possible that it could extend to fraud of a witness by perjury[72].

54 There were other categories of case in which the Court of Chancery recognised jurisdiction to set aside a perfected decree in the absence of fraud. One was where the decree affected rights of parties who had not been joined[73]. Another was where the enrolment of the decree occurred by "surprise"[74], involving "[u]nderhanded dealings"[75], such as where the enrolling party had led the other party to believe that the decree would not be enrolled[76]. It is unnecessary in these appeals to attempt to catalogue those other categories or to identify the principles which underlay their recognition. What is more important

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70 *Kennedy v Daly* (1804) 1 Sch & Lef 355 at 375. See, generally, Mitford, *A Treatise on the Pleadings in Suits in the Court of Chancery, by English Bill*, 5th ed (1847) at 112-113.

71 *Sheldon v Aland* (1731) 3 P Wms 104 at 111 [24 ER 987 at 989]; *Boswell v Coaks* (1894) 6 R 167 at 168; *Cabassi v Vila* (1940) 64 CLR 130 at 147; [1940] HCA 41.

72 *Baker v Wadsworth* (1898) 67 LJQB 301; *Cabassi v Vila* (1940) 64 CLR 130 at 148; *McDonald v McDonald* (1965) 113 CLR 529 at 544; *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189 at 196 [16]; [2007] HCA 35.

73 *Earl of Carlisle v Goble* (1659) 3 Chan Rep 94 [21 ER 739]; Cooper, *A Treatise of Pleading on the Equity Side of the High Court of Chancery*, (1809) at 97; Mitford, *A Treatise on the Pleadings in Suits in the Court of Chancery, by English Bill*, 5th ed (1847) at 113. See also *Cameron v Cole* (1944) 68 CLR 571 at 589, 590-591; [1944] HCA 5; *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at 48 [137]; [2010] HCA 19.

74 Story, *Commentaries on Equity Pleadings*, (1838) at 281 fn 1.

75 Sheridan, "Fraud and Surprise in Legal Proceedings", (1955) 18 *Modern Law Review* 441 at 448.

76 *Stevens v Guppy* (1823) 1 Turn & R 178 [37 ER 1065]. See also *Gutta v Ierino* [2010] WASC 402 (S2) at [40]-[44].

to note is that they were never suggested to extend to malpractice not amounting to fraud in the course of proceedings.

55 The general power to set aside a judgment on the ground of fraud required actual fraud. The "essence of the action [was] fraud"[77]. The general ground of fraud was not diluted to allow, for instance, the judgment to be set aside for misconduct, accident, surprise, or mistake. This point was made pellucidly in 1867 in *Patch v Ward*[78]. In that case, as Lord Cairns LJ observed[79], the application was not brought on the basis of either category of the bill of review – either error of law or fresh evidence discovered since the decree. Rather, it was brought upon the basis that the decree was obtained by fraud. His Lordship explained that it was necessary that the fraud be "actual fraud ... the person chargeable with it ... acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him"[80]. Similarly, Sir John Rolt LJ, after observing that a particular ground of review in cases of foreclosure was inapplicable, remarked of the claim to set aside the order for fraud[81]:

> "I think, for the reasons which have been given by my learned brother, that the fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case, and obtaining that decree by that contrivance. Mere constructive fraud not originating in actual contrivance, but consisting of acts tending possibly to deceive or mislead without any such intention or contrivance, would probably not be sufficient – at all events I think could not, after such delay as has occurred in this case, be deemed sufficient – to set aside the order which has been made. What, therefore, the Appellant has to do is to satisfy the Court that the decree was obtained by the positive and actual fraud and contrivance of the party obtaining it."

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77 *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534 at 538.

78 (1867) LR 3 Ch App 203.

79 *Patch v Ward* (1867) LR 3 Ch App 203 at 206.

80 *Patch v Ward* (1867) LR 3 Ch App 203 at 207.

81 *Patch v Ward* (1867) LR 3 Ch App 203 at 212-213.

56 The power of a court of equity to rescind its own decrees for fraud was unaffected by the provisions of the *Supreme Court of Judicature Act*. Indeed, the power expanded to apply also to perfected common law judgments[82], the execution of which could no longer be restrained by a common injunction[83]. As an exception to finality, the power survived the statutory regime which defined the powers of appellate courts because it was, and remained, a "narrowly defined"[84] exception and was therefore tolerable. In contrast, the broad equitable bill of review did not survive as a separate procedure alongside the appellate jurisdiction finally created by the *Supreme Court of Judicature Act* because it would have stultified the operation of the statutorily defined principles of finality, including the conditions to be met before an appellate court could exercise a power to order a new trial. For instance, as Jessel MR said in *In re St Nazaire Co*[85], it would have been a "most remarkable thing" if a Chancery petition for rehearing could have been used to evade rules for appeals such as those involving time limitations.

57 The narrow scope of the general power of a court to rescind a judgment for fraud was reiterated after the *Supreme Court of Judicature Act* in *The Ampthill Peerage*[86]. In the course of considering whether a declaration of legitimacy could be set aside, Lord Wilberforce compared an application to a court to set aside its own judgment and said that equitable fraud or "lack of frankness" would not suffice to set aside a judgment and that "only fraud in a strict legal sense will do"[87]. Similarly, Lord Simon of Glaisdale said that "lack of frankness or an ulterior or oblique or indirect motive is insufficient"[88].

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82 *Cole v Langford* [1898] 2 QB 36; *Wyatt v Palmer* [1899] 2 QB 106.

83 See also *Monroe Schneider Associates (Inc) v No 1 Raberem Pty Ltd* (1992) 37 FCR 234 at 239.

84 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 17 [34]; [2005] HCA 12.

85 (1879) 12 Ch D 88 at 99.

86 [1977] AC 547. See also *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* [2013] 1 NZLR 804 at 820 [29].

87 *The Ampthill Peerage* [1977] AC 547 at 571.

88 *The Ampthill Peerage* [1977] AC 547 at 591.

58 In the instant appeals, one case upon which Players placed much reliance was the decision of the Privy Council in *Hip Foong Hong v H Neotia and Co*[89]. Players submitted that the decision established that the general power of a court to rescind its own judgments was not limited to fraud but extended also to surprise. But that case was an exercise of the power of an appellate court to order a new trial. It was in the nature of a bill of review. It was not concerned with the equitable power of a court to rescind its own judgment for fraud.

59 The appeal in *Hip Foong Hong v H Neotia and Co* was to the Privy Council from a refusal by the Full Court of the British Supreme Court for China to set aside the judgment of the trial judge. The appellants relied upon conduct by the respondents about which, in a polite euphemism, Lord Buckmaster said "[t]heir Lordships regard with great disfavour the method of obtaining evidence"[90]. The conduct, about which their Lordships did not have sufficient evidence to reach a determination of dishonesty, included suppressing evidence, paying witnesses to give evidence, telling a witness what to say in his evidence, and calling evidence from a witness who subsequently swore an affidavit saying that his evidence was untrue[91]. Delivering the advice of the Privy Council, Lord Buckmaster referred to the ground upon which the new trial was sought as one of "[f]raud or surprise or both"[92]. It is unclear what was meant by his Lordship's reference to "surprise", which echoed the reference to "surprise, fraud, or conspiracy" in a decision of the House of Lords that he cited[93]. It is unlikely that the surprise to which he referred could have been much removed from fraud since the extraordinary conduct in that case did not amount to surprise.

60 Although there might be doubt about what was meant by Lord Buckmaster's reference in *Hip Foong Hong v H Neotia and Co* to "surprise", there is a more fundamental reason why this case does not assist Players. As the House of Lords later observed in *Jonesco v Beard*[94], the Privy Council in *Hip*

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89 [1918] AC 888.

90 *Hip Foong Hong v H Neotia and Co* [1918] AC 888 at 893.

91 *Hip Foong Hong v H Neotia & Co* (1917) *North-China Herald*, 20 January at 160-161.

92 *Hip Foong Hong v H Neotia and Co* [1918] AC 888 at 894.

93 *Brown v Dean* [1910] AC 373 at 375.

94 [1930] AC 298 at 301.

Foong Hong v H Neotia and Co had not been concerned with the power of a court to set aside its own decision. The application was to an appellate court for the grant of a new trial.

The nature of the power applicable in this case

61 The applications before Hargrave AJ sought to have the Supreme Court of South Australia rescind its own perfected judgment. The proper application by Players was a fresh action to rescind the perfected orders. If fraud had been alleged, as was necessary, then even if there had not already been an appeal from the orders of the Supreme Court the proper course was to bring such an application to the same court rather than to the Full Court of the Supreme Court for a new trial[95].

62 The power to set aside the Supreme Court's own decision with which Hargrave AJ was concerned was the narrower power that was historically distinct from an appellate court's powers to set aside orders of a court below and order a new trial. Before that narrower power could be exercised in this case it required a pleading, and proof, of actual fraud. Players' alternative contention was that even if actual fraud was required, it could still succeed. That contention should be rejected. Fraud needs to be clearly pleaded and proved. It was not. Unsurprisingly, the factual findings of Hargrave AJ and the Full Court did not address, and were not adequate to establish, actual fraud. The appeals must be allowed on the first ground.

Failure to exercise reasonable diligence to discover the fraud

63 The second ground of appeal raised the issue of whether there is a further precondition requiring an applicant who seeks to set aside a judgment for fraud to establish that reasonable diligence was taken prior to the judgment to discover the fraud. Such a requirement is not present in other areas of the law concerned with fraud. As Brennan J said in *Gould v Vaggelas*[96], "[a] knave does not escape liability because he is dealing with a fool". The effect of such a requirement would be that a judgment might be set aside for a less serious, but well

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95 *McCann v Parsons* (1954) 93 CLR 418 at 425-426, citing *Jonesco v Beard* [1930] AC 298 at 300.

96 (1984) 157 CLR 215 at 252; [1984] HCA 68. See also *Toubia v Schwenke* (2002) 54 NSWLR 46 at 54 [37].

concealed, fraud but the judgment could never be set aside for an extremely serious but brazen fraud that could reasonably have been detected.

64 The requirement is also inconsistent with the sharp historical distinction between an original bill to set a judgment aside for fraud and a bill of review. Reasonable diligence was never a requirement of an original action based upon fraud to set aside a judgment. It was only ever a condition for leave to be granted for a bill of review based on fresh evidence, where the fresh evidence could relate to any subject matter. But it was not a condition where the bill of review was based on some error of law.

65 However, in *Owens Bank Ltd v Bracco*[97], Lord Bridge of Harwich, delivering the leading speech in the House of Lords, described the English rule for setting aside a judgment on the ground of fraud as requiring that the party seeking to set aside the judgment "prove that fraud by fresh evidence which was not available to him and could not have been discovered with reasonable diligence before the judgment was delivered". This statement was obiter dicta, was not the subject of contrary argument, and was based only upon the submissions of counsel. Nevertheless, in the Full Federal Court in *Monroe Schneider Associates (Inc) v No 1 Raberem Pty Ltd*[98] the parties did not dispute that this was also an accurate statement of Australian law. The requirement was reiterated by Lord Templeman in *Owens Bank Ltd v Etoile Commerciale SA*[99].

66 In *Toubia v Schwenke*[100], Handley JA, with whom Heydon and Hodgson JJA agreed, explained that other earlier English decisions cited in those cases do not support the proposition in each of the *Owens Bank* appeals that reasonable diligence is a precondition to relief. In particular, in *Boswell v Coaks*, which was relied upon by Parker LJ in the Court of Appeal in *Owens Bank Ltd v Bracco*[101] and by Lord Templeman in *Owens Bank Ltd v Etoile Commerciale*

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97 [1992] 2 AC 443 at 483.

98 (1992) 37 FCR 234 at 241. See also *Bourke v Beneficial Finance Corporation Ltd* (1993) 47 FCR 264 at 271-272.

99 [1995] 1 WLR 44 at 48.

100 (2002) 54 NSWLR 46 at 52-54 [27]-[37].

101 [1992] 2 AC 443 at 459-460.

SA[102], the Earl of Selborne spoke of the requirement of materiality of the new evidence, not a requirement of diligence[103].

67 It appears that the reason for the modern English position that reasonable diligence is required for the success of an original action to rescind a judgment for fraud has been based upon an assimilation of two historical sets of principles. The first relates to the principles concerning reversing, altering, or explaining a decree for fresh evidence on a bill of review, whether the underlying subject matter of the decree was fraud[104] or anything else. In this set of principles reasonable diligence had historically been a precondition for relief. The second concerns the principles governing rescission of a decree on an original bill based upon fraud in obtaining the judgment. Perhaps the earliest suggestion that these principles might be assimilated, and treated "even with greater freedom than before", was by the Earl of Selborne in *Boswell v Coaks*[105]. In England, this suggestion was adopted in later cases to apply the condition of reasonable diligence to the two separate sets of principles[106].

68 That approach has not been adopted in the course of the Australian decisions. After the bill of review was superseded by the power of an appellate court to grant a new trial, in Australia the absence of the condition of due diligence was maintained for new trials based on claims of errors of law[107]. Further, the condition of due diligence became only a discretionary consideration in that limited class of case where a new trial was sought by application to an appellate court based upon misconduct or fraud[108], although a case involving an

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102 [1995] 1 WLR 44 at 48.

103 *Boswell v Coaks* (1894) 6 R 167 at 174.

104 *Phosphate Sewage Co v Molleson* (1879) 4 App Cas 801.

105 (1894) 6 R 167 at 169.

106 *Takhar v Gracefield Developments Ltd* [2018] Ch 1. See also *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 545.

107 *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134 at 140.

108 *Wollongong Corporation v Cowan* (1955) 93 CLR 435 at 444; *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134 at 140.

allegation of fraud in procuring the judgment is more properly brought first as an original or fresh action[109].

Conclusion

69 In the Full Court, Players submitted that a strict approach to the requirements for a court to set aside its own perfected judgment, which confined the general power to fraud, would have an absurd consequence. It would mean that misconduct that is discovered before an appeal might be sufficient for the appellate court to order a new trial but if discovered after the appeal then it would not be sufficient. There is nothing absurd about this consequence. As Debelle AJ correctly observed in the Full Court, the submission ignores the interest of finality in litigation[110]. As five members of this Court said in *Burrell v The Queen*[111], the interest of finality means that "[l]ater correction of error is not always possible. If it is possible, it is often difficult and time-consuming, and it is almost always costly." Even then, if the misconduct amounts to fraud, equity supplies a narrowly defined exception to the principle of finality that permits rescission of a perfected judgment by the original court even after the appeal process has been concluded.

70 This litigation is a good illustration of the need for a strict approach to finality. The trial judgment which was set aside on Players' application, and the new trial which was ordered, concerned events that occurred nearly 25 years ago. The original 29-day trial was held almost 13 years ago. Issues related to the trial have been the subject of three appeals to the Full Court of the Supreme Court of South Australia, three applications for special leave to appeal, and the present appeals to this Court. Even apart from the non-financial impact upon the parties of the prolonged dispute, the legal costs of these proceedings must be many multiples of the underlying value of the licences, which, at best, was $750,000.

71 Players submitted that if the appeals were allowed then Clone should not be entitled to its costs in the courts below. Players said that, despite Clone's pleading to the contrary, Clone had accepted that if its conduct had misled the

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109 *McCann v Parsons* (1954) 93 CLR 418 at 425-426, citing *Jonesco v Beard* [1930] AC 298 at 300.

110 *Clone Pty Ltd v Players Pty Ltd (In liquidation) (Receivers Appointed)* (2016) 127 SASR 1 at 183 [715].

111 (2008) 238 CLR 218 at 223 [16]; [2008] HCA 34.

courts then it was capable of amounting to malpractice sufficient to set aside the original judgment. Players said that Clone's position had only changed in this Court. There was a dispute about the extent to which Clone had accepted this proposition and whether this should affect an order as to costs. However, as Clone observed, the Attorney-General for South Australia, whose submissions were of considerable assistance in this Court, had submitted in the courts below that fraud or conduct analogous to fraud must be proved. The parties had joined issue on this point in the courts below. Whether or not Players' submissions are correct about the manner in which the case was run, Clone should be entitled to the usual order for its costs in the courts below and in this Court.

72 The appeals must be allowed. Orders should be made as follows:

In Matter No A22/2017:

(1) Appeal allowed.

(2) Set aside orders 3, 4 and 5 of the Full Court of the Supreme Court of South Australia dated 8 December 2016 and, in their place, order that:

(a) the appeal to the Full Court of the Supreme Court of South Australia be allowed;

(b) the orders of the Supreme Court of South Australia (Hargrave AJ) dated 9 November 2015 in proceeding SCCIV-04-319 be set aside and, in their place, order that:

(i) the application be refused; and

(ii) the first, seventh, eighth and tenth defendants pay the plaintiff's costs; and

(c) the first to fourth respondents pay the appellant's costs.

(3) The first to fourth respondents pay the appellant's costs of the appeal to this Court.

In Matter No A23/2017:

(1) Appeal allowed.

(2) Set aside orders 3, 4 and 5 of the Full Court of the Supreme Court of South Australia dated 8 December 2016 and, in their place, order that:

(a) the appeal to the Full Court of the Supreme Court of South Australia be allowed;

(b) the orders of the Supreme Court of South Australia (Hargrave AJ) dated 9 November 2015 in proceeding SCCIV-10-819 be set aside and, in their place, order that:

(i) the action be dismissed; and

(ii) the plaintiffs pay the defendant's costs; and

(c) the first to fourth respondents pay the appellant's costs.

(3) The first to fourth respondents pay the appellant's costs of the appeal to this Court.