IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A22/2017
A23/2017

BETWEEN:

CLONE PTY LTD (ACN 060 208 602), Appellant

and

PLAYERS PTY LTD (IN LIQUIDATION) (RECEIVERS & MANAGERS APPOINTED) (ACN 056 340 884), First Respondent

GREGORY MICHAEL GRIFFIN, Second Respondent

DARREN JOHN CAHILL, Third Respondent

CHRISTOPHER STEPHEN MCDERMOTT, Fourth Respondent

LIQUOR & GAMBLING COMMISSIONER, Fifth Respondent

ATTORNEY-GENERAL OF SOUTH AUSTRALIA, Sixth Respondent

APPELLANT'S SUBMISSIONS

Part I:

1. I certify that this submission is in a form suitable for publication on the internet.

Part II:

2. The appeal presents two issues. *First*, is the jurisdiction to set aside a perfected judgment in equity limited to fraud, or does it extend to forms of malpractice not amounting to fraud? *Secondly*, is the plaintiff in an action to set aside a perfected judgment required to satisfy one or more of the following conditions, namely, that: (a) there be fresh evidence newly discovered since the trial; (b) the unsuccessful party exercised reasonable diligence to find that evidence; and (c) the evidence was so material that its production at trial would probably have affected the outcome?

Part III:

3. The appellant certifies that it has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903* and that no notice is required.

Part IV:

4. The judgment of the Full Court of the Supreme Court of South Australia is reported as *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1 (***Appeal Judgment***). The judgment of the primary judge is reported as *Players Pty Ltd v Clone Pty Ltd* [2015] SASC 133 (***Primary Judgment***).

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Part V:

5. The primary judge, Hargrave AJ, applied the test in *Commonwealth Bank of Australia v Quade*[1] to an action to set aside a perfected judgment following trial and appeal, based upon allegations of malpractice by the appellant's then legal advisers. That was the common position of the appellant and the first to fourth respondents (***Players Parties***) (at [81)]. The sixth respondent (***Attorney-General***), intervening pursuant to s 9(2)(b)(ii) of the *Crown Proceedings Act, 1992* (SA), submitted that the power to set aside a perfected judgment is limited to fraud or conduct analogous to fraud (at [81]).

6. The primary judge held that the appellant, by its legal advisers, had "engaged in serious malpractice by [their] reckless failure to discover the 3rd Copy Agreement" (at [240]), a document that was contained within the files of the fifth respondent, the Liquor and Gambling Commissioner (***the Commissioner***). The document was held to be within the appellant's "power" (as well in the power of the Players Parties), and thereby discoverable, by reason of the parties' "actual and immediate ability to inspect the Commissioner's files" in consequence of the so-called "discovery dispensation order" (at [178]). By that order, reproduced by the primary judge at [93], the Commissioner had been relieved of the obligation to file a verified list of documents on the understanding that he would make his files available to the other parties. The primary judge held that the document "was never in the appellant's possession or custody" (at [177]).

7. The primary judge did not find that the appellant acted in intentional breach of its discovery obligations,[2] but held that the appellant's failure to discover the 3rd Copy Agreement was "reckless", and constituted "serious malpractice" (at [204] and [240]). Each of the parties' solicitors had in fact inspected the file containing that document pursuant to the "discovery dispensation order", but the primary judge held that the Players Parties' solicitor was "a junior lawyer and was searching the files for particular purposes" (at [273]). The primary judge also held that the appellant engaged in "significant malpractice" by failing to call on a notice to produce (a finding overturned on appeal[3]), but that this was insufficient on its own to justify the ordering of a new trial (at [229] and [241]). The contention that the appellant's counsel had misled the Court outside of the discovery failure, either at the original trial or on the appeal, was rejected by the primary judge (at [238]). The primary judge held that the interests of justice would best be served

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[1] *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134.
[2] See Appeal Judgment at [186] per Blue J.
[3] Appeal Judgment at [627] per Debelle AJ, Stanley J agreeing at [422]; see also at [211] per Blue J.

by ordering a new trial in respect of certain issues the subject of the original proceedings (at [304]).

8. The primary judge found not only that the Grenfell Tavern Removal File that contained the 3rd Copy Agreement had been inspected by the legal advisers of the Players Parties ([273]),[4] but also that the Players Parties failed to exercise reasonable diligence in searching for that document ([291]).[5] As to the materiality of the document, the primary judge held that doubts remained as to its provenance ([237]), and found only that "there was a real possibility" that the issue would have been decided differently in the original proceeding absent the malpractice ([242]), on the basis that the fresh evidence "*may* have tipped the balance in favour of Players" ([243]) (emphasis in original).

9. On appeal, the Full Court held that the *Quade* test that had been applied by the primary judge did not apply to an action to set aside a perfected judgment in equity.[6] Nonetheless, the majority applied the *Quade* test in the circumstances.[7] That test was applied by the majority (it seems) because they found that the original Full Court had been misled by counsel's submissions; it was reasonably possible that a different result would otherwise have occurred on appeal had counsel disclosed the document; and the appellant thus could not rely upon any greater strictures in equity than those on a statutory appeal.[8]

10. The Full Court, by majority, overturned the two conclusions in relation to malpractice reached by the primary judge, holding that (a) the primary judge erred in finding that the 3rd Copy Agreement was discoverable because it was within the "power" of the appellant;[9] and (b) the appellant did not engage in malpractice capable of justifying the setting aside of the judgment by failing to call on the notice to produce.[10]

11. By majority,[11] the Full Court upheld the primary judge's decision that a new trial should be ordered. In so doing, Blue and Stanley JJ made new findings of malpractice, which were not argued before the primary judge or which had been rejected by him, as follows.

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[4] A finding upheld on appeal: Appeal Judgment at [265]-[268] per Blue J; Stanley J agreeing at [420].
[5] A finding also upheld on appeal: Appeal Judgment at [280], [281], [285], [288] per Blue J; at [649] per Debelle AJ.
[6] Appeal Judgment at [438] per Stanley J; at [570], [704] per Debelle AJ.
[7] Appeal Judgment at [323] per Blue J; at [461], [470] per Stanley J.
[8] Appeal Judgment at [322], [323] per Blue J; at [461]-[463], [470] per Stanley J.
[9] Appeal Judgment at [588] per Debelle AJ; Stanley J agreeing at [421].
[10] Appeal Judgment at [211] per Blue J; at [627] per Debelle AJ; Stanley J agreeing at [422].
[11] Comprising Blue and Stanley JJ, Debelle AJ dissenting.

11.1. The 3rd Copy Agreement was found to be discoverable by the appellant because it was within the "custody" of the appellant's junior counsel when he briefly inspected the Grenfell Tavern Removal File at the Commissioner's offices.[12] This had not been argued before the primary judge, and it was never suggested to the appellant's witnesses.[13]

11.2. The appellant was held to have engaged in malpractice by misleading the original trial judge[14] and the Full Court.[15] Findings to the contrary effect had been made by the primary judge.[16]

12. Debelle AJ in dissent summarised his findings at [489]. Specifically, Debelle AJ held:

12.1. both the trial judge and the majority erred in applying the test in *Quade* upon an action to set aside a perfected judgment ([570]);

12.2. there was no malpractice (much less fraud) ([599]), and in particular: (a) there was no obligation to discover the relevant document ([588], [599]); and (b) the appellant's counsel did not mislead the Court ([644]);

12.3. the so-called fresh evidence would not have made any difference ("it adds nothing to the evidence") ([692]-[695]); and

12.4. even if the *Quade* test was applied, the trial judge erred in setting aside the perfected judgment ([702]).

13. In summary:

13.1. there is no finding of actual fraud by either the primary judge or any member of the Full Court;

13.2. there are concurrent findings of fact that the file containing the relevant document was available to, and inspected by, the legal advisers of the Player Parties,[17] directly raising the question of whether the (so-called) fresh evidence was denied to the unsuccessful party in the relevant respect;

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[12] Appeal Judgment at [148] per Blue J, Stanley J agreeing at [423]; cf Debelle AJ at [598] (diss.).
[13] Appeal Judgment at [590] per Debelle J (diss.).
[14] Appeal Judgment at [261] per Blue J, Stanley J agreeing at [432]; cf Debelle AJ at [630]-[644] (diss.).
[15] Appeal Judgment at [436] per Stanley J, Blue J agreeing at [322]; cf Debelle AJ at [640] (diss.).
[16] Primary Judgment at [238].
[17] Primary Judgment at [273]; Appeal Judgment at [265]-[268] per Blue J; Stanley J agreeing at [420].

13.3. there are concurrent findings of fact that the unsuccessful party failed to exercise reasonable diligence to find the document;[18]

13.4. the findings as to the materiality of the fresh evidence rise no higher than a "real possibility" that the result may have been different,[19] and not that the evidence was so material that it probably would have affected the outcome.

Part VI:

Issue 1 – requirement for fraud to set aside a perfected judgment in equity

14. The majority erred in applying the *Quade* test to a fresh proceeding in the equitable jurisdiction to set aside a perfected judgment. *Quade* addresses the test on an application for new trial upon a statutory appeal.[20] Both the differing nature of the jurisdiction, and principles of finality of litigation, require that there be no conflation of the principles pertaining to a collateral attack on a perfected judgment with those relevant to a statutory appeal. The equitable jurisdiction to set aside a perfected judgment for fraud was accordingly not properly invoked.

15. A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances.[21] One such circumstance is that a perfected judgment may, subject to certain conditions, be impeached on the ground of fraud.[22] The action is equitable in origin and nature.[23]

16. The Players Parties alleged "malpractice", not fraud.[24] By the time of trial, they disavowed any Rules-based jurisdiction to set aside a perfected judgment.[25] There is no inherent jurisdiction to set aside a perfected judgment.[26] The judgment could thus only be set aside if the "malpractice" alleged and found was sufficient to invoke the equitable jurisdiction to set aside for fraud. It was not.

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[18] Primary Judgment at [291]; Appeal Judgment at [280], [281], [285], [288] per Blue J; at [649] per Debelle AJ (diss.).
[19] Primary Judgment at [242]-[243]; Appeal Judgment at [306], cf [219]-[226] per Blue J; at [467] per Stanley J. Debelle AJ at [655] (diss.) held that the "fresh" evidence would have had no effect on the result.
[20] *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134 at 139.
[21] *NH v DPP* (2016) 90 ALJR 978 at [70]; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [34]; *Burrell v The Queen* (2008) 238 CLR 218 at [15]; *Achurch v The Queen* (2014) 253 CLR 141 at [14].
[22] *Gamser v Nominal Defendant* (1977) 136 CLR 145 at 154.
[23] *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534 at 538; *Monroe Schneider v No 1 Raberem Pty Ltd* (1992) 37 FCR 234 at 238.
[24] See [59A] of the Players Parties Fourth Points of Claim.
[25] Primary Judgment at [80].
[26] *Bailey v Marinoff* (1971) 125 CLR 529 at 530; *NH v DPP* (2016) 90 ALJR 978 at [70].

17. Stringent rules apply once a judgment has been perfected by entry of orders, being the formal act that concludes the disposition of the proceedings.[27] As this Court unanimously observed in *SZFDE v Minister for Immigration and Citizenship,*[28] "particular principles, or at least practices, have been developed with respect to collateral attacks in later litigation upon the outcome in earlier litigation where this was alleged to have been vitiated by fraud".

18. Stanley J accepted that the principles in *Quade* are not applicable to an equitable action for the setting aside of a perfected judgment, but instead address the test to be applied on an appeal (at [438]). Nonetheless, Stanley J decided to apply the *Quade* test in the circumstances (at [461], [470]). His rationale (it seems) was that, had the appellant not misled the original Full Court, the existence of the 3rd Copy Agreement would have been disclosed to the Court (at [460]),[29] and the *Quade* test would then have been applied in that appeal (at [461]).

19. Blue J agreed with Stanley J that *Quade* principles should be applied, even if different principles would otherwise be attracted on an application to set aside a perfected judgment in equity (at [322], [323]). Blue J likewise considered that it was reasonably possible that the result of the original appeal might have been different if the document was disclosed to the Full Court and the appellant thus could not rely upon any greater strictures in equity than those on appeal (at [322], [323]).

20. Debelle AJ, in dissent, held that the trial judge, and inferentially the majority, erred in applying *Quade* (at [570]), and that the principles to be applied in the equitable jurisdiction are set out in *Monroe Schneider v No 1 Raberem Pty Ltd (No 2).*[30] Debelle AJ was correct to do so. *Monroe Schneider* has been cited with apparent approval in this Court as describing the equitable jurisdiction to set aside a perfected judgment for fraud,[31] and followed by many subsequent decisions.[32] It should be expressly approved by this Court.

21. The majority was wrong to apply the *Quade* test to an action in equity, irrespective of their finding that the original Full Court was misled by a form of "malpractice". In *Gamser*, Aickin J saw no reason why the rules applying to impeachment of a judgment upon the ground of fraud should not also apply to judgments upon appeal, albeit noting how unlikely it was that a judgment on appeal could be obtained by fraud other than where the original judgment had

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[27] *Bailey v Marinoff* (1971) 125 CLR 529 at 530.
[28] (2007) 232 CLR 189 at [16].
[29] Appeal Judgment at [460] per Stanley J.
[30] (1992) 37 FCR 234 at 238-43.
[31] *DJL v Central Authority* (2000) 201 CLR 226 at [36]; *CDJ v VAJ* (1998) 197 CLR 172 at [96]; *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189 at [16].
[32] See the authorities at fn 61 below.

been obtained by fraud.[33] Barwick CJ, Gibbs and Stephen JJ agreed with Aickin J. There is no basis in principle or authority to support the contrary approach of Blue and Stanley JJ.

22. The approach of the majority in applying the *Quade* test to an action in equity also demonstrated a misapprehension of equitable principle. Like all equitable principle, the jurisdiction to set aside a perfected judgment is confined to that warranted by established equitable principles, or by the legitimate processes of legal reasoning.[34] It is an error to import into a jurisdiction that is equitable in origin and nature principles uniquely developed in the context of statutory appeals.

23. The equitable jurisdiction is invoked where fraud is established. While there are differing standards of fraud in equity, the fraud relied upon to set aside a perfected judgment must be actual fraud.[35] As Sir John Rolt, L.J. said in *Patch v. Ward*:[36] "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". The majority's adoption of principles applicable to a motion for a new trial on a statutory appeal, which permits lesser species of "malpractice", is thus directly contrary to established equitable principle.

24. "Malpractice", in the sense that it is used in *Quade,* is not equivalent to actual fraud. Nor is there any warrant for an extension of the equitable jurisdiction to encompass "malpractice" not involving relevant dishonesty. The findings of "malpractice" made by the primary judge or by the majority do not meet the threshold for the relevant mental element to constitute actual fraud.

25. The finding of the primary judge was that the practitioners acted "unreasonably, to the extent of recklessness, in failing to turn their minds to the forensic significance of the third copy agreement and the fact that it was found on the Grenfell Tavern file".[37] It is unlikely that the judge intended to use the term "recklessness" in the *Derry v Peek* sense, for, if he so intended, he would have made it abundantly clear, having regard to the seriousness of the charge. If the judge did so intend, then he confused the concept of recklessness as a species of deceit, which is to be equated with intention, with a departure (even if serious) from an appropriate standard of care. The latter is insufficient for a finding of fraud, or conduct "analogous to fraud" whatever the content of that phrase may

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[33] *Gamser v Nominal Defendant* (1977) 136 CLR 145 at 154.
[34] Cf., *Muschinski v Dodds* (1985) 160 CLR 583 at 615.
[35] *The Ampthill Peerage* [1977] AC 547 at 570-571, 591.
[36] (1867) III Ch. App. 203 at 212; see also at 206-7.
[37] Primary Judgment at [183].

be.[38] A person who makes a statement reckless as to its truth is liable in deceit, not because there is an absence of reasonable grounds for making the statement, but because a person making a statement without regard to its truth or falsity is acting dishonestly.[39] A representation is fraudulently made if the person made it knowing it to be false, or recklessly, neither knowing *nor caring* whether it is false or true. That is fraud in the strict sense.[40] A departure from a standard of care is insufficient. Dishonesty was neither alleged nor found.

26. The primary judge expressly eschewed any finding of intentional conduct, finding that there was *not* a deliberate decision not to make discovery ([200]). The primary judge did not reject the evidence of the practitioners that they did not turn their mind to the forensic significance of the 3rd Copy Agreement ([183]). The effect of the primary judge's findings was that the practitioners failed to give proper consideration to the question of discovery ([192], [200], [203]), and not that they were indifferent to the discoverability of the document. He summarised his findings by referring to a failure to meet appropriate standards of conduct ([204], [240]). Findings to that effect are insufficient for actual fraud, or any species of malpractice "analogous to fraud".

27. In the Full Court, the primary judge's finding that the document was within the appellant's "power" was overturned,[41] and instead a finding was made by majority that the document was within the "custody" of the appellant's junior counsel during an inspection of documents at the Commissioner's offices.[42] This necessitated consideration afresh of the availability of findings of the practitioners' state of mind as to whether the document may be discoverable in those circumstances, and as to the availability of findings of fraud (or "malpractice") in respect of the newly advanced case. Neither member of the majority did so. The errors inherent in this process are numerous.

    27.1. As in all cases of fraud, the fraud must be pleaded distinctly and with particularity,[43] and clearly proved.[44] In *Forrest v Australian Securities and Investments Commission,*[45] it was observed that a pleading of fraud will necessarily focus attention upon what it was that the person making the statement intended to convey by its making. And the pleading must make plain that it is alleged that the person who made the statement knew it to

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[38] Cf., Appeal Judgment at [441] per Stanley J.
[39] *Derry v Peek* (1889) 14 App Cas 337 at 350.
[40] *Magill v Magill* (2006) 226 CLR 551 at [17]; *Nocton v Lord Ashburton* [1914] AC 932 at 950-955.
[41] Appeal Judgment at [588] per Debelle AJ; Stanley J agreeing at [421].
[42] Appeal Judgment at [148] per Blue J, Stanley J agreeing at [423]; cf Debelle AJ at [598] (diss.).
[43] *Jonesco v Beard* [1930] AC 298 at 301; *Banque Commerciale SA en Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 at 285, 295.
[44] *Neat Holdings Pyt Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 170-171.
[45] (2012) 247 CLR 486 at [25]-[26].

be false or was careless as to its truth or falsity. None of this was observed in the Players Parties' pleading. It had not been clearly proved.

27.2. The suggestion that the 3rd Copy Agreement had been within the custody of the appellant's junior counsel had not been argued before the primary judge, and it was never suggested to the appellant's witnesses.[46] In those circumstances, it was unfair to make findings of "malpractice", much less findings of fraudulent conduct or conduct analogous to actual fraud.[47] The seriousness of a finding of dishonesty or reckless indifference to the truth requires that it may not be made without an opportunity being given to deal with the alleged conduct.[48]

27.3. That there should be clear and cogent proof of serious allegations reflects the principles stated in *Briginshaw v Briginshaw*. Proof to reasonable satisfaction "should not be produced by inexact proofs, indefinite testimony, or indirect inferences".[49] *Briginishaw* was not considered by the majority at all in the assessment of the conduct of the appellant's legal advisers.

27.4. A consequence of the three preceding points was stated by Beazley P in *Sgro v Australian Associated Motor Insurers Ltd*:[50] "The seriousness of a finding of fraud, including statutory fraud, does not permit of other than a specific finding that the fraud, or the contravening conduct, has in fact occurred." This was ignored by the majority.

28. Stanley J at [441] held: "For the reasons set out above, I consider the failure to discover the third copy agreement and Clone's misleading submissions to Vanstone J and the Full Court constitute malpractice that is analogous to fraud." Stanley J did not make any finding of dishonesty or otherwise consider the mental element required to sustain that conclusion.

29. Blue J did not make any separate finding as to the mental state implicit in actual fraud. Blue J found that the primary judge's finding of recklessness in compliance with the discovery obligation was open on the evidence, and he refused to overturn that finding ([196]). As Blue J acknowledged, that was a finding of unintentional conduct ([186]), constituted by want of reasonable care. It was also a finding based upon discoverability of the document as having been

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[46] Appeal Judgment at [590] per Debelle J (diss.).
[47] Appeal Judgment at [590] per Debelle J (diss.).
[48] *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 at [67]; *Bale v Mills* (2011) 81 NSWLR 498 at [66]-[67].
[49] *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-362.
[50] (2015) 91 NSWLR 325 at [54].

within the appellant's power, rather than its custody. Blue J made no further finding as to the extent of the practitioners' culpability in the failure to make discovery. Stanley J simply agreed with Blue J on this issue, without otherwise addressing the mental element ([420]). The findings of the majority relating to the discovery issue are insufficient for a finding of fraud.

30. There is likewise no finding by the majority as to the extent of counsel's culpability in any misleading of the Court, whether at the original trial or appeal. The primary judge had rejected the contention that the appellant's counsel had misled the Court outside of the discovery failure, either at the original trial or on the appeal ([238]). The primary judge relevantly found that: (a) the appellant did not mislead the Court by the "strength of its submissions" ([236]); (b) even had the 3rd Copy Agreement been in evidence, Mr McNamara QC could still have made the strong submissions that he did without misleading the Court ([238]); and (c) the Court was misled because it did not have the 3rd Copy Agreement in evidence (based on the finding that the appellant failed to discover it), but not otherwise ([236], [238], [239]).

31. On appeal, at [245], and footnote 96, Blue J observes that the original trial judge may have been misled by calls for production made by the appellant's counsel, Mr McNamara QC, even if his subjective purpose for making the calls was for a different reason. It is implicit that Blue J approached the question of whether counsel misled the Court as an objective inquiry. While the question of whether the Court was in fact misled might be objective, that is to pose the wrong question. The relevant question is whether counsel engaged in conduct that engages the jurisdiction to set aside the perfected judgment, which requires proof of fraud. It is the sense in which the representor intended the representation to be understood that is relevant to the question of whether the conduct was engaged in fraudulently.[51] The finding that the Court was misled, when viewed objectively, is insufficient for a finding of fraud. Blue J gave no other consideration to the question of Mr McNamara QC's state of mind. Stanley J agreed with Blue J without further considering the issue ([432]).

32. Similarly, Stanley J found that the submissions of Mr McNamara QC to the Full Court were "objectively misleading" ([434]). Stanley J did not otherwise consider the mental element inherent in a finding of fraud, or even the mental element required for a lesser species of "malpractice". Blue J agreed with Stanley J that the submissions on appeal were misleading, and that this amounts to "malpractice", without any separate consideration of the mental element ([322]). That is insufficient for a finding of fraud.

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[51] *Krakowski v Eurolinx Properties Ltd* (1995) 183 CLR 563 at 577.

33. In summary, there are no findings that the appellant's lawyers acted fraudulently in failing to make discovery, nor that Mr McNamara deliberately set out to mislead the Court. Accordingly, the equitable jurisdiction to set aside perfected orders was not attracted.

Issue 2 – Principles or practices to be applied on application to set aside in equity

34. The appellant submits that there is a further consequence of the majority's error in applying the *Quade* test to the equitable action: it should have been fatal to the claim that there were concurrent findings of fact that: (a) the evidence was not fresh (but in fact the relevant file was available to and inspected by the Players Parties);[52] (b) the Players Parties failed to exercise reasonable diligence to find the document;[53] and (c) the materiality of the fresh evidence rose no higher than a "real possibility" that the result may have been different.[54]

35. The appellant submits that the test in equity is correctly stated in *Monroe Schneider,*[55] and this Court should so hold. There, the Full Federal Court said (at 241) that the "stringent principles established by the authorities to confine the jurisdiction" to set aside a perfected judgment entail the following requirements, which were summarised by Mr D M Gordon QC:[56]

> "(a) evidence newly discovered since the trial;
>
> (b) evidence that could not have been found by the time of trial by exercise of reasonable diligence;
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> (c) evidence so material that its production at the trial would probably have affected the outcome; and when the fraud charge consists of perjury, then:
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> (d) the evidence must be so strong that it would be reasonably be considered to be decisive at a new hearing, and if unanswered must have that result."

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[52] Primary Judgment at [273]; Appeal Judgment at [265]-[268] per Blue J; Stanley J agreeing at [420].
[53] Primary Judgment at [291]; Appeal Judgment at [280], [281], [285], [288] per Blue J; at [649] per Debelle AJ (diss.).
[54] Primary Judgment at [242]-[243]; Appeal Judgment at [306], cf [219]-[226] per Blue J; at [467] per Stanley J. Debelle AJ at [655] (diss.) held that the "fresh" evidence would have had no effect on the result.
[55] *Monroe Schneider v No 1 Raberem Pty Ltd* (1992) 37 FCR 234 at 238-43.
[56] DM Gordon QC "*Fraud or New Evidence as Grounds for Actions to Set Aside Judgments*" (1961) 77 LQR 358 (Pt 1), 533 (Pt 2) at 376-77.

36. This Court in *SZFDE*[57] cited *Monroe Schneider* and the observations of Lord Bridge in *Owens Bank Limited v Bracco*[58] in support of the proposition that particular principles or practices have developed in respect of an application to set aside a perfected judgment for fraud. That was in the context of the Court's conclusion that the vitiating effect of fraud is not universal throughout the law, and that the restrictions on collateral attacks upon final judgments, even in the case of fraud, reflect the importance attached to finality of litigation.[59] The Court has otherwise cited *Monroe Schneider* with apparent approval.[60] The test in *Monroe Schneider* has been repeatedly applied by trial and intermediate appellate courts as stating the test in equity.[61]

37. The statement of Lord Bridge in *Owens Bank* referred to in *SZFDE* is to like effect of *Monroe Schneider,* that a party seeking to impugn a judgment for fraud must prove the fraud by fresh evidence which was not available to him, and could not have been discovered with reasonable diligence before judgment was delivered. That reflects the position in England in any case where there is a collateral attack upon a perfected judgment.[62]

38. In *McIlkenny v Chief Constable,*[63] Goff LJ was considering a collateral attack upon an earlier criminal verdict by a later civil action. The defence that there was an estoppel preventing such a collateral attack was sought to be met by a contention that the earlier judgment was obtained by perjury, as well as an application to adduce fresh evidence.[64] Having considered authorities concerning both allegations of fraud and applications for the admission of fresh

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[57] *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189 at [16].
[58] [1992] 2 AC 443 at 483.
[59] *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189 at [16].
[60] *Mann v O'Neill* (1997) 191 CLR 204 at 239; *DJL v Central Authority* (2000) 201 CLR 226 at [36] and *CDJ v VAJ* (1998) 197 CLR 172 at [96].
[61] See, eg, *SNF (Australia) Pty Ltd v Ciba Specialty Water Treatments Ltd* [2015] FCA 787 at [154]; *AKS Investments v Gazal* [2015] QSC 247 at [35]; *In the Matter of Wan Ze Property Development (Aust) Pty Ltd (in liquidation)* [2013] NSWSC 189 at [87] – [92]; *Soyza v Adolphus* [2007] VSC 549 at [23]; *Wu v Avin Operations Pty Ltd (No 2)* [2006] FCA 792 at [24]; *Microsoft Corporation v Crosslink Marketing Group (CMG) Pty Ltd* [2005] FCA 1817 at [21], [62]; *Spalla v St George Motor Finance Ltd (No 5)* [2004] FCA 1261 at [61] – [66]; *Pembroke School Incorporated v Human Rights & Equal Opportunity Commission* [2002] FCA 1020 at [27]; *Yap v Granich* [2001] FCA 1735 at [9]; *Biritz v National Australia Bank Limited* (2001) 187 ALR 757 at [20]; *Commonwealth Bank of Australia v Casella* [2000] FCA 1518 at [38]; *Margaditch v Australia and New Zealand Banking Group Limited* (1999) 30 ACSR 265 at 276; affirmed on appeal (1999) 32 ACSR 367 at [74]; *Kirk v Ashdown* [1999] FCA 522 at [16]; *Grimson v O'Donnell* [1999] FCA 245 at [5]; *Bourke v Beneficial Finance* (1993) 124 ALR 716 at 724.
[62] *Takhar v Gracefield Developments Ltd* [2017] EWCA Civ 147 at [54]; *McIlkenny v Chief Constable* [1980] 1 QB 283 at 333-335; affirmed in the House of Lords: *Hunter v The Chief Constable* [1982] AC 529 at 545E; *Phosphate Sewage Co Ltd v Molleson* (1879) 4 App.Cas. 801 at 814. See also *Owens Bank v Etoile Commerciale SA* [1995] 1 WLR 44 at 48.
[63] [1980] 1 QB 283.
[64] [1980] 1 QB 283 at 333B.

evidence, Goff LJ held that the fraud and fresh evidence points merge into one,[65] and accordingly it was not permissible to call further evidence that was available at trial or could by reasonable diligence have been obtained.[66] Goff LJ also held that the fresh evidence must be likely to be decisive.[67] That decision was later affirmed by the House of Lords in *Hunter v The Chief Constable*,[68] where Lord Diplock agreed with the decision of Goff LJ.[69] As to the materiality of the evidence, Lord Diplock held that, in the case of collateral attack in a court of coordinate jurisdiction, the test laid down by Earl Cairns LC in *Phosphate Sewage Co Ltd v Molleson*[70] should be applied, namely that the new evidence must be such as "entirely changes the aspect of the case".[71]

39. The decisions in *McIlkenny, Hunter* and *Phosphate Sewage* were relied upon in argument in *Owens Bank* as setting out the test to be applied to impeach an English judgment for fraud.[72] Lord Bridge found it unnecessary to examine the authorities, but observed that the "rule they establish is unquestionable and the principle on which they rest is clear".[73]

40. In the recent decision of *Takhar v Gracefield Developments Ltd*, the English Court of Appeal held that the requirement for reasonable diligence has been decided authoritatively in the United Kingdom by the Court of Appeal and the House of Lords in *Hunter,* and stated to be the law in *Owens Bank v Bracco*.[74]

41. The appellant submits that the test in *Monroe Schneider,* and in England as stated in *Hunter* and *Owens Bank*, should, as a matter of policy, represent the law in Australia. A tension will always exist between the aversion of courts to fraud in their process and the recognition of the danger of too readily granting a retrial.[75] Once the appellate process has been concluded and a judgment perfected by sealing, the policy in bringing suits to a final end is all important. The remedy of a new trial is, by that stage, a blunt instrument. In *Owens Bank*, Lord Bridge remarked that it is in order to preserve finality that any attempt to re-open litigation, once concluded, even on the grounds of fraud, has to be confined within very restrictive limits.[76] The imposition of jurisdictional requirements to confine the action to a case where the evidence was not available to, and could

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[65] [1980] 1 QB 283 at 334G.
[66] [1980] 1 QB 283 at 335C.
[67] [1980] 1 QB 283 at 335C.
[68] [1982] AC 529.
[69] [1982] AC 529 at 545B.
[70] (1879) 4 App.Cas. 801 at 814.
[71] [1982] AC 529 at 545C-E.
[72] [1992] 2 AC 443 at 475G and 478D.
[73] [1992] 2 AC 443 at 483H.
[74] *Takhar v Gracefield Developments Ltd* [2017] EWCA Civ 147 at [54].
[75] *McCann v Parsons* (1954) 93 CLR 418 at 430-431.
[76] *Owens Bank Limited v Bracco* [1992] 2 AC 443 at 489.

not by the exercise of reasonable diligence be found by, the unsuccessful party, and where it is so material that it would probably have affected the outcome, reflects the importance of the policy of finality. The need for imposition of such requirements is demonstrated by the findings in this case, where the document was always available to the Players Parties, where they failed to exercise due diligence to find it, and it is mere conjecture as to whether it might have made any difference at trial.

42. In the course of applying the test in *Quade,*[77] both Blue and Stanley JJ declined to follow *Monroe Schneider* and *Owens Bank.*[78] This was on the basis that those decisions were said to be inconsistent with *McCann v Parsons,*[79] *Greater Wollongong Corporation v Cowan*[80] and *McDonald v McDonald.*[81] However, each of those decisions concerned the power of an intermediate appellate court, on a statutory appeal, to order a fresh trial prior to entry of its own judgment. In such cases, principles of finality do not arise. The court's process has yet to be concluded. As the plurality made clear in *CDJ v VAJ,*[82] each of *Wollongong*, *McCann* and *Orr* came before the Court on a motion for a new trial on the ground of discovery of fresh evidence, and are to be understood by reference to the procedures of the common law courts. They do not set out the test in the equitable jurisdiction to set aside a perfected judgment.

43. Further, *McDonald* does not contain a clear majority opinion as to the test applicable to a motion for a new trial on a statutory appeal. To the extent that it stands for the proposition that fraud without more is sufficient to set aside a perfected judgment (which it does not), it should be reconsidered and overruled by this Court. *Hip Fong*[83] contains no reference to the due diligence condition, but due diligence was not an issue on the appeal. Insofar as *Hip Fong* is authority for the proposition that fraud unravels all, it should not be followed, being inconsistent with *SZFDE*. In *Takhar*, the English Court of Appeal refused to follow *Hip Fong* as authority for such a proposition.[84]

44. If the test from *Monroe Schneider* had been applied, the action to set aside the perfected judgment would have been dismissed.

45. *The first requirement* in *Monroe Schneider* is that the evidence must be fresh newly discovered since the trial. That does not mean merely that the fraud or

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[77] Appeal Judgment at [322] - [323] per Blue J; at [461], [470] per Stanley J.
[78] Appeal Judgment at [380] - [386] per Blue J; at [439] per Stanley J.
[79] (1954) 93 CLR 418.
[80] (1955) 93 CLR 435.
[81] (1965) 113 CLR 529.
[82] (1998) 197 CLR 172 at [97]-[98].
[83] *Hip Foong Hong v Neotia & Co* [1918] AC 888 at 894.
[84] *Takhar v Gracefield Developments Ltd* [2017] EWCA Civ 147 at [48] - [54].

"malpractice" has been identified since the trial, but that the evidence that was said to have been concealed was not available to the unsuccessful party at trial. In *Quade*, it was accepted that there was a necessity to demonstrate that the "unavailability of the evidence at trial"[85] was occasioned by the malpractice. In *Hunter*, it was said to be fatal to an application if the evidence "was available at trial".[86] As French J observed in *Spalla v St George Motor Finance Ltd (No 5),*[87] in reference to the first of the requirements from *Monroe Schneider:* "The fresh evidence is not the fact of non-disclosure. It is that which was not disclosed". In *Spalla*, the evidence relied upon to establish the fraud could not be described as fresh, because that which was not disclosed "was in plain sight for all to see".[88]

46. So too in this case the 3rd Copy Agreement was in plain sight for the Players Parties to see. The evidence was not fresh. The Commissioner's files were available to them to inspect, and the file containing the 3rd Copy Agreement was in fact inspected by their lawyer. The concurrent findings of fact are that the Grenfell Tavern Removal File, which contained the document, was inspected by the Players Parties' lawyer in February 2005, only a few weeks before the original trial, and as part of the preparation for trial.[89] The primary judge seemingly accepted that the 3rd Copy Agreement itself had been seen by the Players Parties' lawyer during that inspection, but he excused this on the basis that the solicitor was "a junior lawyer and was searching the files for particular purposes."[90] Blue J, with whom Stanley J agreed, proceeded instead on the basis that the primary judge had found only that the lawyer had inspected the Grenfell Tavern Removal File, but not that he saw the 3rd Copy Agreement.[91] That is inconsistent with the Primary Judgment at [273]. Irrespective, it is not a large file.[92] The 3rd Copy Agreement would have been easy to locate within that file.[93] If the lawyer did not see the 3rd Copy Agreement, it is because he chose to inspect only a small part of an obviously relevant file. It was in plain sight for him to see. It undermines principles of finality for a perfected judgment to be set aside where the evidence was available to the unsuccessful party at trial.

47. *The second requirement* in *Monroe Schneider* is that that which has been concealed by the fraud must be evidence that could not have been found by the time of trial by exercise of reasonable diligence. It is on this question that there is a divergence of authority between the English position and that in *Monroe*

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[85] (1991) 178 CLR 134 at 142.
[86] [1982] AC 529 at 545B.
[87] [2004] FCA 1261 at [62].
[88] [2004] FCA 1261 at [62].
[89] Primary Judgment at [273]; Appeal Judgment at [265]-[268] per Blue J; Stanley J agreeing at [420].
[90] Primary Judgment at [273].
[91] Appeal Judgment at [265] per Blue J.
[92] Appeal Judgment at [646] per Debelle AJ (diss.).
[93] Appeal Judgment at [646] per Debelle AJ (diss.).

Schneider, on the one hand, and the New South Wales decision in *Toubia v Schwenke,*[94] on the other. In *Toubia*, the Court of Appeal was considering the statutory right, pursuant to s 66 of the *Motor Vehicles Act*, on proof of fraud, to obtain restitution of monies paid under a judgment in former proceedings. That section enabled recovery of the monies paid without the need for the earlier judgment to be set aside or varied.[95] In opposing the recovery of monies under the section, the defendant contended that the fraud could have been detected by the exercise of reasonable diligence by the plaintiff. Notwithstanding that this involved a question of construction of the statute, the Court went on to consider whether the exercise of reasonable diligence was required under the general law. The Court declined to follow *Owens Bank* and *Monroe Schneider* as to the requirement for the exercise of reasonable diligence, both because it was said to be contrary to principles applying in an action for deceit[96] and because it was said to be inconsistent with the decision in *McDonald*.[97] The decision in *Toubia* is to the effect that there is no reasonable diligence requirement at all.[98]

48. It is submitted that the decision in *Toubia* is wrong and should be overruled. First, the Court of Appeal proceeded by analogy with the requirements of, and the defences in, an action in deceit. The Court reasoned that in such an action the plaintiff must prove that he was deceived but need not prove that he was diligent. Lack of diligence is not a defence to an action for deceit. So much may be accepted, but the analogy is inapt. An equitable action to act aside a perfected judgment for fraud does not begin to resemble an action in deceit. The equitable action is an exception to the principle of finality, in respect of which stringent conditions apply that find no equivalent in an action for deceit. Secondly, the Court of Appeal appears to have proceeded on the footing that "fraud unravels everything", which is inconsistent with this Court's decision in *SZDFE* and with the recent decision of the New South Wales Court of Appeal in *Nadinic v Drinkwater,*[99] where, applying what this court wrote in *SZDFE*, the court held that the aphorism is dangerous and wrong.

49. As to the proposition that *Monroe Schneider* is inconsistent with the decision in *McDonald*, the Court of Appeal failed to recognise that *McDonald* concerned a statutory appeal rather than an action in the equitable jurisdiction. There is good reason, associated with principles of finality in litigation, to mark the distinction

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[94] (2002) 54 NSWLR 46.
[95] *Toubia v Schwenke* (2002) 54 NSWLR 46 at [6].
[96] *Toubia v Schwenke* (2002) 54 NSWLR 46 at [37].
[97] *Toubia v Schwenke* (2002) 54 NSWLR 46 at [42].
[98] *Toubia v Schwenke* (2002) 54 NSWLR 46 at [22].
[99] [2017] NSWCA 114 at [37] – [49].

between the equitable jurisdiction and that on appeal. On appeal, the point of finality has yet to be reached.

50. The approach in *Monroe Schneider* and in England should be preferred to that in *Toubia.* The four "Gordon requirements" were accepted by the Court of Appeal of New Zealand as representing the law in that country in *Shannon v Shannon.*[100] In particular, the Court held that there is a due diligence requirement in New Zealand but that the rule is not immutable and may be waived in the Court's discretion where "it is in the interests of justice to do so and the public would consider it an affront to justice not to let the case proceed".[101] However, the discretion "should not be lightly exercised". "Before exercising its discretion to waive the due diligence requirement a court should, at least, require a very convincing explanation as to why the 'new' evidence was not available at the first trial. The evidence must also be of very high relevance and materiality".[102] In determining that there was a requirement of reasonable diligence, the Court took into account that the absence of such a requirement could encourage the proliferation of actions by providing the incentive for dissatisfied parties to search for evidence, as well as discouraging thoroughness in preparation.[103]

51. There are concurrent findings of fact that the Players Parties failed to exercise reasonable diligence to find the document.[104] The primary judge also accepted that this lack of diligence was causative of its unavailability at trial, finding that, but for that lack of diligence, the Grenfell Tavern Removal File would have been produced to the Players Parties for their inspection by the Commissioner's staff (for a second time), on this occasion during the course of the original trial ([281]).

52. As Debelle AJ noted, the Commissioner had been relieved of the obligation to make discovery by filing of a list of documents, with the consequence that a careful and diligent search of the Commissioner's files was necessary ([647]). His Honour further observed that the shortest route to the conclusion that the Players Parties' legal team failed to exercise reasonable diligence is to note that, by the exercise of reasonable diligence, the appellant's legal team located the 3rd Copy Agreement ([649]).

53. The primary judge's approach was to weigh the degree of culpability of the successful party as against the extent of any lack of diligence on the part of the

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[100] [2005] NZCA 83, at [104], [109].
[101] *Shannon v Shannon* [2005] 3 NZLR 757 at [124] – [125].
[102] *Shannon v Shannon* [2005] 3 NZLR 757 at [125].
[103] *Shannon v Shannon* [2005] 3 NZLR 757 at [124].
[104] Primary Judgment at [291]; Appeal Judgment at [280], [281], [285], [288] per Blue J; at [649] per Debelle AJ (diss.).

unsuccessful party ([303]). Stanley J made a similar observation ([447]). However, if that be the approach, the success of the application to set aside for fraud is almost assured. Once there is a finding of fraud, any lack of reasonable diligence will necessarily be of lesser gravity. These are not matters that are capable of being weighed in the context of the principle favouring finality of litigation. If the evidence which has been concealed by the fraud could have been found by the time of trial by the exercise of reasonable diligence, it should be fatal to the application to set aside a perfected judgment, because otherwise insufficient importance is ascribed to the principle of finality. It is properly to be regarded as a jurisdictional requirement, and not a matter to be weighed against the degree of culpability of the successful party. On the approach in *Toubia*, it would not be relevant even to the exercise of a discretion.

54. *The third requirement* in *Monroe Schneider* is that the evidence concealed by the fraud must be so material that its production at the trial would probably have affected the outcome. Blue and Stanley JJ each rejected such a proposition on appeal,[105] Blue J instead posing a negative test where "it cannot have affected the outcome" ([392]) and Stanley J regarding the malpractice as material "if it may have affected the outcome" ([440]). Nevertheless, each saw it necessary to consider the "degree of materiality" in order to weigh the issue in the exercise of discretion contemplated by *Quade*.[106]

55. The appellant submits that the balance between finality and the protection of a court's processes is appropriately struck if the evidence is so material that its production at the trial would probably have affected the outcome. Unless this be so, the administration of justice will not be served by the requirement for a retrial.

56. A relevant consideration in determining the requisite materiality is that the correct procedure in equity is by action.[107] Unlike the position in a statutory appeal, a single judge can be asked to set aside a perfected judgment, including the setting aside of orders of an appeal court. A more rigorous test as to materiality is thus warranted than on appeal.[108]

57. Further, there is an interrelationship with the first issue arising on this appeal. If malpractice short of actual fraud will invoke the jurisdiction, it will include conduct over varying degrees of seriousness.[109] If that be so, increased strictures will be required to preserve principles of finality.

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[105] Appeal Judgment at [371] per Blue J; at [440] per Stanley J; cf, Debelle AJ at [714] (diss.).
[106] Appeal Judgment at [392] per Blue J; at [440] per Stanley J.
[107] *Jonesco v Beard* [1930] AC 298 at 301.
[108] See *Hunter v The Chief Constable* [1982] AC 529 at 545E.
[109] Appeal Judgment at [712] per Debelle AJ (diss.).

58. The 3rd Copy Agreement is a photocopy of the agreement for lease, as were exhibits P9 and D9 at trial. It was potentially relevant, but only to the extent that there was evidence to support an inference that the further copy was (or was derived from) a copy of the original made at a different time to the photocopies sent to the parties on 30 August 1994.[110] The primary judge did not make a finding to that effect, instead finding that doubts remained as to the provenance of the 3rd Copy Agreement (at [237]). The primary judge found only that "there was a real possibility" that the issue would have been decided differently in the original proceeding absent the malpractice (at [242]), on the basis that the fresh evidence "may" have tipped the balance (at [243]). Each of Blue and Stanley JJ held that the primary judge did not err in his assessment of materiality.[111]

59. Debelle AJ found that there was no real possibility that the result would have been different because it was not possible to find on the balance of probabilities that the 3rd Copy Agreement is a copy of the original ([700]). He remarked that the Players Parties seek to avoid the "very cogent evidence" that positively tells against their case by "no more than conjecture as to the provenance of the [3rd Copy Agreement]" ([700]). That "very cogent evidence" is considered by Debelle AJ at [656] - [694]. Based on that analysis, he concludes that the existence of the 3rd Copy Agreement "adds nothing to the evidence" ([694]).

60. Blue J did not consider the "very cogent evidence" that was addressed by Debelle AJ at [656] - [694]. That was the evidence upon which the original trial judge and the original Full Court acted. Such a process would have been necessary if there was to be a finding that the additional evidence, the 3rd Copy Agreement, was so material that its production at the trial would probably have affected the outcome. Stanley J made reference to that evidence at [465], but he found no more than the existence of the 3rd Copy Agreement "might well have" led to a different decision, and that it was "at least a reasonable possibility" that a different result would have pertained ([465]). Neither the primary judge, nor any of the members of the Full Court, found that the evidence was so material that its production at trial would probably have affected the outcome.

61. The appellant submits that any one or more of the concurrent findings summarised at [13.2] – [13.4] above is sufficient to see the appeal allowed.

Part VII:

62. Not Applicable.

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[110] Primary Judgment at [166]; see also Appeal Judgment at [653] per Debelle AJ (diss.).
[111] Appeal Judgment at [306] per Blue J; Stanley J agreeing at [453].

Part VIII:

63. Orders sought:

1. That the appeal be allowed in Actions A22/2017 and A23/2017.

2. That orders numbered 4 and 5 made by the Full Court of the Supreme Court of South Australia on 8 December 2016 in Actions SCCIV-04-319 and SCCIV-10-819 be set aside.

3. That orders 1 to 20 (inclusive) and orders 1 to 10 (inclusive) of the orders of the Honourable Auxiliary Justice Hargrave made on 9 November 2015 in South Australian Supreme Court Actions SCCIV-04-319 and SCCIV-10-819, respectively, be set aside.

4. That the application for a re-trial commenced in Action SCCIV-04-319 of the South Australian Supreme Court by Notice for Specific Directions dated 17 December 2010, amended on 11 April 2011, and action SCCIV-10-819, be dismissed, with judgment entered for the Appellant in each action.

5. That the First, Second, Third and Fourth Respondents pay the Appellant's costs of, and incidental to, these proceedings and of the appeal before the Full Court of the Supreme Court of South Australia and of the trial before Hargrave AJ in Actions SCCIV-04-319 and SCCIV-10-819 of the South Australian Supreme Court, including any reserved costs.

Part IX:

64. The appellant estimates that it will require 2.5 hours to present its oral argument.

Dated:

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