IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A22 and A23 of 2017

BETWEEN:

CLONE PTY LTD (ACN 060 208 602)
Appellant

and

PLAYERS PTY LTD (In Liquidation) (Receivers 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

FIRST TO FOUTH RESPONDENTS' SUBMISSIONS

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FIRST TO FOURTH RESPONDENTS' SUBMISSIONS

Part I: Internet Publication

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues on Appeal

2. The appeal presents the following questions:

   (a) Is the equitable jurisdiction of the Supreme Court of South Australia to set aside a perfected judgment confined to actual fraud in the sense required for common law deceit?

   (b) Where misconduct by the successful party involves the suppression of relevant evidence, is it a pre-condition to the attraction of the jurisdiction:

      (i) that there be no lack of reasonable diligence on the part of the unsuccessful party; and

      (ii) that the evidence is so material that it probably would have affected the outcome,

   or are matters of reasonable diligence and materiality to be weighed by the Court in its overall assessment of the interests of justice in the particular case?

Preliminary matters

3. Several preliminary matters are to be observed in respect of Clone's submissions (**[C]**) and the Attorney's submissions ([A]) on these questions.

4. First, in relation to question (a), Clone never submitted below that "actual fraud" was required to enliven the court's jurisdiction to set aside the judgment of Vanstone J. At trial, Clone *agreed* that *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134 was the governing authority to be applied to the application[1], and both at trial and on appeal,[2] Clone *accepted* that *Quade*-type malpractice (ie, failing to comply with discovery obligations) was sufficient to enliven the Court's jurisdiction to set aside the judgment of Vanstone J. Clone accepted on appeal that a reckless failure to make discovery and misleading the Court (at the original trial or the 2006 appeal) amounted to malpractice capable, subject to issues of reasonable diligence and materiality and the exercise of the residual discretion, of justifying setting aside the original judgment.[3] In the Full Court Clone submitted in writing[4]:

> "Further, as held by Kourakis J (as his Honour then was), the Court has jurisdiction to set aside a perfected judgment in a case of an intentional or reckless abuse of the procedures of the Court which has concealed from the unsuccessful party important evidentiary material which that party would otherwise have obtained [*Clone v Players* [2012] SASC 12 at [105]]. This case, of course, does not involve fraud and fraud was never alleged. It is instead limited to allegations of malpractice akin to those referred to and considered in *Quade* (as distinct from fraud). **While Quade type malpractice can invoke the**

1 *Players Pty Ltd v Clone Pty Ltd* [2015] SASC 133 (Primary Judgment) at [11], [12], [81].
2 *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1 (Appeal Judgment) at [325] per Blue J.
3 Appeal Judgment at [89] & [92] per Blue J.
4 Clone's written Reply submissions dated 22 March 2016 at [139].

jurisdiction to set aside a perfected judgment, nevertheless the particular principles, or practices, which have been developed with respect to collateral attacks on a perfected judgment operate to limit the circumstances where an order setting aside the judgment is warranted."

5. Accordingly, Clone's present submission that there are no findings in the Court below that its lawyers acted fraudulently and that therefore the equitable jurisdiction to set aside was not attracted must be considered in the context of how Clone conducted its case below. Neither the primary judge, Hargrave J, nor the Full Court was asked or required to make such findings.

6. Equally, at first instance and on appeal, the Attorney submitted that **a reckless suppression of relevant evidence** attracted the Court's jurisdiction to set aside the original judgment.[5] The Attorney submitted at trial that "conduct analogous to fraud" was sufficient to set aside the judgment[6], a position which it maintained on appeal.[7] The Attorney appears now to seek to resile from this position and is critical of Stanley J in the Full Court for employing that test (at A[28.1], A[34], A[35]). That criticism is unjustified in light of the manner in which the Attorney put the case below.

7. Secondly, at trial Clone contended that the application of *Quade* required Hargrave J, in exercising his discretion, to address and **weigh up** three considerations, namely the degree of culpability of the successful party, the degree of any lack of diligence and the extent of any likelihood that the result would have been different.[8] Clone specifically submitted that the primary judge was required to weigh the degree of culpability of the successful party against the extent of any lack of diligence by the unsuccessful party.[9] In its submissions to this Court (at C[53]), Clone is now critical of the primary judge for adopting that relative weighing exercise. That criticism is untenable in light of the manner in which Clone conducted its case below.

8. Further, Clone submits to this Court (at C[9], C[60]) that the equitable jurisdiction was not attracted because the primary judge made no finding that the evidence was so material that its production at trial would probably have affected the outcome. That submission cannot provide a basis upon which to attack the judgment of the primary judge in light of the manner in which Clone conducted the case below. The primary judge was not required to make such a finding. On the principles of *Quade*, which Clone explicitly advanced to the primary judge, the primary judge was required only to be satisfied that there was a "real possibility" that the result would have been different. The primary judge applied the very test accepted and advanced by Clone.

9. Thirdly, Clone was given special leave only on its proposed appeal ground 1 which raised a question of legal principle. It was refused leave in respect of the challenges it sought to make to a number of concurrent factual findings: see [2017] HCA Tans 130. Nonetheless, in its submission to this Court, Clone seeks impermissibly and mischievously to agitate matters in respect of which special leave was expressly refused:

   9.1 At C[11] and C[27.2], Clone advances the complaint that the discoverability of the 3rd Copy Agreement by reason of it being in Clone's custody was never put or argued at trial. An appeal ground on that issue was rejected by the Full Court. Blue J found that the issue of "custody" was a live issue at trial (at [125]). Further, special leave was refused both in respect of discoverability generally

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5 Primary Judgment at [88]; Appeal Judgment at [97].
6 Primary Judgment at [81]; Appeal Judgment at [97].
7 Attorney's written submissions regarding jurisdiction dated 3 March 2016 at [3.4], [18], [19], [20] and [25].
8 Primary Judgment at [11] ,[12].
9 Trial Transcript page 796; and see paragraphs [72] and [73] of Clone's written closing submissions before Hargrave J.

(proposed appeal ground 4) and in respect of Clone's complaint that the Court below erred in finding malpractice on the basis of the "custody" finding because the issue was allegedly not explored at trial (proposed appeal ground 5).

9.2 At C[46], Clone contends that the primary judge seemingly accepted that the 3rd Copy Agreement had been seen by Players and that the findings by the majority of the Full Court to the contrary were unjustified. As the Full Court confirmed, the primary judge did not find that Players had seen the 3rd Copy Agreement.[10] An appeal to the Full Court on that issue failed. The Full Court upheld the primary judge's finding that Players had not seen the 3rd Copy Agreement.[11] Special leave was refused in respect of Clone's proposed appeal ground 2 which, in sub-ground 2.2, sought to agitate the Full Court's finding.

9.3 At C[58]-C[60], Clone seeks to attack the findings of the primary judge and the majority of the Full Court as to the materiality of the 3rd Copy Agreement. Special leave to appeal was also refused on that issue (see Clone's proposed appeal grounds 2.4 and 2.5). The primary judge found that the 3rd Copy Agreement was material and that there was a "real possibility the deletion issue would have been decided differently"[12] had the 3rd Copy Agreement been in evidence. On appeal, the Full Court rejected Clone's challenge to this finding. Blue J (at FC [226]) found that the existence and location of the 3rd Copy Agreement "was of substantial probative force"[13] on the deletion issue as it was the product of a separate photocopying event from Clone's discovered copy (D9).[14] Stanley J agreed,[15] finding that the existence and location of the 3rd Copy Agreement was a matter of "considerable probative significance"[16] that provided a foundation for the conclusion that Players' evidence concerning the deletion issue should be accepted.[17] Stanley J also held that the 3rd Copy Agreement might well have led the 2006 Full Court to reach "a different decision" on the appeal.[18] Blue J agreed.[19]

Part III: SECTION 78B OF THE JUDICIARY ACT 1903

10. Notice pursuant to s 78B of the Judiciary Act 1903 (Cth) need not be given.

Part IV: STATEMENT OF MATERIAL FACTS

11. Clone entered into an agreement (**Agreement**) with the first respondent (**Players**) to lease a hotel and gaming premises known as the Planet hotel.[20] At a trial before Vanstone J in 2005, Players claimed that Clone was obliged to pay it consideration for the transfer of the liquor and gaming licenses at the end of the lease. Players case was that it had struck through the word "NIL" in clause 11(i) of the Agreement such that the clause provided that the transfer of the licenses was to be "for consideration".[21]

12. At trial two photocopies of the Agreement were tendered in evidence,[22] one discovered by Clone and the other by Players. It was established at the end of Clone's case that the

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10 Appeal Judgment at [263] per Blue J.
11 Appeal Judgment at [263], [265], [268] per Blue J.
12 Primary Judgment at [242].
13 Appeal Judgment at [226] per Blue J.
14 Appeal Judgment at [222] & [293] per Blue J.
15 Appeal Judgment at [453] per Stanley J.
16 Appeal Judgment at [465] per Stanley J.
17 Appeal Judgment at [465] per Stanley J.
18 Appeal Judgment at [467] per Stanley J.
19 Appeal Judgment at [322] per Blue J.
20 Appeal Judgment at [2] per Blue J.
21 Appeal Judgment at [4] & [5] per Blue J.
22 Appeal Judgment at [6] per Blue J.

original Agreement had been destroyed.[23] Each photocopy of the Agreement bore a horizontal mark through the word "NIL" in clause 11(i).[24] Players' witnesses, Mr Griffin, a senior legal practitioner, and Mr McDermott gave evidence that Mr Griffin had struck through the word "NIL".[25] Clone's case at trial on this issue (**the deletion issue**) was that this evidence was a fraudulent concoction.[26] Clone advanced a case that the two (photo)copies before the Court were the product of a *single* photocopying event and that the horizontal mark on each (photo)copy was a "scratch" produced by a photocopier.[27]

13. During the trial, on 7 April 2005, Clone's legal team, including counsel, learned about and obtained custody of a third copy of the Agreement[28] (**3rd Copy Agreement**) located in a folder maintained by the licensing authority.[29] The folder was Planet Hotel folder 1, also known as the Grenfell Tavern Removal file.[30] The 3rd Copy Agreement to Clone's knowledge also contained a line through the word "NIL".[31] The document was of substantial probative force on the deletion issue because the evidence, including evidence in the folder in which it was located,[32] established on the balance of probabilities that the 3rd Copy Agreement was the product of a *separate* photocopying event from Clone's discovered copy (D9),[33] and thus inconsistent with Clone's photocopying "scratch" theory, central to its case of fraudulent concoction on the deletion issue.

14. On 8 April 2005, Players' legal representative, in search of further copies of the Agreement, attended upon the licensing authority and asked to inspect "all volumes" of its file "relating to the Planet Hotel".[34] The representative of the licensing authority who only the previous afternoon had shown the Planet Hotel folder 1 file containing the 3rd Copy Agreement to Clone's legal representative,[35] in circumstances which the primary judge described as "problematic",[36] did not produce that file to Players' solicitor.[37] The primary judge and the Full Court found that, as a consequence, Players remained unaware of the existence of the 3rd Copy Agreement.[38]

15. Clone, through a private arrangement with the licensing authority's representative,[39] learned that Players had not inspected or seen the 3rd Copy Agreement. Clone failed itself to discover the document and pressed on with its case of fraudulent concoction making submissions to this effect to Vanstone J and subsequently to the 2006 Full Court. Vanstone J found in favour of Clone on the deletion issue. The appeal by Players to the 2006 Full Court on the deletion issue failed.

16. In late 2009, Players learned for the first time of the existence of the 3rd Copy Agreement and that Clone had been aware of its existence during the trial but had suppressed its existence from Players and the Court.[40] Players subsequently brought an interlocutory

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23 Primary Judgment at [266].
24 Appeal Judgment at [6] per Blue J.
25 Appeal Judgment at [68] per Blue J.
26 Appeal Judgment at [229]-[234],[237] per Blue J. Clone did not put that case to the Players' witnesses in cross-examination: Blue J at [232],[241],[242],[252],[254].
27 Primary Judgment at [117], [157], [158],[161].
28 Appeal Judgment at [137], [249] per Blue J; [423] per Stanley J.
29 The expression includes the Liquor Licensing Commissioner and the Licensing Court: see Appeal Judgment at [43] per Blue J.
30 Appeal Judgment at [249], [43], [44] per Blue J.
31 Primary Judgment at [63].
32 Appeal Judgment at [466] per Stanley J.
33 Appeal Judgment at [222]-[226] & [293] per Blue J. Blue J refers to accompanying documents in Planet Hotel Folder 1 in footnote 81 which demonstrated this. Stanley J also refers to those documents at FC [466].
34 Primary Judgment at [278].
35 Primary Judgment at [277], [278].
36 Primary Judgment at [100].
37 Primary Judgment at [63], [278].
38 Primary Judgment at [279].
39 Primary Judgment at [137], [277].
40 Primary Judgment at [6], Appeal Judgment at [11] per Blue J. The circumstances in which Players came to learn of these matters are set out in the judgment of Hargrave J at [64]-[66].

application in the original action and also commenced a new action making an application to set aside the judgment of Vanstone J.[41]

17. The primary judge allowed the application, set aside the judgment of Vanstone J and ordered a new trial on the deletion issue.[42] Hargrave J found that Clone's legal representatives had engaged in "serious malpractice" by recklessly failing to discover the 3rd Copy Agreement[43] and found that Vanstone J was misled because of that misconduct.[44] The Full Court, by majority (Blue and Stanley JJ, Debelle AJ in dissent), upheld these findings[45] but also found that Clone had engaged in additional malpractice by misleading Vanstone J and the Full Court independently of its reckless failure to make discovery.[46]

Part V: LEGISLATIVE PROVISIONS

18. Nil.

Part VI: PLAYERS' ARGUMENT

The nature of the malpractice

19. It is appropriate at the outset to consider in greater detail the findings of the primary judge and the Full Court respecting Clone's malpractice. In relation to the reckless failure to make discovery of the 3rd Copy Agreement, the primary judge found that Clone's senior counsel **"shut his eyes"**[47] to any possibility that the 3rd Copy Agreement might be relevant and that the whole of Clone's legal team was infected by senior counsel's closed mind.[48] That finding was made in circumstances where:

(a) Clone was *dux litis* at the trial advancing an affirmative case that the licenses be transferred for NIL consideration.[49]

(b) Clone was prosecuting a case of fraudulent concoction of evidence by Players' witnesses, including against a senior legal practitioner [50], and advancing a case that the line across the word "NIL" was a photocopying "scratch" [51] based upon the two copies of the Agreement in evidence being the product of a single photocopying event.

(c) During the trial, Clone's senior counsel made several calls for the production of further copies of the Agreement[52] and specifically instructed his solicitor to search for any further copies in the files maintained by the licensing authority[53] expressing a concern that if Players found a document that was favorable to Clone they would not disclose it.[54]

(d) Clone knew that Players considered the 3rd Copy Agreement would have forensic significance to the resolution of the deletion issue[55] and that Players wished to put

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41 Appeal Judgment at [11] per Blue J.
42 Primary Judgment at [305], Appeal Judgment at [12] per Blue J.
43 Primary Judgment at [191], [204], [240].
44 Primary Judgment at [236], [239], Blue J at [213].
45 Appeal Judgment at [196], [197], [213] per Blue J, Appeal Judgment at [420], [424] per Stanley J.
46 Appeal Judgment at [261], [322] per Blue J. Appeal Judgment at [434], [436], [453], [454] per Stanley J.
47 Primary Judgment at [191].
48 Primary Judgment at [186] & [191].
49 Appeal Judgment at [228] per Blue J.
50 Appeal Judgment at [229]-[235] per Blue J.
51 Primary Judgment at [117], [157], [158] & [161]; Appeal Judgment at [256], [257] per Blue J.
52 Primary Judgment at [122].
53 Primary Judgment at [126], [127].
54 Primary Judgment at [127].
55 Primary Judgment at [167].

before the Court as many copies of the Agreement as could be found to corroborate its witnesses and counter the suggestion that the mark across the word "NIL" was a photocopying scratch.[56]

(e) Clone knew that the 3rd Copy Agreement was of interest to the trial judge, her Honour having enquired about the existence of further copies of the Agreement including copies in the files of the licensing authority[57] and having also asked questions as to the provenance of the photocopies in evidence.[58]

(f) Clone's legal team, having found the 3rd Copy Agreement, was concerned that it might have potential forensic significance in the hands of Players.[59]

(g) Clone's junior counsel deliberately refrained from taking a photocopy of the 3rd Copy Agreement because he believed that Players considered it was relevant[60] and he believed that Players did not know of the 3rd Copy Agreement and he did not want to inform them of a document they could otherwise find for themselves.[61]

(h) Clone's legal team made a discreet request of the licensing authority's representative to monitor and keep them informed of any searches or inspections undertaken by Players of the licensing authority's files to find out if Players found the 3rd Copy Agreement.[62]

(i) Clone's legal team was informed by the licensing authority's representative that Players had attended upon it to inspect documents but that Players had not seen the 3rd Copy Agreement.[63]

(j) Clone's senior counsel made a forensic decision not to challenge Mr Griffin's evidence that he believed that the Grenfell Tavern Removal file (Planet Hotel folder 1) had been destroyed because such challenge would have revealed the existence of the file and the 3rd Copy Agreement.[64]

(k) Clone's legal team knew that Players and the trial judge were unaware of the 3rd Copy Agreement and were proceeding in the mistaken belief that the file containing the 3rd Copy Agreement had been destroyed.[65]

20. The Full Court found that Clone misled Vanstone J by:

(a) conducting a case "with the ostensible purpose"[66] of conveying to Vanstone J (which contributed to the trial judge believing) that she had before her all copies of the Agreement that could be found[67]; and

(b) making closing submissions to Vanstone J that gave the impression that all copies of the Agreement known to be in existence were in evidence when Clone knew this was not the case.[68] It submitted to her Honour that it was prejudiced on the deletion issue because the original Agreement had been lost or destroyed and "Other

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56 Appeal Judgment at [60], [247] per Blue J; Primary Judgment at [63], [75], [118]-[122].
57 Appeal Judgment at [247] per Blue J. Primary Judgment at [118]-[122].
58 Appeal Judgment at [257] per Blue J.
59 Primary Judgment at [173].
60 Primary Judgment at [170].
61 Primary Judgment at [170].
62 Primary Judgment at [137], [171].
63 Appeal Judgment at [71] per Blue J; Primary Judgment at [63], [178].
64 Primary Judgment at [63](11) , [141] & [253].
65 Primary Judgment [178], [182]; Appeal Judgment [250], [260] per Blue J.
66 Appeal Judgment at [245] per Blue J.
67 Appeal Judgment at [244] – [246], [250] per Blue J.
68 Appeal Judgment at [256] – [261] per Blue J; [431] per Stanley J.

contemporaneous documents have been lost or destroyed".[69] It submitted that there was "no objective corroboration" of the evidence of Players' witnesses: "Nothing. Not a single scrap of paper that supports what they have to say except the scratch on the photocopies."[70]

21. Clone's misleading conduct occurred in circumstances where it was advancing serious allegations of fraudulent concoction of evidence against Players' witnesses, knew that the trial judge was interested in the existence of any further copies of the Agreement, including in the files held by the licensing authority, for the purpose of determining that contention[71] and knew that the trial judge was laboring under the misapprehension that copies of the Agreement held with the licensing authority had been destroyed[72].

22. The Full Court found that Clone also misled the 2006 Full Court by making a submission that gave the impression that there were no other copies of the Agreement in existence other than the two copies tendered into evidence while **"simultaneously concealing"**[73] the fact that there was a further copy of the Agreement in existence unknown to Players or the Court.[74] Clone was found to have made that submissions in circumstances where Doyle CJ and Layton J were clearly troubled by the evidence of the objective fact that the only copies of the Agreement in evidence showed the word "NIL" struck through.[75]

Issue 1: The Extent of the Equitable Jurisdiction

23. Clone and the Attorney submit that the jurisdiction to set aside a perfected judgment outside a statutory appeal is equitable in nature and requires proof of actual fraud in the sense of that required in an action for common law deceit, namely an intention to deceive the Court or reckless indifference as to the Court's knowledge of the true facts (at C[23], C[25]). Adopting that premise Clone submits that neither the Full Court nor the primary judge found actual fraud and thus the equitable jurisdiction was not attracted. It contends that adoption of principles which permit lesser species of malpractice are directly contrary to established equitable principle (at C[23]) and contrary to the "principle" of finality. These submissions should be rejected.

24. At first instance and on appeal, Clone never submitted that the jurisdiction was confined to common law fraud and positively submitted that a lesser species of malpractice (ie, *Quade*-type malpractice as distinct from fraud) was sufficient to attract the equitable jurisdiction.[76] It makes a mockery of the appellate process for Clone now to contend (at C[33]) that the courts below fell into error because those courts did not make any findings of actual fraud and, accordingly, the equitable jurisdiction to set aside perfected orders was not attracted.

25. In any event, assuming the test postulated is correct (and for the reasons articulated below, it is not), contrary to Clone's submission, the finding of reckless malpractice in failing to make discovery was sufficient to amount to fraud. In order to overcome that conclusion Clone seeks to characterize that finding as one of negligence submitting that it was based upon no more than "a departure from a standard of care" (at C[25]) or a "want of reasonable care" (at C[29]). It submits that the primary judge did not find that the legal practitioners were "indifferent to the discoverability of the document" (at C[26]). That

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69 Appeal Judgment at [259] per Blue J.
70 Appeal Judgment at [256] per Blue J.
71 Primary Judgment at [118] – [122]; Appeal Judgment at [247] per Blue J.
72 Appeal Judgment at [250], [260] per Blue J.
73 Appeal Judgment at [434] per Stanley J.
74 Appeal Judgment [434] per Stanley J.
75 Appeal Judgment [460] per Stanley J.
76 Appeal Judgment at [325] per Blue J; and see Trial Transcript page 796; and see paragraphs [72] and [73] of Clone's written closing submissions before Hargrave J.

misrepresents the description of the serious malpractice found by the primary judge. The primary judge found that Clone's senior counsel "shut his eyes" to any possibility that the 3rd Copy Agreement might be relevant and that the whole of Clone's legal team was infected by senior counsel's closed mind.[77] That conduct was found to have occurred in the circumstances referred to earlier in paragraph [19] of these submissions. Wilfully shutting one's eyes to the obligation of discovery in such circumstances constitutes recklessness sufficient to amount to fraud for the purpose of common law deceit. In *Angus v Clifford* (1891) 2 Ch 449, Lindley LJ said in respect of a common law action of deceit[78]:

> "...an action of this kind cannot be supported without proof of fraud, an intention to deceive, and that it is not sufficient that there is blundering carelessness, however gross, unless there is wilful recklessness, by which I mean wilfully shutting one's eyes, which is of course fraud."

26. Contrary to Clone's submissions (at C[26]), the effect of the primary judge's finding (ie that Clone's legal team shut its eyes to the relevance of the 3rd Copy Agreement) constituted a finding that Clone's legal team was indifferent to the discoverability of the document.

27. There is no substance to Clone's further and alternative contention (at C[27]) that the primary judge's finding of recklessness in relation to discovery was of no utility because the basis of that finding was that the document was in Clone's power, whereas the Full Court concluded it was in Clone's custody. A finding that Clone "shut its eyes" to the relevance of the 3rd Copy Agreement is equally applicable to a failure to make discovery by reason of the document being in Clone's custody. Moreover, the complaint advanced by Clone was rejected by Blue J who found that custody was a live issue at trial (at FC [125]) and that on a consideration of the whole of the judge's reasons on the issue of recklessness the primary judge considered discoverability encompassing not only relevance "but also possession, **custody** or power." As for Clone's submission (at C[27.2]) that it ought to have been given the opportunity to answer a case of reckless indifference, the primary judge found that it had been given that opportunity and in particular that Clone's senior counsel had ample opportunity to respond to the case that he recklessly failed to consider the relevance of the 3rd Copy Agreement.[79]

28. Given the manner in which Clone conducted its case below it was not necessary for the Full Court to make findings that Clone's misleading conduct was intentional or reckless. Nonetheless, had Clone advanced the case that it is now presenting, a finding to that effect was open and would have been made. For example, Clone submitted to Vanstone J that it was prejudiced on the deletion issue because the original Agreement had been lost or destroyed and "Other contemporaneous documents have been lost or destroyed".[80] Clone made that submission knowing of the existence of a contemporaneous document, the 3rd Copy Agreement; knowing that Vanstone J was interested in the existence of such documents;[81] and knowing that Vanstone J was laboring under the misapprehension that such documents had been destroyed.[82] Each of those matters readily support the conclusion that Clone's submission was recklessly made.

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77 Primary Judgment at [186] & [191].
78 At page 469.
79 Primary Judgment at [235].
80 Appeal Judgment at [259] per Blue J.
81 Primary Judgment at [118] – [122]; Appeal Judgment at [247] per Blue J.
82 Appeal Judgment at [260] per Blue J.

The Equitable Jurisdiction

29. In any event, the underlying premise of Clone's submission, that the equitable jurisdiction is confined to actual fraud in the common law deceit sense, is wrong.

30. The equitable jurisdiction to set aside judgments (aside from cases of the mere discovery of "fresh evidence") is and remains flexible so as primarily to serve the interests of justice. Aside from cases of fraud, it has been described as extending to cases of surprise, imposition, mistake, malpractice, subornation of witnesses, corruption, duress or other taint.[83] Further, fraud as a basis for invoking the equitable jurisdiction extends to equitable fraud, a concept sufficiently wide to embrace malpractice of the kind found in this case.

31. In 1721, Lord Chancellor Macclesfield in *Richmond v Tayleur* (1721) 24 ER 591 spoke of exercising the jurisdiction to set aside a decree against an infant "if any fraud **or surprise** upon the court has been proved"[84] (emphasis added). Subsequently, in *Barnesly v Powel* (1748) 27 ER 930 Lord Chancellor Hardwicke, referring to *Richmond v Tayleur,* explained that "[t]here are several instances of relief, notwithstanding a former decree, if obtained by fraud **and imposition**, which infects judgments at law, and decrees of all courts; and annuls the whole in the consideration of this court..."[85] (emphasis added). In *Cannan v Reynolds* (1855) 119 ER 493, Lord Campbell CJ, referring to the general equitable jurisdiction of the Court to set aside a judgment, noted that "[i]n equity **mistake** affords a ground for relief as well as fraud"[86]. In the same case Erle J stated he was "not prepared to lay down the limits of that jurisdiction"[87].

32. In *Hip Foong Hong v H Neotia and Company* [1918] AC 888, the Privy Council, speaking of the equitable jurisdiction, observed that in all applications for a new trial the fundamental ground must be that there has been a miscarriage of justice and proceeded to identify a distinction as to what would suffice to establish a miscarriage of justice between, on the one hand, cases of "fraud **or surprise**" and, on the other hand, cases resting solely upon the discovery of fresh evidence. In *Hip Foong*, the surprise alleged was the failure to make discovery of a book of account which was material and ought to have been produced. Thus "surprise" comprised malpractice.[88] Surprise as a basis for the exercise of the equitable jurisdiction has also been described as conduct amounting to "sharp practice falling short of fraud".[89] The significance of *Hip Foong* is not diminished because the Privy Council was dealing with an application for a new trial following a jury verdict.[90] Lord Buckmaster was describing the equitable jurisdiction to set aside judgments obtained by fraud or surprise, noting that where fraud was the ground for setting aside the judgment the better course was to bring a separate action.

33. *Hip Foong* was cited with approval by the High Court in *Orr v Holmes* (1948) 76 CLR 632[91] and *McCann v Parsons* (1954) 93 CLR 418. In *Council of the City of Greater Wollongong v Cowan* (1955) 93 CLR 435, Dixon CJ, referring to *Orr* and *McCann*, included "**malpractice**" alongside fraud and surprise in adopting the distinction advanced in *Hip Foong* between cases based solely on the discovery of fresh evidence and cases of fraud and surprise.[92] In *McDonald v McDonald* (1965) 113 CLR 529, Barwick CJ (with

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83 See the reasons of Stanley J at Appeal Judgment [440] and the references cited therein.
84 At page 592.
85 At page 930.
86 At page 495.
87 At page 496.
88 Sheridan L.A., "*Fraud and Surprise in Legal Proceedings*" (1955) 18 MLR 441 at page 448-449; see also Appeal Judgment at [357] per Blue J.
89 *Monroe Schneider* at page 241.
90 See Attorney's submissions at [19.3].
91 At page 641 – 642.
92 At page 444.

whom Kitto J concurred), referring to *Hip Foong* and *McCann,* spoke of the Court's power to set aside a judgment based upon "fraud, surprise or **subornation of witnesses**"[93] whilst Menzies J referred to "malpractice or fraud".[94]

34. Clone and the Attorney contend (at C[42]; A[14]-[20]) that the relevant statements of principle in *McCann*, *Greater Wollongong* and *McDonald* have no application outside the context of a motion for a new trial within the appellate proceeding. However, nothing in those cases was made to turn on the fact that the statements of principle were articulated in the context of a motion for a new trial on appeal.

Meaning of Fraud

35. The concept of fraud in equity has never been confined to fraud in the sense required for common law deceit. In *SZFDE v Minister for Immigration* (2007) 232 CLR 189, the High Court, citing Professor Hanbury's work, noted that in equity the word fraud applied "indifferently to all failures in relations wherein equity set a certain standard of conduct".[95] In *Nocton v Lord Ashburton* [1914] AC 932, Viscount Haldane LC observed that fraud as it was known in the exclusive equitable jurisdiction "did not necessarily import the element of *dolus malus*"[96] and described it as a mistake "to suppose that an actual intention to cheat must always be proved".[97] The Court took it upon itself to prevent a person from acting against the dictates of conscience, the Lord Chancellor noting that fraud may exists where "man may misconceive the extent of the obligation which a court of Equity imposes upon him."[98] It has also been observed that a "suit in equity to impeach a judgment [involved]...a personal obligation to give up the fruits of unconscionable conduct". [99]

36. In the context of the equitable jurisdiction to set aside judgments for fraud, the concept is not confined to proof of fraud in the sense required for common law deceit. The equitable jurisdiction applies to fraud as more broadly understood in equity, and includes the suppression of relevant evidence without proof of dishonesty. In *Brooke v Lord Mostyn* [1864] 46 ER 419, a suit was successfully instituted to set aside a decree of the Court sanctioning a compromise on behalf of an infant. A valuation of an estate relevant to the compromise had been in the possession of the owners of the estate but withheld from the Court. Lord Justice Turner, proceeding on the basis that the decree could be impeached for fraud by original bill, set aside the decree because material information was not "*fairly and properly*"[100] brought to the Court's attention. Lord Justice Turner said:

> "...if there is knowledge on one side which is withheld, the compromise cannot stand, because the withholding of the knowledge amounts in the view of a Court of Equity to fraud."[101]
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> "I am satisfied that information was withheld which was material to have been given, and which if given, might have altered the conclusion arrived at, and I think the fact of such information having been withheld amounts in the eye of this Court to fraud."[102]

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93 At page 533.
94 At page 543.
95 At [10].
96 At page 952.
97 At page 954.
98 At page 954.
99 Meagher, Heydon and Leeming, *Equity Doctrines and Remedies,* 4th ed. (2002) at [12.145].
100 At page 438.
101 At page 436.
102 At page 439. In *Boswell v Coaks* [1886] 11 AC 232, the House of Lords distinguished *Brooke v Lord Mostyn* on the facts but did not criticise the reasoning. In *Boswell*, unlike in *Brooke*, there was held to have been no duty to disclose

37. In *Ex parte Cockerell* (1878) 4 CPD 39, Lord Coleridge CJ observed[103] that "[i]f it can be shewn that the order was obtained by fraud **or** by the suppression of information which it was essential that the Court should have, the Court will undoubtedly set aside the order."

38. Clone relies (at C[23]) upon a passage in the judgment of Sir John Rolt LJ in *Patch v Ward* (1867) III Ch App 203[104] in support of its contention that the equitable jurisdiction is confined to common law fraud. Sir John Rolt LJ did not advance an absolute position in relation to the issue. Following the passage quoted by Clone, Sir John Rolt LJ went on to observe[105]: "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." Further, Sir John Rolt LJ did *not* undertake any analysis of the equitable jurisdiction or refer to any of the cases in which it was invoked. Instead he relied upon the judgment of Lord Cairns LJ in *Patch* who referred to a short passage from *The Duchess of Kingston's Case* [1775] – [1802] All ER Rep 623[106] and said "[t]he fraud there spoken of must clearly, as it seems to me, be actual fraud"[107]. But the *The Duchess of Kingston's Case* was a judgment of a common law court. The observations of de Grey CJ in *The Duchess of Kingston's Case* that a common law court could only impugn a judgment by looking at fraud extrinsic to the trial was not a position mirrored in Chancery which did not confine itself to extrinsic fraud in impeaching a decree.[108]

39. The case of *The Ampthill Peerage* [1977] AC 547 (cited by the Attorney at A[37.2]) provides no support for the contention that the equitable jurisdiction is confined to common law deceit. In that case the Court was dealing with the definition of fraud as used in a statutory setting. Further, insofar as the Court drew upon the common law for ascribing a meaning to the statutory provision, it too referred to *The Duchess of Kingston's Case*[109].

40. The New Zealand Supreme Court case of *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* [2012] NZSC 94 (cited by the Attorney at A[38]) does not advance matters because the Court's observations were based upon *The Ampthill Peerage.*[110]

Principle

41. The exclusion of equitable fraud from the equitable jurisdiction is inconsistent with principle. Equity's intervention is based upon conduct, which although not consciously dishonest or reckless, offends conscience. To limit the scope of the equitable jurisdiction by reference to fraud of the common law kind is inconsistent with equitable principle.[111]

42. The inclusion of equitable fraud is also consistent with a principal objective of the equitable jurisdiction, namely the prevention of a miscarriage of justice. That objective recognizes the broader public interest that justice be done. It is not only in cases where a party has been deceitful or reckless in the common law sense that a miscarriage of justice

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the material information and further that the failure to disclose that information created "*no implied representation, positive or negative, direct or indirect, in what is actually stated*".

103 At page 39. (emphasis supplied)

104 At page 212 - 213.

105 At page 213.

106 (1776) 20 State Tr 355.

107 At page 207.

108 See the discussion by DM Gordon QC at (1961) 77 LQR 358 at 366 which concludes that "when modern judges deal with an action to review, by resort to de Grey's description of fraud as an extrinsic collateral act, they may be choosing the wrong tool for their job."

109 See Lord Simon at page 591.

110 At [28] – [29].

111 See article by Professor Dal Pont, "*Judgments Fraudulently Obtained: The Forgotten Equity*", University of Tasmania Law Review Vol. 14 No. 2 (1995) 129.

occurs. A miscarriage of justice may occur by reason of misconduct falling short of common law deceit. In *Quade,* this Court held that it was just to order a new trial on the basis of an unexplained failure of the Bank to make proper discovery. Similarly, in *Brookfield v Yevad Products Pty Ltd* [2004] FCA 1164, Lander J set aside a perfected judgment on the ground that relevant and important material had not been discovered by the successful party at trial. Both cases recognize the importance which discovery plays in administering justice and therefore in maintaining public confidence in the administration of justice.

43. In this case discovery of the 3rd Copy Agreement was critical to a just resolution of a serious allegation made by Clone against Players' witnesses, including a legal practitioner, of fraudulently concocting evidence in circumstances where Clone was advancing a case that the provenance of the two photocopies of the Agreement in evidence was uncertain and that the line through the word NIL was the product of a photocopying imperfection made on the two photocopies at the same time. Clone's reckless breach of its discovery obligations, constituted by Clone willfully shutting its eyes to those obligations, sufficed to engage the equitable jurisdiction, particularly given Clone's knowledge of the importance of the 3rd Copy Agreement to Players[112] and the Court[113]; Clone's concern that the document may have forensic relevance and significance to Players;[114] Clone's knowledge that both Players and the Court were unaware of its existence;[115] and Clone's knowledge that Players and the Court were labouring under the misapprehension that the 3rd Copy Agreement had been destroyed.[116]

44. Equally, engaging in conduct and making submissions to the Court which conveyed the false impression that no other copies of the Agreement were known to be in existence in those circumstances was also sufficient to attract the equitable jurisdiction.

Finality

45. Considerations of finality and its undoubted importance do not, as Clone and the Attorney contend, provide a principled basis for narrowly confining the equitable jurisdiction to fraud in the sense of common law deceit. The public interest in the finality of litigation serves primarily to protect a successful party against the oppression that would arise if a suit could be re-agitated.[117] The policy underlying this is founded fundamentally on a judgment being **regularly obtained**. Where the verdict is not regularly obtained by reason of fraud, surprise or malpractice, for example, the policy underpinning the principle falls away. Thus, in *Greater Wollongong*, Dixon CJ, delivering the judgment of the Court, said that "if cases of surprise, malpractice or fraud are put on one side, it is essential to give effect to the rule that the verdict, **regularly obtained**, must not be disturbed without some insistent demand of justice."[118] And later his Honour, in dealing with the twin considerations of lack of reasonable diligence and materiality, emphasized that he was speaking "upon the hypothesis that a verdict has been **regularly** obtained without **any** miscarriage at the trial"[119] and that the application for the new trial was based wholly on the ground of the discovery of fresh evidence.

46. The same point was made by this Court in *Quade* where, in discussing finality, it noted that it would be unfair to the successful party if he or she were deprived of a verdict

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112 Primary Judgment at [75], [167], [168], [170].
113 Primary Judgment at [122]; Appeal Judgment at [247] & [257] per Blue J.
114 Primary Judgment at [173].
115 Primary Judgment at [137], [178], [182], [277]; Appeal Judgment at [260] per Blue J.
116 Primary Judgment at [182]; Appeal Judgment at [260] per Blue J.
117 See *Burrell v The Queen* (2008) 238 CLR 218 at [16].
118 At page 444 (emphasis added).
119 At page 447 (emphasis added).

obtained after a trial "on the merits"[120] and subjected to the expense, inconvenience and uncertainty of a further trial merely because some relevant evidence had "without fault on his part"[121] been unavailable to the unsuccessful party at trial. However, as the Court went on to note, the position is different where the unavailability of the evidence at the trial resulted from a "significant failure"[122] by the successful party to comply with their obligations of discovery.

47. These considerations as to the role of the public interest in the finality of litigation in relation to the exercise of the Court's equitable jurisdiction do not lose their significance by reason of the formal entry of the judgment. So much is clear from *Burrell v The Queen* (2008) 238 CLR 218 where this Court, recognizing the importance of substance and principle over form, observed that "[t]he questions that arise in this matter must depend for their answer not upon what forms and solemnities have been observed but upon how effect is to be given to the principle of finality."[123]

The Approach of the Majority in the Full Court

48. Clone contends that Stanley J erred in applying *Quade* to a fresh proceeding in the equitable jurisdiction (at C[14]). That submission is incorrect. Stanley J did not apply *Quade*. His Honour held that the principles in *Quade* were not applicable and that the relevant applicable principles were those enunciated in *McCann*, *Greater Wollongong* and *McDonald*.[124] His Honour applied those principles in respect of Clone's malpractice in misleading the Full Court, which he considered was itself sufficient to enliven the equitable jurisdiction. In applying the principles in *McCann*, *Greater Wollongong* and *McDonald* in that context, it was necessary for his Honour to determine whether the misconduct practised upon the Full Court was "material". His Honour answered that question affirmatively (at FC [472]) on the basis that but for the malpractice the Full Court would have been aware of the 3rd Copy Agreement and, applying the principles in *Quade*, the Full Court would have set aside the judgment of Vanstone J and ordered a new trial.

49. Blue J considered that *Quade* principles should be applied on the basis that Clone had misled the Full Court.[125] His Honour reasoned (agreeing with Stanley J) that, but for that conduct, Players could have sought to have the judgment of Vanstone J set aside in the Full Court on the basis of the principles set out in *Quade*.[126] In those circumstances, his Honour considered that it would be unjust for Clone to be permitted to advance principles ordinarily applicable after the exhaustion of appeal rights. As his Honour pointed out (at FC [388]), if it were otherwise, the criteria would vary "depending on whether the malpractice remained concealed until after the appeal has been heard and determined." Nonetheless, his Honour considered the principles applicable to the equitable jurisdiction in the event that, contrary to his conclusion, the 2006 appeal had not been vitiated by malpractice (at FC [324]). His Honour held (at FC [380]) that the principles applicable were those advanced in *McCann*, *Greater Wollongong* and *McDonald*.

50. It is of no practical consequence that Blue J applied *Quade*. For the reasons discussed above, *Quade*-type misconduct (as conceded by Clone in the Full Court) is caught by the equitable jurisdiction. Further, there is little difference in the practical application of the principles enunciated in *McCann*, *Greater Wollongong* and *McDonald* and those applied

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120 At page 141.
121 At page 141.
122 At page 142.
123 At [18].
124 Appeal Judgment at [439] per Stanley J.
125 Appeal Judgment at [322], [323] per Blue J.
126 Appeal Judgment at [323] per Blue J.

in *Quade*. Both are founded upon the Court being vested with a discretion based upon its assessment of what will, in the particular circumstances before it, best serve the interests of justice both in relation to the parties and more generally in relation to the administration of justice. In the exercise of that discretion the Court will have regard to the successful party's misconduct and its materiality as well as any lack of diligence on the part of the unsuccessful party. Principles of finality are not (and were not) ignored, but are (and were) expressly considered in that context and sit alongside other interests, namely that of a just result in litigation and the need to maintain the integrity of the judicial process[127] and not to condone or reward malpractice.

Issue 2: The Conditions of the Equitable Jurisdiction

51. Clone further submits (at C[34] – C[35]) by reference to an article of Mr David Gordon QC[128] (**Mr Gordon's Article**) that the equitable jurisdiction is available *only where* the misconduct conceals evidence (a) that is newly discovered since the trial; (b) that could not have been found by the time of trial by the exercise of reasonable diligence; and (c) that is so material that its production at trial would probably have affected the outcome. Neither authority nor principle supports the second or third conditions or requirements, and they have been rejected including by judges of this[129] and other Australian courts.[130] Clone's submission as to the first condition proceeds upon the basis of a number of fallacies which are, in any event, irrelevant because the concurrent findings in the courts below were that Players remained unaware of the existence of the 3rd Copy Agreement at trial[131] and its existence first became known to Players in late 2009.[132]

Preliminary Observation

52. As noted above, at trial Clone accepted that the test in *Quade* applied, and that under that test a lack of reasonable diligence was not a disqualifying factor but was merely an element to be weighed in the scales against the seriousness of the malpractice in the exercise of the discretion, and that materiality was established by demonstrating that there was a "real possibility" that the result would have been different. Unsurprisingly, the primary judge proceeded on that basis. In those circumstances, it is not now open to Clone to contend (as it does at C[34] and C[53]) that the primary judge erred in taking that approach. Nor should Clone be permitted to contend that the equitable jurisdiction was not attracted because the primary judge found "only" that there was a "real possibility" that the result would have been different in the absence of Clone's serious malpractice. The primary judge was not required on Clone's case to make any other finding.

53. Further, and in any event, Clone's asserted qualifying pre-conditions to the attraction of the equitable jurisdiction can have no application to the Full Court's separate and distinct finding that Clone engaged in serious malpractice by misleading Vanstone J and the 2006 Full Court independently of any failure to make discovery. It makes little sense to speak of the unsuccessful party lacking reasonable diligence in the context of those findings.

General Observation

54. It is wrong to speak of the equitable jurisdiction to set aside judgments being saddled with any rigid requirements, whether the case be one of the discovery of fresh evidence only or one also involving serious malpractice. In *Hip Foong*, Lord Buckmaster observed

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127 See Primary Judgment at [303].
128 DM Gordon QC, *"Fraud or New Evidence as Grounds for Actions to Set Aside Judgments"* (1961) 77 LQR 358.
129 See Menzies J in *McDonald* at pages 542 – 543.
130 See [60] below.
131 Primary Judgment at [178] & [182].
132 Primary Judgment at [65].

that in all applications for a new trial the fundamental ground must be that there has been a miscarriage of justice.[133] This is and should be the ultimate test. Lord Buckmaster went on to observe that, where there was no fraud or surprise, an applicant seeking to discharge this burden would need to show that the evidence would, so far as could be foreseen, have formed a determining factor in the result.[134] In *Greater Wollongong*, Dixon CJ observed[135] that where a judgment has been regularly obtained the mere discovery of fresh evidence could **"rarely, if ever"** be a ground for a new trial unless reasonable diligence had been exercised and it was reasonably clear that the freshly discovered evidence would be highly likely to produce an opposite result. Thus Dixon CJ was careful not to advance any absolute proposition and constrain relief that might be required "in the interests of justice" in an appropriate case. The interests of justice should not be strait-jacketed by the imposition of absolute conditions or constraints, as contended for by Clone.

The First Asserted Condition

55. Clone's submission (at C[45]) draws a false distinction in respect of the first asserted condition between the discovery of the malpractice and the discovery of the evidence suppressed by it. Where the application to set aside is based upon malpractice, the relevant focus for the attraction of the equitable jurisdiction is that the evidence of the malpractice be newly discovered since the trial.[136] It is in this sense that the equitable jurisdiction accommodates and gives effect to considerations of finality in cases of fraud and malpractice. The interests of justice are served by requiring that a party who has knowledge of the malpractice at the trial should come forward with such an allegation at the time of trial. In *Monroe Schneider Associates (Inc) v No 1 Raberem Pty Ltd (No 2)* (1992) 37 FCR 234, the application to set aside failed because the asserted evidence of the fraud (ie, the intimidation of a witness) was not 'fresh'. The focus is not upon the 'freshness' of any relevant evidence that may be tendered at the new trial. So much is clear from *McDonald,* in which Barwick CJ (Kitto J concurring) observed that it was **not** necessary that the 'fresh' evidence of the fraud or surprise should be evidence "which would be admissible on the issues between the parties in the action; or that it should be found to be probably conclusive of those issues."[137] Usually, but not always, proof of the malpractice will involve uncovering fresh evidence that is relevant to the underlying issues at trial. It is therefore readily understandable that one might speak in terms of the fresh evidence being newly discovered. But the relevant focus remains on establishing that the fraud or malpractice was newly discovered. If relevant evidence admissible on the underlying issues between the parties was known to the unsuccessful party at trial, the application to set aside will not succeed because the malpractice or fraud cannot be considered to have been material.

56. Further, the 'first requirement' described in Mr Gordon's Article, that the evidence be newly discovered since the trial, means that the relevant evidence was evidence which was not actually known to the unsuccessful party at trial. It does not mean, as Clone contends (at C[45]), that the relevant evidence "was not available" to the unsuccessful party. The fallacy of Clone's proposition is demonstrated by reference to the second of the requirements or conditions advanced by Mr Gordon which necessarily assumes that the evidence was available, but that it was not found by the unsuccessful party due to a lack of reasonable diligence.

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133 At page 894.
134 At page 894.
135 At page 444.
136 *McDonald v McDonald* at page 533 (per Barwick CJ).
137 At page 533.

57. Clone appears to advance (at C[45] – C[46]) a proposition that a form of constructive knowledge on the part of the unsuccessful party of the evidence which was suppressed by the malpractice will preclude the attraction of the equitable jurisdiction. It submits that the equitable jurisdiction will be precluded if the evidence suppressed by the malpractice was available in the sense that it "was in plain sight for all to see". The cases cited by Clone do not provide any support for that contention. The remarks which Clone cites from *Quade* are taken out of context. There the Court drew a sharp distinction between cases of mere fresh evidence on the one hand and cases of misconduct on the other hand, observing that in cases of mere fresh evidence the successful party should not be subjected to further litigation "merely because some relevant evidence had, **without fault on his part,** been unavailable to the unsuccessful party at the time of the trial."[138] *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 was not a case dealing with the equitable jurisdiction to set aside a judgment for fraud. It was a case in which a statement of claim was struck out as an abuse of process because Hunter sought to mount a collateral attack on a finding previously made at his murder trial concerning the admissibility of his confession. *Spalla v St George Motor Finance Ltd (No 5)* [2004] FCA 1262 was also a case in which a new action was struck out as an abuse of process because it sought to re-agitate findings previously made at an earlier trial. In that case the information the subject of the new action (the relevant transaction documents) had in fact been in the possession of the unsuccessful party (and was available to the Court) at the earlier trial. It was in this context that French J remarked (at [62]) that the fact which was said to have been concealed from the Court: "...was in plain sight for all to see. What was fresh was that somebody took the trouble, long after the trial, to read the transaction documents carefully".

58. Contrary to Clone's submission (at C[46]), there was no finding by the primary judge or the Full Court that the 3rd Copy Agreement was in "plain sight" for Players to see. Further, the primary judge did not find that Players had seen the 3rd Copy Agreement, as Clone seems to assert (at C[46]). The Full Court rejected that contention (at FC [263]) and rejected Clone's appeal on that issue (at FC [265]-[268]). Clone's submissions (at C[46]) seek impermissibly to challenge those concurrent findings notwithstanding that special leave to do so was expressly refused by this Court (see paragraph [9] above).

The Second and Third Asserted Conditions – "Reasonable diligence" and degree of materiality

59. The second and third conditions advanced by Clone have been soundly and authoritatively rejected in Australia. The comprehensive reasons of Blue and Stanley JJ rejecting such requirements[139] are correct and supported by the authorities to which their Honours referred. Where a judgment is tainted by malpractice, the jurisdiction to set it aside is engaged without more. Any lack of reasonable diligence on the part of the unsuccessful party and questions of materiality are, as Blue and Stanley JJ observed, factors to be weighed in the exercise of the discretion.[140] For the reasons explained by Blue J (at FC [375]), propositions (b) and (c) advanced by Mr Gordon QC are not supported by the cases to which the author refers.

60. The issue of the asserted requirement or condition of no lack of reasonable diligence was considered and addressed by the New South Wales Court of Appeal in *Toubia v Schwenke* (2002) 54 NSWLR 46. In that case the Court squarely rejected an argument that in cases of fraud the unsuccessful party was required to establish that it had exercised reasonable diligence.[141] The Court held that such a requirement would be contrary to

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138 At page 141 (emphasis added).
139 Appeal Judgment at [325] – [392] per Blue J; [440] per Stanley J.
140 Appeal Judgment at [392] per Blue J; [440] per Stanley J.
141 See the reasons of Handley JA at [22]-[45].

long-established and fundamental principle.[142] It also held that such a requirement was contrary to the decision of the Privy Council in *Hip Foong* and contrary to the decision of the House of Lords in *Jonesco v Beard* [1930] AC 298[143], both of which were approved by the High Court in *McCann*.[144] The Court of Appeal observed that the issue was foreclosed by the High Court's decision in *McDonald*[145] where Menzies J[146] expressly rejected Mr Gordon's contention. The reasoning in *Toubia* has been considered and followed by the New South Wales Court of Appeal in subsequent cases.[147] It has also been considered and followed in the Supreme Court of Queensland,[148] the Supreme Court of Western Australia[149] and the Supreme Court of the Australian Capital Territory.[150] It is both well entrenched and is correct.

61. The asserted requirement or condition respecting materiality has also been conclusively rejected by this Court in *McCann, Greater Wollongong* and *McDonald*. In *McDonald*, Barwick CJ (Kitto J concurring) made the observation that it was not essential that the fresh evidence of the fraud or surprise should be evidence which would be "admissible on the issues between the parties in the action; or that it should be found to be probably conclusive of those issues."[151] Menzies J expressly rejected Mr Gordon's third requirement.[152]

62. The observations of this Court in *McCann, Greater Wollongong* and *McDonald* rejecting these requirements **as conditions** of the equitable jurisdiction do not lose their significance because they were made in the context of a motion for a new trial within an appellate proceeding. The reasoning of the Court was based on general considerations of the interests of justice. A sharp distinction was drawn between cases where a judgment had been "regularly obtained without any miscarriage at the trial"[153] and cases where the application for a new trial was based "wholly on the ground that the subsequent discovery of fresh evidence demands a second trial".[154] The rationale for that distinction in terms of the interests of justice holds good whether the application for a new trial is within or outside the appellate process.

63. The principle of finality does not support or compel the dual requirements or conditions for which Clone contends. In *Quade*, this Court rejected that principle as supplying a basis for imposing those dual requirements in cases where the verdict was not regularly obtained by reason of a significant failure by the successful party to comply with its discovery obligations. The Court observed that in such cases, particularly where the failure was deliberate or remains unexplained, the application of the strict requirements that apply to cases of mere "fresh evidence" where the verdict had been regularly obtained would serve "neither the demands of justice in the individual case nor the public interest in the administration of justice generally".[155] Rather, the application of those strict requirements "would be likely to ensure to the successful party the spoils of his own default and thereby encourage, rather than penalize, failure to comply with pre-trial orders and procedural requirements".[156] As the Court noted, the third requirement or

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142 At [37]-[38].
143 See page 301 – 302.
144 (1954) 93 CLR 418 at 425-428.
145 (1965) 113 CLR 529.
146 At page 542 - 543.
147 *Quarter Enterprises Pty Ltd v Allardyce Lumber Company Ltd* [2014] NSWCA 3 at [99]; *Donnelly v Australia and New Zealand Banking Group Ltd* [2015] NSWCA 341, at [29].
148 *Hansen Yuncken Pty Ltd v Ian James Ericson trading as Flea's Concreting* & Anor [2011] QSC 327 at [126]-[130].
149 *Ridout v O'Brien* [2004] WASC 137 at [49]-[50].
150 *Nick Zardo v Mate Ivancic* [2003] ACTSC 32 at [50]-[51].
151 At page 533.
152 At page 542 - 543.
153 *Greater Wollongong* at page 447 (per Dixon CJ) and see also page 444.
154 *Greater Wollongong* at page 447 (per Dixon CJ).
155 At page 142.
156 At page 142.

condition would "cast upon the innocent party an unfairly onerous burden of demonstrating to virtual certainty what would have happened in the hypothetical situation which would have existed but for the other party's misconduct."[157] Blue J observed in the Full Court[158] that in many cases the malpractice would make it impossible for the Court subsequently to determine whether, but for the malpractice, the result would have been different. In *Quade*, the High Court also observed (agreeing with the remarks of Burchett J in the Full Court) that in such cases there was a further matter at stake, namely "the equally important principle that a party should not be permitted to mock the orders of the court".[159] To this may be added the importance of observance of appropriate standards by the legal profession which is a fundamental aspect of the administration of justice.

64. Further, any conceivable harm that may be caused to the policy underlying the principle of finality by too readily granting a new trial in cases of misconduct can be appropriately accommodated in the exercise of the Court's discretion. This case illustrates the necessity for the Court to retain a measure of flexibility in exercising the jurisdiction. The finding of the primary judge was that Players' lack of reasonable diligence was at the lower end of the scale and an "error of judgement".[160] His Honour described it as a failure by Players to implement "best practice"[161] by not specifically asking to inspect the Grenfell Tavern Removal file notwithstanding that his Honour also found that Players' legal team reasonably believed that the Grenfell Tavern Removal file had been destroyed as a result of what Mr Griffin had been informed by the licensing authority[162], and notwithstanding his Honour's finding that Players' broad request during the trial to inspect "all volumes" of the Commissioner's file "relating to the Planet Hotel" encompassed and included the Grenfell Tavern Removal file (the Planet Hotel folder No 1[163]) which contained the 3rd Copy Agreement.[164] Having regard to the seriousness of the malpractice and its materiality (as to which see paragraph [9.3] and [19] above) the interests of justice dictated that the equitable jurisdiction be exercised notwithstanding a finding of a lack of diligence. Clone's attempt (at C[59]- C[60]) to challenge the concurrent findings of materiality should not be entertained by this Court in circumstances where Clone was expressly refused leave to challenge those factual findings (see paragraph [9] above).

Monroe Schneider

65. Clone's reliance upon *Monroe Schneider* is misplaced. That case, properly understood, is not authority for the propositions advanced by Clone. As Blue J noted (at FC [378] – [380]), the issues of reasonable diligence and materiality did not arise for adjudication in *Monroe Schneider*. This was because the evidence of the fraud (ie, the intimidation of a witness) was not 'fresh'. Accordingly, the application failed at the threshold. Further, the *obiter* observations respecting Mr Gordon's requirements were conceded without argument. A further matter, not noted by Blue J, was that **in *Monroe Schneider* the Court adopted the observations of Barwick CJ in *McDonald*** where his Honour stated that it was not necessary that the fresh evidence should be admissible on the issues between the parties in the action in which the judgment sought to be impugned was given,[165] a proposition which is directly contrary to the 'third requirement' advanced by Mr Gordon QC. **In *Monroe Schneider* the Court also cited with approval that part of the judgment of Menzies J in *McDonald*** in which his Honour rejected the requirements

157 At page 142.
158 Appeal Judgment at [390].
159 At page 143.
160 Primary Judgment at [291].
161 Primary Judgment at [287].
162 Primary Judgment at [253], [257], [290], [291].
163 Appeal Judgment at [44] per Blue J.
164 Primary Judgment at [100], [143], [277], [278].
165 At page 242.

advanced by Mr Gordon QC[166]. In those circumstances, *Monroe Schneider* provides no support for Clone's contentions.

66. Clone also asserts (at C[20] and C[36]) that this Court has in several cases[167] otherwise cited *Monroe Schneider* with apparent approval. For the reasons set out above, *Monroe Schneider* does not support Clone's contentions. Further, and in any event, as Blue J observed (at FC [386]), in none of those cases was the specific issue raised for consideration or discussed. The footnoted references to *Monroe Schneider* in judgments of this Court represent this Court's acknowledgment of the equitable jurisdiction to set aside judgments for fraud, not the principles engaged by it, and cannot be taken as a reconsideration, let alone a reversal, of established authority of this Court on matters of fundamental principle, particularly given that in each of those cases this Court referred to its decision in *McDonald.*[168]

The English Cases

67. Clone relies upon the judgment of the House of Lords in *Owens Bank Limited v Bracco* [1992] 2 AC 443. That case, as Blue J observed (at FC [376] – [377]), provides no authority for the position in Australia. It was a case dealing with the meaning of fraud as it appeared in s 9(2)(d) of the *Administration of Justice Act* which prevented the registration of foreign judgments if obtained by fraud. Insofar as Lord Bridge made observations concerning the circumstances in which an English court would set aside a domestic judgment for fraud, those observations were *obiter*, not the subject of any argument, not supported by any case law and contrary to *Hip Foong* and *Jonesco* to which no reference was made. Further, in the Court of Appeal[169] Parker LJ, who made similar observations to those of Lord Bridge, relied upon the judgment of Earl Cairns LC in *Phosphate Sewage Company Ltd v Molleson* [1879] 4 AC 801. However, *Phosphate Sewage* provides no support for the proposition advanced by Parker LJ and Lord Bridge in *Owens Bank*. First, *Phosphate Sewage* was a case dealing with *res judicata*. Second, it was a fresh evidence case. The Phosphate Sewage Company unsuccessfully sought to overcome a previous judgment disallowing a proof of debt by lodging a further proof with the bankrupt's trustee which was supposedly based upon fresh evidence. The plea of *res judicata* prevailed because the fresh evidence had in fact been known to the Phosphate Sewage Company when the original proof it had lodged was adjudicated upon. It was in that context that Earl Cairns LC made *obiter* observations (cited by Parker LJ in *Owens Bank*) in relation to re-litigating a claim by reason of fresh evidence. The case had nothing to do with the equitable jurisdiction to set aside a judgment for fraud. There was no suggestion in the case that any judgment was obtained by fraud. The references to fraud in *Phosphate Sewage* were references to the underlying claim in respect of which the Phosphate Sewage Company lodged its proof of debt. Thus, the observations emerging from *Owens Bank* dealing with the requirements for setting aside a judgment for fraud appear to have been misconceived and are not soundly based.

68. The same can be said of *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, a case dealing with abuse of process, not the impeachment of a judgment for fraud. Lord Diplock, agreeing with the judgment of Goff LJ in the Court of Appeal, adopted the judgment of Earl Cairns LC in *Phosphate Sewage* as the proper test for determining whether the commencement of a civil action initiating a collateral attack on an earlier judgment should be treated as an abuse of process of the court.[170] The same

166 At page 242.
167 *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].
168 In *DJL* at [37]; in *SZFDE* at footnote 40; in *CDJ* at footnote 77.
169 *Owens Bank v Bracco* [1992] 2 WLR 127.
170 At page 545.

erroneous reading of *Phosphate Sewage* underpins the reasoning in *Takhar v Gracefield Developments Ltd* [2017] EWCA Civ 147 which is relied upon by Clone (at C[40] and C[43]). There Patten LJ, relying upon *Phosphate Sewage*, incorrectly described it as a case in which the claimant was seeking to rely upon evidence of fraud in relation to the earlier decision.[171]

69. Clone also relies (at C[50]) upon the New Zealand Court of Appeal decision of *Shannon v Shannon* [2005] 3 NZLR 757 as supporting its contentions. That case does not assist Clone. *Shannon* was a case where the fraud alleged was perjury. As Blue J noted (at FC [356]), perjury cases fall into a special category and are to be treated with caution. In any event, the Court of Appeal, in remarks which were *obiter*,[172] observed that lack of reasonable diligence was not an immutable rule precluding the exercise of the jurisdiction. The Court noted that it had a discretion to allow an action to set aside a judgment for fraud to proceed even where the fresh evidence was reasonably discoverable at the time of the original trial if it was in the interests of justice to do so.[173] The principle advanced thus supports the approach taken by the majority of the Full Court in this case. Additionally, Canadian authority has also rejected exercise of reasonable diligence as a pre-condition to the engagement of the equitable jurisdiction to set aside judgments for fraud.[174]

Players' costs of the trial and this appeal – Clone's embrace of *Quade* at trial

70. At the special leave hearing this Court left open the question of whether Clone should pay Players' costs of the trial, intermediate appeal and the appeal to this Court "in any event", irrespective of the outcome of this appeal, in response to a submissions by Players' counsel that any grant of special leave to Clone should be on the condition of such costs orders, due to the manner in which Clone conducted its case at trial in terms of its embrace of the *Quade* test and its subsequent change of position on appeal.[175] Players submit that, by reason of the various matters raised in paragraphs [4] – [9], [24] – [28] and [52] above respecting the manner in which Clone has fundamentally changed its case during the course of this litigation, such a costs order is both appropriate and justified. It would be most unjust if, for example, Players were required to pay Clone's costs of the trial in the event that this Court should hold Clone entitled to succeed on this appeal on a basis directly contrary to the **agreed basis** on which Clone conducted the case at trial and in circumstances where Clone never put a case of actual fraud to the Full Court, but instead agreed that a lesser species of malpractice would suffice to attract the jurisdiction.

Part VII: NOTICE OF CONTENTION OR NOTICE OF CROSS-APPEAL

71. Not applicable.

Part VIII: TIME ESTIMATE

72. Players estimate that 3 hours will be required for presentation of their oral argument.

Dated: 11 August 2017

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171 At [47].
172 The Court did not have to decide the issue because it found that the evidence of the alleged perjury was not new.
173 At [125], [143].
174 *Canada v Granitile Inc* (2008) 302 DLR (4th) 40 at [295] – [312].
175 See [2017] HCA Trans 130 at page 12 (line 450) and page 15 (line 585).