IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY **No. A22 of 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

SIXTH RESPONDENT'S SUBMISSIONS

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SIXTH RESPONDENT'S SUBMISSIONS

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Part I: INTERNET PUBLICATION

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

Part II: ISSUES ON APPEAL

2. These appeals raise three questions of legal principle to which the Sixth Respondent (the '**Attorney-General**') contends that the answer to each question is "no":

   2.1. First, are the principles for setting aside a perfected judgment outside of a statutory appeal the same as those which apply within the Supreme Court's appellate jurisdiction (including an application for a new trial following a jury verdict)?

   2.2. Second, does the power of the Supreme Court to set aside a perfected judgment outside the appellate jurisdiction extend to malpractice by the successful party not amounting to actual fraud?

   2.3. Third, is it an essential requirement to set aside a perfected judgment outside of a statutory appeal that the further evidence (i) was not available and could not have been discovered with reasonable diligence by the unsuccessful party and (ii) was so material that it would probably have affected the outcome of the original trial?

3. The first question of legal principle is relevant to both grounds of appeal. The second question arises from the first ground of appeal. The third question arises from the second ground of appeal. If the first ground of appeal is upheld, it is not strictly necessary to address the second ground of appeal.

Part III: SECTION 78B OF THE *JUDICIARY ACT 1903*

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

Part IV: STATEMENT OF MATERIAL FACTS

<u>The original proceeding</u>

5. On 29 July and 18 August 2005, Vanstone J in the Supreme Court of South Australia made final orders in favour of the landlord ('**Clone**') against its tenant and the guarantors of the tenant's obligations (collectively, '**Players Parties**').[1] Vanstone J found in favour of Clone that the word "NIL" had not been struck out of the agreement to lease in 1994 by a handwritten amendment to the typed document at the time that the Players Parties executed the agreement ('**the deletion issue**').[2] That finding led to the conclusion that the Players Parties were required to transfer the liquor and gambling licences to Clone at the end of the lease in 2005 "for NIL

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1 See *Clone Pty Ltd v Players Pty Ltd* [2005] SASC 281 (Vanstone J); *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1, 11 [9] and 20 [76] (Blue J).

2 See *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1, 10 [5], 11 [9] and 20 [75] (Blue J).

consideration" (rather than "for consideration").[3] At trial, the original agreement to lease was presumed destroyed,[4] the two photocopies of the agreement to lease in evidence showed a mark through the word "NIL"[5] and Vanstone J expressly declined to accept the direct oral evidence of the handwritten amendment given by two of the guarantors of the Players Parties (one of whom was a senior solicitor).[6]

6. On 24 April 2006, the Full Court of the Supreme Court of South Australia allowed an appeal by the Players Parties in part, but did not set aside the findings in respect of the deletion issue[7] and the related orders. On 10 November 2006, this Court dismissed the Players Parties' application for special leave to appeal.[8]

10 The set-aside proceedings

7. On 25 June 2010 and 17 December 2010[9] respectively, the Players Parties commenced a new proceeding in the Supreme Court of South Australia and filed an application in the original proceeding (by way of notice of specific directions) seeking to set aside the perfected orders of Vanstone J and the previous Full Court that related to the determination of the deletion issue. A new trial was also sought on the deletion and consequential issues.

8. On 9 November 2015, Hargrave AJ made the orders sought by the Players Parties in both the new proceeding and the original proceeding.[10] Hargrave AJ concluded that, during the original trial, Clone's former lawyers recklessly failed to comply with
20 Clone's discovery obligation to disclose a particular copy of the agreement to lease in the files of the Liquor & Gambling Commissioner,[11] that being material to the deletion issue.[12] This failure justified setting aside the perfected orders notwithstanding his finding that the Players Parties' lawyers had not exercised reasonable diligence in searching for that copy agreement.[13]

9. On 8 December 2016, a majority of the Full Court (Blue and Stanley JJ; Debelle AJ dissenting) dismissed Clone's appeals from Hargrave AJ's judgments. The majority upheld the finding of a reckless failure by Clone's former lawyers to comply with

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3 See *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1, 10 [5] and 20 [76] (Blue J).

4 See *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1, 10 [6], 17 [55]-[56] and 18 [62] (Blue J), 121 [493] (Debelle AJ).

5 See *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1, 10 [6] (Blue J), 121 [493] (Debelle AJ).

6 See *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1, 11 [9] and 12 [20] (Blue J).

7 *Players Pty Ltd v Clone Pty Ltd* [2006] SASC 118, [189]-[190] (Doyle CJ), [223] (Sulan J), [224]-[232] (Layton J).

8 *Players Pty Ltd v Clone Pty Ltd* [2006] HCATrans 625 (10 November 2006).

9 *Players Pty Ltd v Clone Pty Ltd (No 2)* [2015] SASC 178, [9] (Hargrave AJ).

10 See *Players Pty Ltd v Clone Pty Ltd (No 2)* [2015] SASC 178 (Hargrave AJ).

11 *Players Pty Ltd v Clone Pty Ltd* [2015] SASC 133, [204] (Hargrave AJ).

12 *Players Pty Ltd v Clone Pty Ltd* [2015] SASC 133, [242]-[243] (Hargrave AJ).

13 *Players Pty Ltd v Clone Pty Ltd* [2015] SASC 133, [291] and [303] (Hargrave AJ).

Clone's discovery obligation.[14] They also found that Clone's former senior counsel materially misled Vanstone J and the previous Full Court in submissions about the existence of any further copies of the agreement to lease, which also justified setting aside the perfected orders.[15] Further, Blue J[16] and Debelle AJ[17] upheld Hargrave AJ's finding of a lack of reasonable diligence on the part of the Players Parties' lawyers. Justice Stanley would have set aside that finding.[18]

The Attorney-General's intervention

10. The Attorney-General intervened in the proceedings below pursuant to s 9(2)(b)(ii) of the *Crown Proceedings Act 1992* (SA), making submissions on the question of the power of the Supreme Court of South Australia to set aside a perfected judgment outside of a statutory appeal. By reason of that intervention, the Attorney-General is a respondent to Clone's appeals in this Court.

Part V: LEGISLATIVE PROVISIONS

11. Annexed to these submissions are *Supreme Court Act 1935* (SA) ('**SC Act**') ss 17 and 48, and *Consolidated Chancery Orders 1860* (UK) Order XXXI r 9-11.

Part VI: ATTORNEY-GENERAL'S ARGUMENT ON APPEAL

Question 1: Applicability of appellate principles?

12. The Players Parties' applications seeking to set aside perfected orders of the original trial Judge and the previous Full Court were not statutory appeals. The Players Parties had previously exercised their sole[19] statutory appeal right against Vanstone J's judgment. The SC Act does not provide for an appeal against a judgment of the Full Court.

Trial Judge's and Full Court's application of appellate cases

13. The trial Judge and Full Court majority applied, without modification, principles established by this Court in the context of setting aside a judgment or ordering a new trial by an appellate court (including on an application for a new trial following a jury verdict). In particular:

    13.1. Auxiliary Justice Hargrave applied *Commonwealth Bank of Australia v Quade*[20] ('***Quade***').[21]

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14 *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1, 43 [196]-[197] (Blue J), 103 [424] (Stanley J).

15 *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1, 57-59 [257]-[262] and 72 [322] (Blue J), 106-108 [432]-[436] and 117 [475]-[476] (Stanley J).

16 *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1, 62-63 [286] (Blue J).

17 *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1, 161 [646] (Debelle AJ).

18 *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1, 111-112 [451] (Stanley J).

19 *Postiglione v The Queen* (1997) 189 CLR 295, 300 (Dawson and Gaudron JJ), 315 (McHugh J), 327 (Gummow J).

20 (1991) 178 CLR 134.

13.2. Justice Blue also applied *Quade* based on his Honour's finding that Clone's submissions misled the previous Full Court in the original appeal.[22] However, on the express assumption that the original appeal was not vitiated by malpractice on behalf of Clone on appeal (contrary to his conclusion), Blue J then alternatively considered, *obiter*, the principles to be applied following exhaustion of the appellate process.[23] On that express assumption, Blue J held that *McCann v Parsons*[24] ('***McCann***'), *Council of the City of Greater Wollongong v Cowan*[25] ('***Cowan***') and *McDonald v McDonald*[26] ('***McDonald***') determined the applicable principles.[27]

13.3. Justice Stanley held that the principles in *Quade* do not apply "as such" to an application to set aside a perfected judgment after the exhaustion of appeal rights.[28] His Honour held that the relevant test in deciding whether Clone's conduct warranted setting aside the original orders employed the principles enunciated in *McCann*, *Cowan* and *McDonald*.[29]

Analysis of the appellate cases

14. None of *Quade*, *McCann*, *Cowan* or *McDonald* is concerned with setting aside a perfected judgment or ordering a new trial after the exhaustion of statutory appeal processes. In each of those cases, this Court assessed whether the interests or demands of justice required the judgment to be set aside or a new trial be ordered,[30] and applied different principles to that assessment depending on whether the ground of appeal or application for a new trial was either fresh evidence or some form of malpractice by a party. The principles enunciated therein do not directly, and should not, apply to the Players Parties' impugned applications.

15. In *Quade*, the respondents' claim was dismissed at trial. On appeal, the Full Court of the Federal Court allowed the appeal, ordering a new trial.[31] The only successful

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21 *Players Pty Ltd v Clone Pty Ltd* [2015] SASC 133, [77]-[87] (Hargrave AJ).

22 *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1, 21 [88] and 72 [322]-[323] (Blue J).

23 *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1, 72 [324] (Blue J).

24 (1954) 93 CLR 418.

25 (1955) 93 CLR 435.

26 (1965) 113 CLR 529.

27 *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1, 84-88 [362]-[364], 90 [371], 92 [377] and 93 [380] (Blue J).

28 *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1, 108 [437]-[438] (Stanley J). The subsequent references by his Honour to *Quade* were solely in the context of considering the *materiality* of Clone's malpractice in the original appeal through considering what the previous Full Court would likely have done but for it being misled: see *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1, 114 [460]-[461] and 116 [470] (Stanley J).

29 *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1, 108 [439] (Stanley J).

30 *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134, 142 (the Court); *McCann v Parsons* (1954) 93 CLR 418, 428 (Dixon CJ, Fullagar, Kitto and Taylor JJ); *Council of the City of Greater Wollongong v Cowan* (1955) 93 CLR 435, 444 (Dixon CJ, with whom Williams, Webb, Kitto and Taylor JJ agreed); *McDonald v McDonald* (1965) 113 CLR 529, 532-533 (Barwick CJ, with whom Kitto J agreed), 542 (Menzies J).

31 *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134, 139 (the Court).

ground of appeal was that, after the first instance judgment, the appellant had belatedly discovered numerous relevant documents. This Court expressly confined its consideration "to the question of what is the appropriate approach (or 'test') to be adopted by an *appellate court* for determining whether a new trial should be ordered when documents which should have been discovered were not discovered by the successful party" [emphasis added].[32] This Court's reasons do not suggest that the principles discussed therein apply outside of a statutory appeal.

16. In *McCann*, the respondent was awarded damages by a jury for injuries sustained in a motor vehicle accident. The third-party insurer in the Full Court of the Supreme Court of New South Wales brought a notice of motion for a new trial on the basis of fresh evidence.[33] The Full Court refused the application on the question of liability, which was overturned on appeal to this Court. The respondent argued in this Court, on the authority of *Jonesco v Beard*,[34] that an application for a new trial amounted to impeaching the judgment or verdict on the ground of fraud and should be done only by a suit in equity to have it set aside.[35] A majority of this Court disagreed and amongst other things, distinguished between a case that involved a completed judgment and a case concerned with a verdict already subject to a pending new trial motion.[36]

17. As subsequently explained in the majority judgment of *CDJ v VAJ*[37] ('***CDJ***'), the principles established by *McCann* are to be understood by reference to the procedures of the English common law courts (as applied or modified by legislation).[38] In particular, the common law courts would not entertain any action to set aside a judgment entered after a trial before a jury; however, before entry, the disaffected party might move for a new trial.[39] Such procedures were interlocutory in nature, in the original jurisdiction and directed to whether there should be an order for a new trial.[40] By contrast, orders for a retrial by appellate courts are orders of last resort.[41] Accordingly, the principles established by *McCann* are not relevant to the principles applicable in setting aside a perfected order after the exhaustion of statutory appeal rights. *McCann* concerned an attack on the verdict before perfection of the judgment.

18. Similarly, in *Cowan*, the jury returned a verdict against the respondent who had commenced proceedings seeking damages from the appellant. The respondent

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32 *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134, 139 (the Court).

33 *McCann v Parsons* (1954) 93 CLR 418, 422-424 (Dixon CJ, Fullagar, Kitto and Taylor JJ).

34 [1930] AC 298.

35 *McCann v Parsons* (1954) 93 CLR 418, 425 (Dixon CJ, Fullagar, Kitto and Taylor JJ).

36 *McCann v Parsons* (1954) 93 CLR 418, 426 (Dixon CJ, Fullagar, Kitto and Taylor JJ).

37 (1998) 197 CLR 172.

38 *CDJ v VAJ* (1998) 197 CLR 172, 197-198 [97] (McHugh, Gummow and Callinan JJ).

39 *CDJ v VAJ* (1998) 197 CLR 172, 197 [96] (McHugh, Gummow and Callinan JJ).

40 *CDJ v VAJ* (1998) 197 CLR 172, 197 [96] and 199 [103] (McHugh, Gummow and Callinan JJ).

41 *CDJ v VAJ* (1998) 197 CLR 172, 199 [103] (McHugh, Gummow and Callinan JJ).

brought a motion for a new trial on grounds that fresh evidence was available.[42] The Full Court of the Supreme Court of New South Wales allowed the appeal on that basis and ordered a new trial. In this Court, Dixon CJ (with whom the other members of this Court agreed) said that the "law which governs the grant of new trials on the ground of the discovery of fresh evidence is not in doubt" and distinguished those principles from cases, amongst others of, "surprise, malpractice or fraud".[43] There is nothing in Dixon CJ's reasons to suggest that any of the enunciated principles in *Cowan,* including in respect of "surprise, malpractice or fraud", applied to an application to set aside an order outside of a statutory appeal after the impugned judgment was perfected or completed. Rather, the enunciated principles concerned applications for a new trial following a jury verdict.

19. In *McDonald*, the jury made findings in favour of the appellant who was defending an action for damages. The respondent appealed to the Full Court of the Queensland Supreme Court and applied for a new trial on grounds, set out in a notice of motion, that fresh evidence had been discovered to the effect that a witness called by the appellant had not in fact observed the events he testified about.[44] The Full Court granted a new trial, which was then appealed to this Court. All members of this Court concluded that the order for a new trial had been made on the ground of the discovery of fresh evidence.[45] This Court allowed the appeal, but the reasons materially differed:[46]

19.1. Chief Justice Barwick (with whom Kitto J agreed) said that it is "necessary to emphasize important distinctions to be observed in connexion with motions for a new trial".[47] In that context the Chief Justice discussed the differences in the applicable principles between granting a new trial on the basis of fresh evidence and where the verdict was obtained by fraud, surprise or subornation of witnesses.[48]

19.2. Justice Taylor said that the majority of the Full Court "proceeded upon a misapprehension of the principles upon which an *appellate court* deals with applications for new trials upon the ground that fresh evidence has been discovered" [emphasis added] because, in effect, of a failure to distinguish between the different grounds of fresh evidence and fraud.[49] Whilst Taylor J said that an application to set aside a judgment on the ground of fraud is, in

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42 *Council of the City of Greater Wollongong v Cowan* (1955) 93 CLR 435, 443 (Dixon CJ, with whom Williams, Webb, Kitto and Taylor JJ agreed).

43 *Council of the City of Greater Wollongong v Cowan* (1955) 93 CLR 435, 444 (Dixon CJ, with whom Williams, Webb, Kitto and Taylor JJ agreed).

44 *McDonald v McDonald* (1965) 113 CLR 529, 538 (Menzies J).

45 *McDonald v McDonald* (1965) 113 CLR 529, 534 (Barwick CJ, with whom Kitto J agreed), 536 (Taylor J), 540 (Menzies J) and 544 (Windeyer J).

46 Windeyer J delivered a short concurring judgment that did not relevantly elaborate on the applicable principles: *McDonald v McDonald* (1965) 113 CLR 529, 544 (Windeyer J).

47 *McDonald v McDonald* (1965) 113 CLR 529, 532 (Barwick CJ, with whom Kitto J agreed).

48 *McDonald v McDonald* (1965) 113 CLR 529, 532-533 (Barwick CJ, with whom Kitto J agreed).

49 *McDonald v McDonald* (1965) 113 CLR 529, 534-535 (Taylor J).

substance, an independent proceeding,[50] thereafter his Honour only relevantly discussed the principles to be applied on the ground of fresh evidence notwithstanding that such evidence was indicative of fraud.[51]

19.3. Justice Menzies said that as the Full Court made the order for a new trial upon the ground of discovery of fresh evidence "a distinction has to be made".[52] That distinction was between instances where the evidence would not prove fraud and where the acceptance of the fresh evidence would also prove a party's fraud at the earlier trial.[53] In respect of the latter, Menzies J referred to *McCann, Hip Foong Hong v H. Neotia & Co*[54] ('***Hip Foong Hong***') and *Robinson v Smith*,[55] which were all cases involving an application for a new trial following a jury verdict.

20. To the extent that the reasons in *McDonald* discuss the principles applicable in cases of fraud, they were *obiter*. In any event, there is no suggestion in the reasons that the principles applicable in cases of fraud apply to circumstances of malpractice that do not amount to fraud. Further, there is nothing to suggest that the statements of principle therein were directed to circumstances other than a statutory appeal or an application for a new trial following a jury verdict. They were not directed to the question of when a perfected judgment may be set aside after the exhaustion of statutory appeal rights.

The fundamental principle of finality of litigation

21. The principle of finality requires that the principles to be applied in determining whether to set aside a perfected judgment, following the exhaustion of statutory appeal rights, are not the same as apply in the Supreme Court's appellate jurisdiction.

22. As was recognised by the plurality in *D'Orta-Ekenaike v Victoria Legal Aid*:

> *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.*[56]

It was further explained by the plurality in *Burrell v The Queen* that:

> *It is that the principle of finality serves not only to protect parties to litigation from attempts to re-agitate what has been decided, but also has wider*

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50 *McDonald v McDonald* (1965) 113 CLR 529, 535 (Taylor J).

51 *McDonald v McDonald* (1965) 113 CLR 529, 536-537 (Taylor J).

52 *McDonald v McDonald* (1965) 113 CLR 529, 540 (Menzies J).

53 *McDonald v McDonald* (1965) 113 CLR 529, 540-542 (Menzies J).

54 [1918] AC 888.

55 [1915] 1 KB 711.

56 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 17 [34] (Gleeson CJ, Gummow, Hayne and Heydon JJ). See also *Burrell v The Queen* (2008) 238 CLR 218, 223 [15] (Gummow A-CJ, Hayne, Heydon, Crennan and Kiefel JJ); *Achurch v The Queen* (2014) 253 CLR 141, 152 [14] (French CJ, Crennan, Kiefel and Bell JJ); *NH v Director of Public Prosecutions (SA)* (2016) 90 ALJR 978, 995-996 [70] (French CJ, Kiefel and Bell JJ).

> *purposes. In particular, the principle of finality serves as the sharpest spur to all participants in the judicial process, judges, parties and lawyers alike, to get it right the first time. Later correction of error is not always possible. If it is possible, it is often difficult and time-consuming, and it is almost always costly.*[57]

The finality principle has been said to be a "hypothesis upon which Ch III of the Constitution is founded".[58]

23. The plurality in *D'Orta-Ekenaike* explained that the finality principle finds reflection in: the restrictions upon the reopening of final orders after entry; the rules concerning bringing an action to set aside a final judgment on the ground that it was procured by fraud; the doctrines of *res judicata* and issue estoppel; and other rules of law including the rules of immunity from suit.[59] Importantly, the "principal qualification" to the principle of finality is provided by the appellate system, "[b]ut even there, the importance of finality pervades the law".[60]

24. The principle of finality operates more stringently outside the appellate system (compared to within) so as to confine the circumstances where a perfected judgment may be set aside. The following decisions demonstrate its different operation:

24.1. In *Burrell*, after a judgment of the New South Wales Court of Criminal Appeal had been perfected, that Court realised that its reasons contained substantial factual errors. This Court held that the Court of Criminal Appeal had no power to reopen the appeal. The formal recording of the order was the watershed that "both marks the end of the litigation in that court, and provides conclusive certainty about what was the end result in that court".[61] The original orders were set aside because of the acknowledged factual errors *only* upon appeal to this Court.[62]

24.2. In *Achurch v The Queen*,[63] the appellant applied to the New South Wales Court of Criminal Appeal to reopen his concluded appeal against sentence on the basis that this Court had overturned the governing sentencing practice in an analogous case. The appellant invoked a statutory power permitting reopening where the court had "imposed a penalty that is contrary to law". The plurality in this Court held that the "principle of finality should not be taken to have

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57 *Burrell v The Queen* (2008) 238 CLR 218, 223 [16] (Gummow A-CJ, Hayne, Heydon, Crennan and Kiefel JJ).

58 *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629, 661 [79] (Kirby J) referring to *Fencott v Muller* (1983) 152 CLR 570, 608 (Mason, Murphy, Brennan and Deane JJ).

59 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 17 [34] and 18 [36] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

60 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 17 [35] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

61 *Burrell v The Queen* (2008) 238 CLR 218, 224 [20] (Gummow A-CJ, Hayne, Heydon, Crennan and Kiefel JJ).

62 *Burrell v The Queen* (2008) 238 CLR 218, 226 [29] (Gummow A-CJ, Hayne, Heydon, Crennan and Kiefel JJ).

63 (2014) 253 CLR 141.

been qualified except by clear statutory language and only to the extent that the language clearly permits".[64] Further, such statutory powers "do not subsume the appeal process, which remains the principal qualification on the tenet of finality of litigation".[65] The principle of finality informed the construction of the statutory power to reopen proceedings with the result that notwithstanding the result in the analogous case, the Court of Criminal Appeal was not permitted to reopen to correct the same legal error after the appeal rights had been exhausted.

The appellate principles are not applicable

25. For these reasons, Hargrave AJ and the Full Court majority failed to give the necessary effect to the fundamental principle of finality following the exhaustion of appeal rights. They erred in applying principles applicable on appeal.

26. Justice Blue consequently further erred in concluding that there is "no material difference" between the following situations: (i) where the unsuccessful party initially chooses not to appeal until the subsequent discovery of malpractice and then relies upon that malpractice to found the grant of an extension of time to appeal; and (ii) where the unsuccessful party's initial appeal on other grounds is dismissed but then subsequently learns of the malpractice and applies to set aside the judgment on that ground.[66] There is a principled difference. The party who initially elects not to appeal has not exercised its singular statutory right to appeal. Subject to obtaining an extension of time to appeal, this course falls within the "principal exception" to the principle of finality. By contrast, the party who has previously unsuccessfully appealed has exhausted that party's statutory rights. In that case, the integers of the "principal exception" to the principle of finality are not available to support the setting aside of perfected orders.

27. Further, Blue J's reliance on the *Quade* principles in respect of the impugned applications cannot be justified (as his Honour appears to have done) on the basis that the dismissal of the initial appeal was vitiated by Clone's malpractice on appeal rather than at first instance.[67] There is no relevant distinction. Once statutory appeal rights are exhausted, the principle of finality excludes the direct application of appellate principles. Moreover, for the reasons discussed below, malpractice alone (that does not amount to fraud) does not sufficiently infect an appeal to justify setting aside after its perfected.

Question 2: Malpractice that does not amount to fraud?

28. This Court has referred only to "fraud" as the *recognised* exception to the principle of finality following an appeal.[68] Nevertheless, all judges in the Full Court below

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64 *Achurch v The Queen* (2014) 253 CLR 141, 163 [36] (French CJ, Crennan, Kiefel and Bell JJ).

65 *Achurch v The Queen* (2014) 253 CLR 141, 163 [35] (French CJ, Crennan, Kiefel and Bell JJ).

66 *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1, 95 [388] (Blue J).

67 Cf *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1, 72 [322]-[323] (Blue J).

68 See *DJL v Central Authority* (2000) 201 CLR 226, 245 [37] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) and 291 [189] (Callinan J); *Burrell v The Queen* (2008) 238 CLR

accepted that the Court's power to set aside a perfected judgment, outside of a statutory appeal, extended to circumstances that were not described as "fraud":

28.1. Justice Stanley concluded that Clone engaged in malpractice *analogous* to fraud,[69] sufficient to set aside perfected orders subsequent to the exhaustion of appeal rights.[70]

28.2. Justice Blue in *obiter*[71] and Debelle AJ in dissent held, in effect, that the jurisdiction in equity empowers the Supreme Court to set aside a perfected judgment on the grounds of "fraud or surprise".[72] Whilst Blue J did not define "surprise", Debelle AJ characterised "surprise" as sharp practice falling short of fraud.[73]

For the reasons that follow, the Supreme Court's power to set aside a perfected judgment outside of a statutory appeal is limited to actual fraud.

Source of the power to set aside a perfected judgment outside of a statutory appeal

29. The only source of power to set aside a perfected judgment outside of a statutory appeal derives from the jurisdiction formerly exercised by the Court of Chancery and now exercised by the Supreme Court of South Australia.[74] There is no other apparent source of power:

29.1. the English common law courts would not entertain any fresh action to set aside an entered judgment;[75]

29.2. this Court has recently confirmed that the Supreme Court does not have inherent power to set aside a perfected judgment;[76]

29.3. the *Supreme Court Civil Rules 2006* (SA) do not create some separate and wider jurisdiction because rules of court cannot expand the Court's jurisdiction or range of orders;[77] and

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218, 223 [15] (Gummow A-CJ, Hayne, Heydon, Crennan and Kiefel JJ); *NH v DPP* [2016] HCA 33 (2016) 90 ALJR 978, 1000 [99] (Nettle and Gordon JJ).

69 *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1, 109 [441] (Stanley J).

70 *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1, 108-109 [440] (Stanley J).

71 *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1, 72 [324] (Blue J).

72 *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1, 76 [339] and 90 [371] (Blue J); 179-180 [706] (Debelle AJ).

73 *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1, 180 [706] (Debelle AJ).

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

75 *CDJ v VAJ* (1998) 197 CLR 172, 197 [96] (McHugh, Gummow and Callinan JJ); *DJL v Central Authority* (2000) 201 CLR 226, 243-244 [33]-[34] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

76 *NH v DPP* (2016) 90 ALJR 978, 994-996 [67]-[74] (French CJ, Kiefel and Bell JJ).

77 See generally *Shrimpton v The Commonwealth* (1945) 69 CLR 613, 629-630 (Dixon J); *Australian Community Party v The Commonwealth* (1951) 83 CLR 1, 258 (Fullagar J); *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1, 18 [40] (French CJ,

29.4. there is no other basis, express or implied, in the SC Act to set aside a perfected judgment outside an appeal.

No power sourced in equity to set aside on the grounds of fresh evidence

30. The Court of Chancery had, in certain circumstances, both the power to re-open and rehear cases which had been tried before it, even after the decree had been enrolled, and also the power to relieve a party against the effect of judgments entered by the common law courts.[78] In *Harrison v Schipp*[79] (‘***Harrison***’), the New South Wales Court of Appeal undertook a detailed consideration of the historical power of the Court of Chancery in respect of enrolled decrees, distinguishing between (i) a bill of review filed with the leave of the court based on the discovery of new matter (fresh evidence) since the trial that enabled an enrolled decree to be varied or reversed[80] and (ii) an original bill to impeach a judgment for fraud filed without leave of the court that led to the setting aside or rescission of the enrolled decree.[81] The Court concluded that the bill of review procedure for fresh evidence was in effect appellate in nature and in England had been transferred to the exclusive jurisdiction of the Court of Appeal under the *Judicature Acts*[82] and similarly, whilst the relevant legislative history differed, the New South Wales Court of Appeal.[83] It was not, however, doubted that a jurisdiction outside of a statutory appeal akin to the original bill to impeach a judgment for fraud survived both in England and in New South Wales.[84]

31. Contrary to Blue J’s statements,[85] there should be no doubt that in South Australia, like in England and New South Wales, the bill of review procedure (based on the discovery of fresh evidence) has been abrogated by the statutory appellate system. In this case, Blue J, by reference to the legislative history establishing and defining the jurisdiction of the Supreme Court of South Australia, stated that it is “difficult to see” how the legislation implicitly abrogated the bill of review for fresh evidence. Justice Blue referred to *In Re Bleechmore*[86] (‘***Bleechmore***’) as having held that the

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Kiefel, Bell, Gageler and Gordon JJ). Cf *Players Pty Ltd v Clone Pty Ltd* (2013) 115 SASR 547, 552 [20] and 561 [69] (Gray, Blue and Stanley JJ); *Players Pty Ltd v Clone Pty Ltd* [2015] SASC 133, [80] (Hargrave AJ).

78 *DJL v Central Authority* (2000) 201 CLR 226, 244-245 [35]-[37] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

79 (2002) 54 NSWLR 612.

80 *Harrison v Schipp* (2002) 54 NSWLR 612, 616 [8] and 617 [14]-[16] (Handley JA), 630-633 [142]-[153] (Giles JA), 648-650 [230]-[242] (Ipp A-JA).

81 *Harrison v Schipp* (2002) 54 NSWLR 612, 618 [18] (Handley JA), 634 [156]-[157] (Giles JA), 650-652 [244]-[256] (Ipp A-JA).

82 *Harrison v Schipp* (2002) 54 NSWLR 612, 624 [52]-[53] (Handley JA), 637 [168]-[170] (Giles JA), 645 [215] and 656-657 [272]-[274] (Ipp A-JA).

83 *Harrison v Schipp* (2002) 54 NSWLR 612, 625-627 [61]-[66] (Handley JA), 641 [191] (Giles JA), 660 [293] (Ipp A-JA).

84 *Harrison v Schipp* (2002) 54 NSWLR 612, 626 [66] (Handley JA), 641-642 [193] (Giles JA), 660 [294] (Ipp A-JA).

85 *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1, 77-78 [346]-[347] (Blue J).

86 [1925] SASR 112.

jurisdiction of a single judge to set aside a judgment on the ground of fresh evidence still existed in 1925.[87] However:

31.1. the relevant statements in *Bleechmore* were *obiter*, contained a materially mistaken understanding of the effect of the House of Lords' decision in *Boswell v Coaks (No 2)*[88] ('***Boswell***') and are inconsistent with subsequent authority;[89] and

31.2. the "difficulty" expressed by Blue J does not withstand the text of the SC Act. Section 48(2)(a)(ii) provides that "the Full Court *shall* hear and determine... *all* appeals" [emphasis added] from a single judge of the Court. This mandatory language is contrasted with the predecessor provisions[90] which provided in permissive terms for appeals without expressly making the appellate jurisdiction from decisions of a single judge exclusive to any or all of the Full Court, the (separate) Court of Appeals or the Privy Council.

Equitable rescission of a perfected judgment is properly limited to the grounds of fraud

32. The equitable jurisdiction is limited to instances of fraud. Any jurisdiction to set aside a perfected judgment for "surprise" has not survived. Justice Blue said that an "original bill" in the Court of Chancery was available on the grounds of both fraud and surprise, and that it "was never suggested" that such a jurisdiction of a single judge did not survive the *Judicature Acts*.[91] However, the ability to set aside a perfected judgment due to "surprise" has been doubted. In *Monroe Schneider Associates (Inc) v No 1 Raberem Pty Ltd*[92] ('***Monroe Schneider***'), the Full Court of the Federal Court[93] said that it was "unsettled" whether the jurisdiction in equity to intervene in cases of "surprise" survives.[94] The Full Court referred to L.A. Sheridan, "Fraud and Surprise in Legal Proceedings",[95] which concluded that the "whole subject is uncertain" partly because no action to set aside a judgment based on surprise after the time for appeal had ever reportedly been brought.[96] *Brookfield v Yevad*[97] ('***Brookfield***') appears to be the only other Australian authority where a perfected judgment has been set aside for malpractice not amounting to fraud,

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87 *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1, 77 [346] (Blue J).

88 (1894) 6 R 167; 86 LT 365n.

89 See *Clone Pty Ltd v Players Pty Ltd* [2012] SASC 12, [66]-[68] (Kourakis J).

90 See *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1, 76-77 [341]-[346] (Blue J).

91 *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1, 74-75 [335]-[336], 76 [339] and 99 [405] (Blue J).

92 (1992) 37 FCR 234.

93 Spender, Gummow and Lee JJ.

94 *Monroe Schneider Associates (Inc) v No 1 Raberem Pty Ltd* (1992) 37 FCR 234, 241 (Spender, Gummow and Lee JJ).

95 (1955) 18 MLR 441.

96 L.A. Sheridan, "Fraud and Surprise in Legal Proceedings" (1955) 18 MLR 441, 450-451.

97 [2004] FCA 1164 (Lander J) and on appeal, *Yevad v Brookfield* [2005] FCAFC 177 (Nicholson, Finkelstein & Jacobson JJ).

outside of a statutory appeal. However, neither the trial judge nor the Full Court in *Brookfield* considered the source or nature of the court's power.[98]

33. Justice Blue relied on Mitford J, *A Treatise on the Pleadings in Suits in the Court of Chancery*[99] at pp 92-94 for the proposition that an "original bill" was available on the grounds of both fraud and surprise.[100] However, those cited pages of Mitford's text do not support such a broad proposition. The cited pages relevantly state "[i]f a decree has been obtained by fraud it may be impeached by original bill" and only referred to "surprize" in a footnote that stated "where the enrolment of the decree by the one party is a fraud or surprize upon the other, it will be vacated". Mitford only cited *Stevens v Guppy*[101] for that latter proposition. That was a case where the party enrolling the decree had made a statement which might have led the other party to believe that the decree would not be enrolled. Accordingly, Mitford's reference to "surprize" was concerned with the special circumstances of enrolling the decree itself. It did not suggest an additional general basis for an original bill to set aside an enrolled decree.[102] In any event, enrolling a decree was abolished by the *Judicature Acts*.

34. The authorities relied on by Stanley J[103] do not support his Honour's conclusion that there is a power to set aside a perfected judgment on the basis of malpractice *analogous* to fraud. In particular:

34.1. In *Cowan*, Dixon CJ distinguished cases involving "surprise, malpractice or fraud" from cases involving the discovery of fresh evidence in the context of discussing the relevant principles as to whether to order a new trial on appeal.[104] However, as addressed above, such motions prior to the completion of the judgment are fundamentally different from the impugned applications.

34.2. In *McDonald*, Taylor J referred to the Privy Council's reference in *Hip Foong Hong* to "fraud or surprise".[105] However, as addressed above, both *McDonald* and *Hip Foong Hong* were motions for new trials. "Surprise" was a recognised ground for such motions.[106]

34.3. In *Wentworth v Rogers (No 5)*,[107] Kirby P (as his Honour then was) referred to the principles developed by courts of equity for dealing with judgments

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98 See the discussion in *SNF (Australia) Pty Ltd v Ciba* [2015] FCA 787, [150]-[151] (Davies J).

99 4th ed, 1827.

100 *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1, 74 [335] (Blue J).

101 (1823) 1 Turn. R. 178.

102 See also L.A. Sheridan, "Fraud and Surprise in Legal Proceedings" (1955) 18 MLR 441, 447-448.

103 *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1, 108-109 [440] (Stanley J).

104 *Council of the City of Greater Wollongong v Cowan* (1955) 93 CLR 435, 444 (Dixon CJ).

105 *McDonald v McDonald* (1965) 113 CLR 529, 535 (Taylor J).

106 See, for example, *Thomas v The Crown* (1904) 2 CLR 127, 132-133 (Griffith CJ, with whom Barton and O'Çonnor JJ agreed).

107 (1986) 6 NSWLR 534.

allegedly procured through "fraud or other taint".[108] However, Kirby P did not explain the reference to "other taint" and had earlier said that the "essence of the action is fraud".[109]

34.4. In *Harrison*, Giles JA referred to the decision in *Barnesly v Powel*[110] (***'Barnesly'***) and the statement in that case that there could be relief against a decree "if obtained by fraud and imposition…".[111] However, it is unclear from *Barnesly* whether "imposition" described something other than fraud (or, alternatively, a species of fraud). Further, Stanley J also referred to an unreported portion of Handley JA's judgment in *Harrison* identifying "corruption or duress", but that identification was, in terms, that "[w]here corruption or duress implicating the successful party can be proved, the case would be one of fraud…".[112]

35. Justice Stanley did not further explain the origin of, or justification for, relying upon the concept of malpractice "analogous" to fraud. At an earlier interlocutory stage in this matter, Kourakis J (as he then was) concluded, in effect, that whether a perfected judgment would now be set aside by reason of the old equitable concept of "surprise" largely depended on the extent to which the alleged impropriety was "analogous" to fraud.[113] The apparent premise of that conclusion was that the power of a court to set aside perfected judgments for fraud could be understood as an instance of a wider power to protect the court's own processes from abuse.[114] However, the recent decision of this Court in *NH v DPP*[115] speaks against the inherent power of the Supreme Court to set aside a perfected judgment being premised on a broader ground of abuse of process or manifestation thereof.

36. With the exception of *Brookfield* where the jurisdiction issue was not addressed, no Australian authority supports a conclusion that outside of a statutory appeal (including an application for a new trial following a jury verdict), a perfected judgment might be set aside for malpractice that does not amount to fraud. The importance of the principle of finality mandates not extending the available grounds beyond the only recognised exception of fraud.

Defining fraud

37. A factual finding based on an objective assessment of recklessness is insufficient to justify a finding of fraud. So much is indicated by the English authorities discussing the meaning of fraud in this context:

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108 *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534, 540C (Kirby P).

109 *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534, 538D (Kirby P).

110 (1748) 1 Ves sen 119; 27 ER 930.

111 *Harrison v Schipp* (2002) 54 NSWLR 612, 633 [152] (Giles JA).

112 *Harrison v Schipp* [2002] NSWCA 78, [92] (Handley JA).

113 *Clone Pty Ltd v Players Pty Ltd* [2012] SASC 12, [103] (Kourakis J).

114 *Clone Pty Ltd v Players Pty Ltd* [2012] SASC 12, [99] (Kourakis J).

115 (2016) 90 ALJR 978, 993 [61] and 996 [74] (French CJ, Kiefel and Bell JJ).

37.1. In *Patch v Ward*,[116] Lord Cairns explained:

> *Now it is necessary to bear in mind what is meant and what must be meant by fraud, when it is said that you may impeach a decree signed and enrolled on the ground of fraud... The fraud there spoken of must clearly, as it seems to me, be* ***actual fraud****, such that there is on the part of the person chargeable with it the malus animus, the mala mens putting itself in motion and acting in order to take an undue advantage of some other person* ***for the purpose of actually and knowingly defrauding him****.*[117] [emphasis added]

37.2. Similarly, in *The Ampthill Peerage*,[118] Lord Wilberforce stated:

> *The real case is based on 'fraud'. What is fraud for this purpose? Learned counsel for John Russell without venturing upon a definition suggested that some kind of equitable fraud, or lack of frankness, was all that is meant, but I cannot accept so anaemic an ingredient. In relation to judgments, and this case is surely a fortiori or at least analogous,* ***it is clear that only fraud in a strict legal sense will do****. There* ***must be conscious and deliberate dishonesty****, and the declaration must be obtained by it.*[119] [emphasis added]

Lord Simon also stated:

> *To impeach a judgment on the ground of fraud it must be proved that the court was deceived into giving the impugned judgment by means of a false case* ***known to be false*** *or* ***not believed to be true*** *or* ***made recklessly*** *without any knowledge on the subject. No doubt, suppression of the truth may sometimes amount to suggestion of the false ... But, short of this, lack of frankness or an ulterior or oblique or indirect motive is insufficient.*[120] [emphasis added]

38. More recently, the New Zealand Supreme Court has held that "only fraud in the strict legal sense will suffice".[121]

39. A finding of "recklessness", which does not encompass dishonesty, is insufficient to establish fraud. For the principles to be enlivened for fraud in the case of a failure to disclose a document, there must have been a finding that the successful party had

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116 (1867) LR 3 Ch 203.

117 *Patch v Ward* (1867) LR 3 Ch 203, 206-207.

118 [1977] AC 547.

119 *The Ampthill Peerage* [1977] AC 547, 571 (Lord Wilberforce).

120 *The Ampthill Peerage* [1977] AC 547, 591 (Lord Simon).

121 *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* [2012] NZSC 94, [29] (the Court).

subjective foresight as to, at least, the possibility or likelihood of presenting a false case by reason of the suppression of relevant evidence.[122]

Pleading fraud

40. It has been a long established requirement for findings of fraud that the party "must make his allegation with full particularity, must when he states it be prepared to prove what he alleges and ultimately must strictly prove it".[123]

Question 3: Essential requirements of reasonable diligence and materiality?

41. The power to set aside a perfected judgment outside of a statutory appeal being limited to cases of fraud, it should not be essential that the further evidence (i) was not available and could not have been discovered with reasonable diligence and (ii) was so material that it would probably have affected the outcome. The English authorities that conclude reasonable diligence and materiality are essential conflate the former requirements in the Court of Chancery for a bill of review based on fresh evidence and an original bill seeking to set aside a judgment for fraud.

42. Prior to the *Judicature Acts*, a bill of review to procure the reversal or alteration of an enrolled decree on the grounds of a new matter (fresh evidence) could only be brought with leave of the court.[124] Leave would only be granted where the new matter had come to the applicant's knowledge since the previous suit, that it could not by reasonable diligence have been discovered sooner and that, if brought forward in the previous suit, it would probably have altered that judgment.[125] Conversely, an original bill could be filed without leave to impeach (rescind) a decree obtained by

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122 See, in the criminal law context, *R v Crabbe* (1985) 156 CLR 464, 468-470 (Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ); *Aubrey v The Queen* (2017) 91 ALJR 601, 614-616 [45]-[50] (Kiefel CJ, Keane, Nettle and Edelman JJ).

123 *The Ampthill Peerage* [1977] AC 547, 571 (Lord Wilberforce) referring to *Jonesco v Beard* [1930] AC 298. See also *Forrest v Australian Securities and Investments Commission* (2012) 247 CLR 486, 502-503 [26] (French CJ, Gummow, Hayne and Kiefel JJ); *Banque Commerciale S.A EN Liquidation v Akhil Holdings Limited* (1990) 169 CLR 279, 285 (Mason CJ, Gaudron J); *Krakowski v Eurolynx Properties Limited* (1995) 183 CLR 563, 573 (Brennan, Deane, Gaudron and McHugh JJ).

124 See Field L and Dunn E, *Daniell's Practice of the High Court of Chancery* (5th ed, 1871), 1422-1423; Mitford J, *A Treatise on the Pleadings in Suits in the Court of Chancery* (4th ed, 1827), 84; Smith J and Smith A, *The Practice of the Court of Chancery* (7th ed, 1862), 814; *Consolidated Chancery Orders 1860*, Order XXXI r 11. See also *Harrison v Schipp* (2002) 54 NSWLR 612, 616 [8] and 617 [14] (Handley JA), 630-631 [142]-[146] (Giles JA), 648 [230]-[233] (Ipp A-JA); *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1, 74 [334] (Blue J).

125 See Field L and Dunn E, *Daniell's Practice of the High Court of Chancery* (5th ed, 1871), 1423-1424; Mitford J, *A Treatise on the Pleadings in Suits in the Court of Chancery* (4th ed, 1827), 84-86; Smith J and Smith A, *The Practice of the Court of Chancery* (7th ed, 1862), 814-815; *Consolidated Chancery Orders 1860*, Order XXXI r 10. See also *Harrison v Schipp* (2002) 54 NSWLR 612, 617 [14] (Handley JA), 630-631 [142]-[146] (Giles JA), 648 [230]-[233] (Ipp A-JA); *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1, 74 [334] and 80 [352] (Blue J).

fraud.[126] The *Consolidated Chancery Orders 1860* (UK), which governed the procedure immediately prior to the *Judicature Acts*, provided for bills of review and other bills of that nature where a party sought to reverse, alter or explain an enrolled decree.[127] Those orders implicitly maintained the distinct requirements between a bill of review and an original bill alleging fraud; a bill seeking relief for fraud was not a "bill of review or … new bill in the nature of a bill of review"[128] within the meaning of those orders, and therefore did not require leave.[129] Rather than seeking to reverse, alter or explain an enrolled decree such a bill, seeking relief for fraud, sought to impeach (rescind) it.

10 43. Notwithstanding that distinction in the Court of Chancery, post-*Judicature Act* English authorities conflated the distinct requirements between reversing a judgment on the grounds of fresh evidence and rescinding a judgment for fraud:

43.1. In *Phosphate Sewage Company Ltd v Molleson*[130] (***'Phosphate Sewage'***), Earl Cairns LC said that the re-opening of litigation on the basis of an additional fact, in exception to the principle of *res judicata*, was confined to "if the litigant were prepared to say, I will shew you that this is a fact which entirely changes the aspect of the case, and I will shew you further that it was not, and could not by reasonable diligence have been, ascertained by me before".[131] In subsequent English cases, this statement of principle has been said to apply
20 where the claimant was seeking to rely on evidence of fraud in relation to the earlier decision.[132] However, it was not alleged in *Phosphate Sewage* that the original judgment was obtained by fraud. Rather, the alleged fraud related to the underlying subject matter of the action.[133] Accordingly, *Phosphate Sewage* concerned a contended exception to *res judicata* on the basis of fresh evidence and not fraud on a perfected judgment.

43.2. In *Boswell*, the Earl of Selborne (with whom the other Lords agreed) said that in an action to rescind a judgment for fraud, the defendant may properly bring a motion to stay its further prosecution upon "the principles applicable to an old bill of review" whereby "the old rule of the Court [of Chancery required]
30 leave to be given for the commencement of such an action".[134] Further, those

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126 See Field L and Dunn E, *Daniell's Practice of the High Court of Chancery* (5th ed, 1871), 1428; Mitford J, *A Treatise on the Pleadings in Suits in the Court of Chancery* (4th ed, 1827), 92-93. See also *Harrison v Schipp* (2002) 54 NSWLR 612, 618 [18] (Handley JA), 634 [156]-[157] (Giles JA), 650-652 [244]-[256] (Ipp A-JA); *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1, 74 [335] and 80 [352] (Blue J).

127 *Consolidated Chancery Orders 1860*, Order XXXI r 9-11.

128 *Consolidated Chancery Orders 1860*, Order XXXI r 11.

129 See *Pearse v Dobinson (No .1)* (1865) 13 LTNS 518, 519; contra: Gordon DM, "Fraud or new evidence as grounds for actions to set aside judgments" (1961) 77 LQR 358, 367.

130 (1879) 4 AC 801.

131 *Phosphate Sewage Company Ltd v Molleson* (1879) 4 AC 801, 814 (Earl Cairns LC).

132 See *Gracefield Developments Ltd v Takhar* [2017] EWCA Civ 147, [46]-[47] (Patten LJ, with whom King LJ and Simon LJ agreed).

133 See *Phosphate Sewage Company Ltd v Molleson* (1879) 4 AC 801, 811-812 (Earl Cairns LC), 816 (Lord Hatherley) and 821 (Lord Blackburn).

134 *Boswell v Coaks (No. 2)* [1894] 6 R 167, 169-170; 86 LT 365n, 366 (Earl of Selborne).

principles ought to be applied "even with greater freedom than before".[135] His Lordship did not explain his conflation of the formerly distinct requirements of a bill of review for fresh evidence and an original bill to rescind a judgment on the grounds of fraud.

43.3. In *Hunter v Chief Constable of the West Midlands Police*,[136] Lord Diplock (with whom the other Lords agreed) endorsed the judgment of Goff LJ in the Court of Appeal as to the requirements for an exception to the general rule against collateral attacks on a final decision.[137] As to the exception, Goff LJ concluded that the "fraud and fresh evidence points merge into one" and accordingly "it is not permissible to call further evidence which was available at the trial or could by reasonably diligence have been obtained and the fresh evidence must be likely to be decisive."[138] This was without reference to the previous distinction between the grounds of fresh evidence and fraud.

43.4. In *Owens Bank Ltd v Bracco*,[139] a case concerned with a foreign judgment, Lord Bridge (with whom the other Lords agreed) said in respect of an English judgment that, in the course of argument, "many authorities" were cited that "demonstrate the stringency of the criterion which the fresh evidence must satisfy if it is to be admissible to impeach a judgment on the ground of fraud".[140] In particular, the rule is that "the unsuccessful party who has been sued to judgment is not permitted to challenge that judgment on the ground that it was obtained by fraud unless he is able to prove that fraud by fresh evidence which was not available to him and could not have been discovered with reasonable diligence before the judgment was delivered".[141] Relevantly, the report records counsel's submission to be that the "cases show that the fraud and fresh evidence rules have merged into one".[142] The submission as recorded does not justify or further explain that contended merger.[143]

43.5. In *Owens Bank Ltd v Etoile Commerciale SA*,[144] Lord Templeman said that "[a]n English judgment is impeachable in an English court on the ground that the first judgment was obtained by fraud but only by the production and establishment of evidence newly discovered since the trial and not reasonably

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135 *Boswell v Coaks (No. 2)* [1894] 6 R 167, 169; 86 LT 365n, 366 (Earl of Selborne).

136 [1982] AC 529.

137 *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, 545.

138 *McIlkenny v Chief Constable of the West Midlands* [1980] 1 QB 283, 333-335.

139 [1992] 2 AC 443.

140 *Owens Bank Ltd v Bracco* [1992] 2 AC 443, 483.

141 *Owens Bank Ltd v Bracco* [1992] 2 AC 443, 483.

142 *Owens Bank Ltd v Bracco* [1992] 2 AC 443, 475-476.

143 The cases cited in the report of counsel's argument variously related to foreign judgments, did not indicate any merger of the requirements of fresh evidence and fraud, or did not explain the basis for the contended merger.

144 [1995] 1 WLR 44 (PC).

discoverable before the trial".[145] His Lordship cited *Boswell*, but provided no further explanation.

44. There is no principled basis for conflating the distinct requirements of the grounds of fresh evidence and fraud. As addressed in answer to Question 2 above, the historical distinction between the bill of review for fresh evidence and the original bill for fraud is significant. It justifies, at least in part, why the latter was not abrogated by the establishment of the statutory appellate system.

45. In any event, equity, being a court of conscience, should not automatically allow a judgment obtained by fraud to stand simply because the defrauded party was to some degree careless or lacked diligence:[146]

> *Were it impossible to impugn the judgment [because of the victim's lack of reasonable diligence], the winner could presumably have been sent to prison for his fraudulent conduct and yet be able to enforce the judgment he had procured by means of it: the judgment could still, in effect, be used to further the fraud.*[147]

46. Nevertheless, the circumstances in which a perfected judgment should, in a given case, be set aside must be assessed against the importance of finality. As with other equitable remedies,[148] whether the judgment should be rescinded ultimately depends upon the principled exercise of the court's discretion, dependent on an assessment of the interests of justice.[149] Given the importance of finality in litigation,[150] (which is significantly but not completely protected by the stringent requirements in proving actual fraud)[151] the discretion to set aside the judgment for fraud should still be informed by:

    46.1. the absence of any prior reasonable diligence. Rescission in such circumstances may ultimately reward a party for failing to properly conduct its case at trial and be inconsistent with the role of the principle of finality as the "sharpest spur to all participants in the judicial process... to get [litigation] right the first time";[152]

    46.2. the nature of the deceit in the particular case. In an action to set aside a judgment for fraud, the plaintiff must prove that the plaintiff and the Court

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145 *Owens Bank Ltd v Etoile Commerciale SA* [1995] 1 WLR 44, 48.

146 *Toubia v Schwenke* (2002) 54 NSWLR 46, 54 [37] (Handley JA, with whom Heydon and Hodgson JJA agreed); see also *Canada v Granitile Inc* (2009) 302 DLR (4th) 40, 106-107 [298]-[300] and 108 [303] (Laderer J).

147 *Takhar v Gracefiled Developments Ltd* [2015] EWHC 1276 (Ch), [37] (Newey J).

148 See Heydon JD et al, *Meagher, Gummow and Lehane's Equity Doctrine & Remedies* (5th ed, 2015), 74-5; Spry I, *The Principles of Equitable Remedies* (9th ed, 2014), 4.

149 See *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1, 109 [440] (Stanley J).

150 See [21]-[24] above.

151 See [37]-[40] above.

152 *Burrell v The Queen* (2008) 238 CLR 218, 223 [16] (Gummow A-CJ, Hayne, Heydon, Crennan and Kiefel JJ).

were deceived. The plaintiff can only do this by showing that the truth has been discovered since trial;[153]

46.3. that, except in exceptional circumstances, proof of perjury alone will normally be insufficient to justify setting aside a perfected judgment;[154] and

46.4. whether the original judgment was actually obtained by the fraud.[155] Fraud at large is insufficient to justify rescission. In the circumstances of the individual case, a court ought to have regard to whether the subject fraud was sufficiently material to justify rescission.[156]

10 **Part VII: ATTORNEY-GENERAL'S ARGUMENT ON NOTICE OF CONTENTION OR NOTICE OF CROSS-APPEAL**

47. Not applicable.

Part VIII: TIME ESTIMATE

48. The Attorney-General estimates that 1 hour will be required for his oral argument.

Dated 21 July 2017

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153 *Toubia v Schwenke* (2002) 54 NSWLR 46, 55 [41] (Hardley JA, with whom Heydon and Hodgson JJA agreed); see also *Canada v Granitile Inc* (2009) 302 DLR (4th) 40, 107 [301]-[302] (Laderer J).

154 See *Cabassi v Vila* (1940) 64 CLR 130, 147-148 (Williams J); *Wentworth v Rogers* (1986) 6 NSWLR 534, 539B (Kirby P, with whom Hope and Samuels JJA agreed).

155 See, for example, *Flower v Lloyd* (1877) 6 Ch D 297, 300 (Jessell MR).

156 See *Johns v Cosgrove* (2002) 1 Qd R 57, 92-93 [94]-[95] (Thomas JA, with whom de Jersey CJ and McMurdo P agreed).

ANNEXURE – SIXTH RESPONDENT'S LEGISLATIVE PROVISIONS

Consolidated Chancery Orders 1860 (UK) Order XXXI – rr 9-11

II ***Bills of Review and other Bills of that nature.***

9. No decree which has been signed and inrolled shall be reversed, altered, or explained, but upon bill of review. (29th Jan. 1618-19; Ord.1, 13.)

10. No bill of review or supplemental or new bill in the nature of a bill of review, shall be admitted, except upon error in law appearing on the face of the decree without further examination of matters in fact, or upon some new matter which has been discovered after the decree and could not possibly have been used when the decree was made. (29th Jan. 1618-19; Ord. 1. 17th Oct. 1741.)

11. No bill of review or supplemental or new bill in the nature of a bill of review grounded upon new matter discovered after the decree, shall be admitted without the special leave of the Court first obtained for that purpose. (17th Oct. 1741. 29th Jan. 1618-19; Ord. 1.)

Supreme Court Act 1935 (SA) – ss 17 and 48

17—General jurisdiction

(1) The court shall be a court of law and equity.

(2) There shall be vested in the court—

(a) the like jurisdiction, in and for the State, as was formerly vested in, or capable of being exercised by, all or any of the courts in England, following:

(i) The High Court of Chancery, both as a common law court and as a court of equity:

(ii) The Court of Queen's Bench:

(iii) The Court of Common Pleas at Westminster:

(iv) The Court of Exchequer both as a court of revenue and as a court of common law:

(v) The courts created by commissions of assize:

(b) such other jurisdiction, whether original or appellate, as is vested in, or capable of being exercised by the court:

(c) such other jurisdiction as is in this Act conferred upon the court.

48—Jurisdiction of Full Court, single judge, master, etc

(1) Subject to any express enactment, and to the rules of court, the jurisdiction vested in, or exercisable by the court, shall be exercisable either by the Full Court or by a single judge sitting in court.

(2) However—

(a) the Full Court shall hear and determine—

(i) all applications for new trials;

(ii) all appeals from a single judge whether sitting in court or chambers;

(iii) all rules and orders to show cause returnable before the Full Court;

(iv) all questions of law referred to or reserved for the consideration of, or directed to be argued before the Full Court;

(v) all trials at bar;

(vi) all causes and matters which are required by the rules of court, or by the express provision of any other Act, to be heard or determined by the Full Court;

(b) the jurisdiction of the court may be exercised by a judge in chambers in all such causes or matters, and in all such proceedings in any cause or matter, as are authorised by statute or by the rules or practice of the court;

(c) the jurisdiction of the court may be exercised by a master or judicial registrar to the extent authorised by this Act or any other Act, or by rules of court made under this Act or any other Act.

(3) Subject to subsection (4) and to the rules of court, where any Act provides that 1 or more of the following powers relating to appeals are exercisable by the Full Court, the power may, instead, be exercised by any judge of the Supreme Court in the same manner as the Full Court and subject to the same provisions:

(a) the power to give permission to appeal;

(b) the power to extend the time within which notice of appeal, or of an application for permission to appeal, may be given;

(c) the power to allow the appellant to be present at any proceedings in cases where he or she is not entitled to be present without permission;

(d) the power to admit an appellant to bail and to direct that time spent in custody by an appellant pending determination of an appeal be counted as part of a term of imprisonment.

(4) If a judge refuses an application by an appellant to exercise any power of a kind referred to in subsection (3) in his or her favour, the appellant is entitled to have the application determined by the Full Court.