IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A22/2017
A23/2017

BETWEEN:

CLONE PTY LTD (ACN 060 208 602), Appellant

and

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

10 **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

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APPELLANT'S REPLY SUBMISSIONS

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Part I:

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

Part II: Issues on appeal

2. At [4] to [6] of the First to Fourth Respondent's (**respondents**) submissions ([**R**]), the respondents advance submissions regarding the nature of the case advanced below as to the invocation of the equitable jurisdiction. The appellant responds as follows. *First*, the respondents (applicants at trial) never alleged fraud, but instead confined their case to *Quade*[1] type "malpractice".[2] The appellant by its points of defence denied that *Quade* principles applied upon an application to set aside a perfected judgment[3] and further denied that the pleaded allegations of "malpractice" conferred jurisdiction in equity to set aside a perfected judgment.[4] The respondents prosecuted their case assuming the risk that something less than fraud would suffice. *Secondly*, findings of fraud could not have been made at trial regardless of any concession made by the appellant because fraud was not alleged.[5] *Thirdly*, the trial itself was conducted on the basis that fraud was in fact required, the appellant having opened its case in that way.[6] *Fourthly*, while the appellant ultimately made the concession that *Quade* principles applied,[7] the appellant was permitted to advance the case on appeal that the principles in *Monroe Schneider*,[8] as endorsed in *SZFDE*,[9] set out the test, because Blue J was satisfied that the respondents would not have run their case differently at trial.[10] *Fifthly*, the Attorney submitted that the power of the Court to set aside a perfected judgment is limited to cases of fraud or conduct analogous to fraud, and maintained that position throughout the trial and on appeal.[11] *Sixthly*, the trial judge was required to consider whether *Quade* set out the relevant test so as to address the Attorney's arguments, and held that the *Quade* test applied.[12] *Seventhly*, the trial judge found it necessary in any event to consider the *degree of culpability* involved in the alleged "malpractice".[13]

3. At R[8] the respondents submit that the appellant cannot attack the findings below on the basis of insufficient findings as to the materiality of the "fresh" evidence because of the concession during the course of trial that *Quade* principles applied.[14] Blue and Stanley JJ expressly rejected an argument that the appellant was precluded by the concession from advancing this argument on appeal.[15] Each were affirmatively satisfied that the respondent would not have run its case differently at trial.[16] Moreover, the submission is wrong insofar as it suggests that the trial judge's finding as to materiality rose no higher than a "real possibility"[17] because of the manner in which the case was

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[1] *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134.
[2] Points of Claim at [59A].
[3] Points of Defence at [27.2].
[4] Points of Defence at [27.3], [29].
[5] *Forrest v Australian Securities and Investments Commission* (2012) 247 CLR 486 at [25]-[26].
[6] The appellant's Written Opening at [13], [52], [59], [62]. Eg., at [59]: "Clone submits that the Court's jurisdiction to set aside this perfected judgment is thereby confined to the equitable jurisdiction to impeach for fraud".
[7] *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1 (Appeal Judgment) at [307].
[8] *Monroe Schneider Associates (Inc) v No 1 Raberem Pty Ltd (No 2)* (1992) 37 FCR 234.
[9] *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189.
[10] Appeal Judgment at [315].
[11] *Players Pty Ltd v Clone Pty Ltd* [2015] SASC 133 (Primary Judgment) at [81].
[12] Primary Judgment at [85] – [87].
[13] Primary Judgment at [11(1)], [13(2)], [89], [180].
[14] *Clone Pty Ltd v Players Pty Ltd* (2016) 127 SASR 1 (Appeal Judgment) at [307].
[15] Appeal Judgment at [312] – [316] (Blue J), Stanley J concurring at [437].
[16] Appeal Judgment at [315] (Blue J), Stanley J concurring at [437].
[17] Primary Judgment at [242]-[243].

conducted. In relation to the question of materiality, the trial judge considered the *extent* of any likelihood that the result would have been different if the non-disclosed material had been available.[18] The trial judge concluded that doubts remained as to the provenance of the third copy agreement[19] and all that could be said is that the availability of the third copy agreement "*may* have tipped the balance".[20]

Part IV: Respondents' argument: Issue 1

4. At R[20], the respondents mischaracterise the findings of the Full Court. At [20(a)], it is submitted that the Full Court found that the appellant conducted its case "with the ostensible purpose" of conveying to Vanstone J that all copies that could be found were before the Court. In context, it is a submission that the appellant's senior counsel engaged in intentional conduct that was designed to mislead the Court. Not only was such a finding not made, Blue J made explicit that he made this observation in the context of addressing the objective question of whether the Court was misled and not whether counsel intended to do so.[21] Moreover, the relevant calls were made at a time before the third copy agreement had been located[22] and thus could not have been made with any intention to mislead. Likewise, the findings that are addressed at R[20(b)] and [21] relate to an objective characterisation of the appellant's case as presented at trial, divorced from any finding as to senior counsel's intention to convey such matters to the Court.

5. At R[22] the respondents emphasise a remark made by Stanley J which juxtaposes a submission made by senior counsel to the Full Court with the observation that this was "while [he was] simultaneously concealing" the existence of a further copy of the agreement.[23] *First*, insofar as this submission is intended to convey that senior counsel intended to mislead the Court, the immediately preceding observation of Stanley J ("the submission …is objectively misleading")[24] makes explicit that Stanley J was not addressing any question of counsel's state of mind, but only the objective question of whether the Court was in fact misled. *Secondly*, insofar as the respondent seeks to fasten upon the notion of "concealment", as though a separate finding of misconduct, that issue was not otherwise addressed by Stanley J. It was clearly not intended to stand as a separate finding of fact.

6. At R[24] the respondents address the manner in which the case was advanced below. The appellant's response is addressed at [3] above. Moreover, the trial judge found it necessary to consider the degree of culpability involved in the alleged "malpractice",[25] and made detailed findings of fact, including that the failure to make discovery was unintentional.[26] It is thus expedient in the interests of justice that the question should be argued and decided.[27]

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[18] Primary Judgment at [11(3)], [13(3)], [242].
[19] Primary Judgment at [237].
[20] Primary Judgment at [243].
[21] Appeal Judgment at [245] and fn 96.
[22] The appellant closed its case on 6 April 2005. The first indication that the appellant had that there was a further copy of the agreement at the Commissioner's Office was on 7 April 2005: see Primary Judgment at [122], [170] and [176].
[23] Appeal Judgment at [434] (Stanley J).
[24] Appeal Judgment at [434] (Stanley J).
[25] Primary Judgment at [11(1)], [13(2)], [89], [180].
[26] Appeal Judgment at [186] (Blue J).
[27] *O'Brien v Komesaroff* (1982) 150 CLR 310 at 319; *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473 at 480; *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438; *Green v Sommerville* (1979) 141 CLR 594 at 607–8.

7. At R[25]-[27] the respondents submit that the trial judge's findings regarding discovery were "sufficient to amount to fraud".

7.1. *First*, fraud must be pleaded distinctly and with particularity[28] and clearly proved.[29] No finding of fraud has been made. It cannot now be found.

7.2. *Secondly*, it was never put to Mr McNamara QC that he had acted dishonestly.[30] The trial judge held that he was sufficiently challenged in cross examination to enable a submission by the respondent that Mr McNamara QC engaged in further malpractice by misleading the Court,[31] a contention that was ultimately rejected by the trial judge.[32] However, a submission that senior counsel's conduct was sufficient to amount to fraud for the purpose of common law deceit should not be entertained where no suggestion of dishonesty was ever put to him.[33] That principle applies in the same manner to an allegation of reckless indifference.[34]

7.3. *Thirdly*, for conduct sufficient for the purpose of common law deceit it must be established that the relevant actor had no honest belief in the truth of the representation in the sense in which the representor intended it to be understood.[35] In *Forrest* it was emphasised that a false statement "made through carelessness and without reasonable grounds for believing it to be true, may be evidence of fraud but does not necessarily amount to fraud". Being reckless or indifferent as to the truth of something describes a state of mind or consciousness.[36] The fact of that indifference is the basis for the conclusion as to the absence of any real belief, which is a finding as to the relevant person's state of mind.[37] The findings of the trial judge are concerned with an objective assessment of the legal team's conduct as careless and unreasonable, to the extent of recklessness. In accordance with the statement in *Forrest* referred to above, those objective considerations could comprise evidence of the legal team not caring as to the discoverability of the third copy agreement, but are not determinative of the question of "recklessness" insofar as it is intended to convey fraud. Neither the trial judge nor the Full Court gave any consideration to the question of whether the legal team was consciously indifferent to the discoverability. The truthfulness of the evidence of each of the practitioners was accepted by the trial judge.[38] In no sense were the findings regarding discovery "sufficient to amount to fraud".

8. At R[28] it is submitted that given the way that the appellant conducted its case below it was not necessary for the Full Court to make findings that the "misleading" conduct was intentional or reckless. That is wrong. Not only did the legal test demand it, the appellant submitted both at trial and on appeal that intention, or at least recklessness,

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[28] *Forrest v Australian Securities and Investments Commission* (2012) 247 CLR 486 at [25]-[26].
[29] *Neat Holdings Pyt Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 170-171.
[30] Primary Judgment at [235].
[31] Primary Judgment at [231], [235].
[32] Primary Judgment at [236], [237], [238].
[33] *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 at [67]. *Permanent Trustee Australia Ltd v FAI General Insurance Co Ltd (in liq)* (2003) 214 CLR 514; 197 ALR 364; [2003] HCA 25 at [38].
[34] *Prepaid Services Pty Ltd v Atradius Credit Insurance NV* (2013) 302 ALR 732 at [55]
[35] *John McGrath Motors v Applebee* (1964) 110 CLR 656 at 659–60; *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563 at 578–9; *Forrest v Australian Securities and Investments Commission* (2012) 247 CLR 486 at [22].
[36] *Angus v Clifford* [1891] 2 Ch 449 at 471; *Le Lievre v Gould* [1893] 1 QB 491 at 500–1; *Banditt v R* (2005) 224 CLR 262 at [2]; *Fidock v Legal Profession Complaints Committee* [2013] WASCA 108 at [93]–[97].
[37] *Banditt v R* (2005) 224 CLR 262 at [2].
[38] Primary Judgment at [183].

was required.[39] Moreover, the respondents submit that the Full Court would have made such findings if so called upon. That submission ignores the fact that the trial judge had positively rejected the contention that senior counsel had misled the Court outside of the discovery failure,[40] much less misled the Court intentionally.

9. At R[30] the respondents cite Stanley J at [440] for the scope of the equitable jurisdiction. There, Stanley J refers to language used in a multitude of contexts, including statutory appeals. It is not a correct, or indeed considered, assessment of the equitable jurisdiction by Stanley J. The respondents also submit that the jurisdiction extends to equitable fraud. The authorities later cited for that proposition do not support it.

10. At R[32] the respondents seemingly submit that, first, "surprise" forms part of the equitable jurisdiction, secondly, "surprise comprised malpractice" and, thirdly, impliedly, that the findings of malpractice are sufficient to enliven the equitable jurisdiction to set aside a perfected judgment for surprise. It is unsettled whether any such jurisdiction still survives.[41] A case of "surprise" has never been advanced. No notice of contention has been filed. It is not now open to the respondents advance such a case.

11. At R[36] the respondents cite *Brooke v Lord Mostyn*[42] for the proposition that the withholding of information amounts to fraud permitting a Court of Equity to set aside a compromise made with the sanction of an order of the court. The Court approved an arrangement amounting to a compromise with an infant, which was grounded on the supposed insufficiency of real estate to pay the infant's legacy. However, a document casting doubt upon the adequacy of the valuation evidence was not before the Court. The setting aside of the compromise was in the exclusive equitable jurisdiction: the jurisdiction there being considered was the supervisory jurisdiction over trustees.[43] The question posed by Lord Justice Turner was whether representations were made to persons acting on behalf of the infant, *or to the Court,* that were untrue, unfair or dishonest.[44] The nature of the supervisory jurisdiction required the Court to form a view as to whether the compromise was for the benefit of the infant, but the non-disclosure of materials affected the Court's capacity to reach such a view. The nature of the supervisory jurisdiction over trustees is distinguishable from the power to set aside a perfected judgment in *inter partes* litigation.

12. At R[37] the respondents refer to the obiter observations of Lord Coleridge CJ in *Ex parte Cockerell*[45] for the reference to "suppression of information which it was essential that the Court should have" as a basis for setting aside an order. As the judgment of Lindley J makes clear (at 40), that observation was in reference to an *ex parte* application.

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[39] See Notice of Appeal at [3.1], [4.2] in the context of the two species of "malpractice" found by the trial judge. The question of "malpractice" by misleading of the Court arose on a Notice of Alternative Contention filed by the respondents. See also T958.23 at trial.
[40] Primary Judgment at [236], [238], [239].
[41] *Monroe Schneider v No 1 Raberem Pty Ltd* (1992) 37 FCR 234 at 241.
[42] [1864] 46ER 419.
[43] At 436.
[44] At 437.
[45] (1878) 4 CPD 39 at 39.

13. At R[48] the respondents address the test in fact applied by Stanley J. The respondents submit at R[48] that Stanley J did not apply *Quade*. At [462]-[465] Stanley J assessed what would have occurred had the Full Court not been misled, and did so by reference to *Quade* principles. At [472] he found that the Full Court would have set aside the judgment applying *Quade* principles had it not been misled. If Stanley J was not intending to apply *Quade* principles, the reasoning that he in fact applied is opaque. If, as the respondents submit, he applied *McCann*, *Greater Wollongong* and *McDonald*, they were each appeal cases. Moreover, it is far from self-evident how he applied them.

14. As is acknowledged at R[49], Blue J applied *Quade* principles, which were developed in the context of a statutory appeal, in the equitable jurisdiction. That was an error.

Respondents' argument: Issue 2

15. At [52] the respondents largely repeat the submission at R[8]. It is addressed at [3] above. Blue and Stanley JJ expressly rejected an argument that the appellant was precluded by its conduct at trial from advancing these arguments on appeal.[46]

16. At [58] the respondents submit that there are concurrent findings of fact that the respondents did not see the third copy agreement. That is not so. The trial judge at [273] remarked that the lawyer inspecting the file for the respondents was "a junior lawyer and was inspecting the file for particular purposes". There was no reason to make such observation other than to ascribe less weight to the fact that he had seen the agreement. In any event, there are concurrent findings that the file itself was inspected by the respondents' lawyers,[47] such that the copy agreement was readily available to them.[48]

17. At [65] the respondents submit that *Monroe Schneider* should not be accepted insofar as it has adopted the four Gordon QC requirements. The respondents submit that the 'third requirement' (the evidence is so material that it probably would have affected the outcome) is inconsistent with the observations of Barwick CJ in *McDonald* to the effect that the evidence of the fraud need not have been admissible in the original action. There is no such inconsistency. As explained in *Monroe Schneider* at 242, it is necessary both to establish the perpetration of the fraud alleged and that the fraud was "directly material" to the judgment or "probably affected" the result. It is that causative element that is reflected in the third requirement, and that underlies the first two requirements as well.

18. At [70], the respondents advance submissions regarding costs. For reasons outlined above, particularly at [2] and [3], the propositions are disputed. The appellant would seek to be heard as to questions of costs at the appropriate time.

Dated:

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[46] Appeal Judgment at [312] – [316] (Blue J), Stanley J concurring at [437].
[47] Primary Judgment at [273]; Appeal Judgment at [265]-[268] per Blue J; Stanley J agreeing at [420].
[48] Appeal Judgment at [646] (Debelle AJ in diss.).