Judgments Fraudulently Obtained: The Forgotten Equity

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Introduction

The judicial policy of finality of legal proceedings is prevalent throughout the common law world. It is reflected in the rules restricting or denying the admissibility of certain forms of evidence, the doctrine of *res judicata* and the rules relating to appeals. There are undoubtedly good reasons for such a policy. The onerous costs of litigation, both financial and emotional, make the speedy resolution of legal disputes desirable.

Finality, however, is not an end in itself. Provided that the rules reflecting this judicial policy do not function to deny judges access to material evidence, the policy of finality is consistent with the accepted role of the judiciary, namely to seek and effect 'justice' in cases before the courts. It is where the promotion of finality is inconsistent with that role that any such policy must defer to the more pressing 'interests of justice'. To this end, it is fitting that the action to set aside judgments which have been fraudulently obtained should be equitable 'in origin and in nature.'[1] Curiously, the equitable jurisdiction to set aside judgments procured by fraud attracts little or no commentary in the established equity texts.[2] Nor does it merit any detailed attention in texts on evidence and procedure.[3] Hence, the object of this article is

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1 *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534 at 538 per Kirby P.

2 For instance, the following equity texts make no reference to the equitable jurisdiction to set aside judgments on the ground of fraud: JD Heydon, WMC Gummow and RP Austin, *Cases and Materials on Equity and Trusts* (4th ed, Butterworths, 1993); PH Pettit, *Equity and the Law of Trusts* (6th ed, Butterworths, 1989); PV Baker and PStJ Langan, *Snell's Equity* (29th ed, Sweet and Maxwell, 1990); J Martin, *Hanbury's Modern Equity* (14th ed, Sweet and Maxwell, 1993). Meagher, Gummow and Lehane make a short reference to the jurisdiction: *Equity: Doctrines and Remedies* (3rd ed, Butterworths, 1992) para [1229]. The most detailed treatment of the law is, curiously, in an introductory text, M Evans *Outline of Equity and Trusts* (2nd ed, Butterworths, 1993) para [608].

3 The following texts make no reference to the jurisdiction: M Aronson and J Hunter, *Litigation: Evidence and Procedure* (Butterworths, 1995); D Byrne and JD Heydon, *Cross on Evidence* (4th Australian ed, Butterworths, 1991). Cairns makes a casual reference to the jurisdiction

to provide a concise statement of the jurisdiction, its elements and scope, and to alert readers to some issues which have yet fully to be resolved by the courts.

I Equity's Jurisdiction to Set Aside Judgments Tainted by Fraud

Equity has always reserved the discretion to set aside judgments procured by the fraud of one party to a proceeding at the suit of the other party.[4] This cause of action derived from the procedure for a bill of review in the Court of Chancery to set aside a judgment on the ground that fresh evidence, capable of altering the result, had been discovered since the judgment was delivered.[5] As expressed in a leading practitioner text of the nineteenth century:

> It is a general rule, that whenever a party, by fraud, accident, or mistake, or otherwise, has obtained an advantage in proceeding in a Court of ordinary jurisdiction, which must necessarily make that Court an instrument of injustice, a Court of Equity will interfere to prevent a manifest wrong, by restraining the party whose conscience is thus bound, from using the advantage he has there gained.[6]

Equity's jurisdiction to set aside judgments tainted by fraud formed part of its general jurisdiction in cases of fraud, a jurisdiction it shared with the common law.[7] Its basis was two-fold. First, the equitable proceeding cast upon the errant party a personal obligation to give up the fruits of unconscionable conduct.[8] Secondly, equity would not tolerate a miscarriage of justice where fraud was proved. In this context, Lord Buckmaster in a leading case observed that '[f]raud is an insidious disease, and if clearly proved to have been used so that it might deceive the court it spreads to and infects the whole body of the judgment.'[9] Therefore, this jurisdiction well illustrates equity's two

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in one sentence in his work *Australian Civil Procedure* (3rd ed, Law Book Co, 1992) p 534.

4 See generally *Flower v Lloyd* (1877) 6 Ch D 297 at 299-300 per Jessel MR, at 301-302 per James LJ; *Ronald v Harper* [1913] VLR 311 at 318; *Jonesco v Beard* [1930] 2 AC 298; *Hurlstone v Steadman* [1937] NZLR 708; *Grierson v R* (1938) 60 CLR 431 at 436 per Dixon J; *Cabassi v Vila* (1940) 64 CLR 130 at 147 per Williams J; *Luxford v Reeves* [1941] VLR 118; *Ongley v Brdjanovic* [1975] 2 NZLR 242 at 244.

5 *Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd* (1986) 65 ALR 683 at 689 per Gray J.

6 *Daniell's Chancery Practice* (5th ed, Stevens and Haynes, 1871) p 1471.

7 *Flower v Lloyd* (1877) 6 Ch D 297 at 301-302 per James LJ. See also *Story's Equity Jurisprudence* (2nd English ed by Grigsby, Stevens and Haynes, 1892) pp 114-115.

8 *Hillman v Hillman* [1977] 2 NSWLR 739 at 745 per Helsham CJ in Eq.

9 *Jonesco v Beard* [1930] 2 AC 298 at 301-302 per Lord Buckmaster.

principal proscriptions, its proscription against *unconscionable conduct*, and its proscription against *unfair outcomes*.

Although there have been judicial statements questioning the continuing existence of the equitable jurisdiction,[10] and other statements recognising the *inherent* right of superior courts to set aside their own judgments on the ground of fraud,[11] the equitable proceeding is well entrenched in Australian law. One could, with some justification, adopt the view that the jurisdiction has become 'fused' with that at law,[12] in itself a not uncommon phenomenon in the

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10 See *Re Barrell Enterprises Ltd* [1973] 1 WLR 19 at 24-27 (CA); *Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd* (1986) 65 ALR 683 at 689 per Gray J.

11 For example, see *Taylor v Taylor* (1979) 143 CLR 1 at 16 per Mason J; *Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd* (1986) 65 ALR 683 at 688 per Gray J.

12 In this context, one must ponder the existence and scope of the common law jurisdiction. Although there are judicial statements expressly recognising its existence, the distinction between it and the equitable jurisdiction is not clear. The following quotes from the judgment of Rich ACJ in *Cabassi v Vila* (1940) 64 CLR 130 at 138-139 may provide some insight in this quest:

> If the judgment was obtained ... by fraud and perjury, the plaintiff has ample remedy by law. The court which rendered the judgment, upon proof of these allegations, would be bound to grant a new trial, so that, upon further investigation, justice might by done. The witnesses, if guilty, might be indicted for perjury, and so might all those be indicted who had unlawfully conspired together to deprive the plaintiff of his rights, and their conviction would afford most convincing evidence that a review of the action should take place: *Dunlop v Glidden* (1850) 52 Am Dec at 627-628.
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> A party to a suit at law cannot maintain an action against the adverse party for suborning a witness, whose false testimony tended to produce the judgment ... nor for the adverse party's fraud and false swearing, so long as the judgment remains in force ... A proceeding of this kind is an attempt to re-examine the merits of a judgment in a collateral suit between the same parties. Reasons of public policy and uniform authority forbid the attacking and impeachment of a judgment in this way. The plaintiff's only remedy is an equitable proceeding to set aside the judgment: *Stevens v Rowe* (1880) 47 Am Rep at 232.

That the Acting Chief Justice felt the need to resort to nineteenth-century American authorities testifies to the dearth of English authority on the topic in question. On the other hand, Williams J, who also addressed the matter of fraud, did not feel constrained to make the distinction suggested by Rich ACJ. Interestingly, it has been the judgment of Williams J, not that of Rich ACJ, that has been the subject of subsequent citation. This would suggest that Rich ACJ's analysis

interplay between common law and equity. Pressure in equity and equitable estoppel are notable examples of this phenomenon. In both cases, it is the *equitable* jurisprudence which has formed the basis of the modern substantive doctrine, meaning that, paradoxically, the common law has followed equity. Likewise in the case of judgments obtained by fraud, it is the principles derived from the practice of the Court of Chancery which continue to shape the availability and scope of the proceeding. Any so-called 'fusion' does not deprive the action of its equitable character. As observed by Kirby P in *Wentworth v Rogers (No 5)*:[13]

> Whilst it is true that the Court has a large inherent jurisdiction, so far as challenges to judgments on the ground that they were procured by fraud is concerned, that jurisdiction has been exercised for more than a century by courts of equity, and upon principles built up over many years.

In the same case, Kirby P, in what is arguably the leading modern judgment in the area, outlined the elements which the applicant must establish for equity to set aside a judgment on the ground of fraud.[14] First, as in all actions based on fraud, the particulars of the fraud alleged must be made with specificity. Secondly, the claim must be based on newly discovered facts. Thirdly, it must be shown that responsibility for the fraud lies with the party entitled to the benefit of the judgment. From a procedural viewpoint, such an action is an *independent proceeding*, where fraud is the sole issue to be resolved.[15] The action in equity takes on none of the characteristics of the proceedings which gave rise to the judgment under impeachment. For this reason, questions of issue estoppel are irrelevant to the equitable proceeding.[16] Similar to other equitable proceedings, it is an action *in personam* - there is a personal obligation, if fraud is made out, to give up the fruits of unconscionable conduct. Hence, the proper way to invoke the jurisdiction is by separate proceedings commenced in equity.[17] The equitable jurisdiction applies equally to consent orders and judgments.[18]

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represents an individual opinion, and should not be used to support the modern law.

13 (1986) 6 NSWLR 534 at 540.

14 Id at 538-539.

15 Prior to the introduction of cross-vesting legislation, the need for an independent proceeding could cause jurisdictional problems in family law cases. For instance, see *Hillman v Hillman* [1977] 2 NSWLR 739. However, since the passage of the cross-vesting legislation, these problems are unlikely to recur.

16 *Boughen v Abel* [1987] 1 Qd R 138 at 143 per Connolly J.

17 In *Spies v Commonwealth Bank of Australia* (1991) 24 NSWLR 691 Handley JA (at 699) observed that the court's jurisdiction to set aside a final

II Nature of the Fraud

Notwithstanding the numerous judicial statements recognising the equitable origin and nature of the action to set aside judgments fraudulently obtained,[19] it remains to be conclusively determined whether the fraud which must be proved to set aside a judgment is of the common law type, or whether conduct falling within the wider definition of fraud recognised in equity is sufficient.

A Fraud at law compared to fraud in equity

In cases of actual fraud, that is, conduct involving conscious dishonesty whether by intent or reckless indifference, courts of equity and common law historically exercised a concurrent jurisdiction. In addition to this concurrent jurisdiction, equity exercised an exclusive jurisdiction in matters which, although classified as cases of fraud, did not require proof of an intention to deceive or recklessness. Hence, in equity the term 'fraud' is used to describe that which, although falling short of deceit, imports the breach of a duty to which the sanction of equity is attracted. The classic statement in this context is that of Lord Haldane LC in *Nocton v Lord Ashburton*:[20]

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judgment on the ground of fraud may also be invoked by an application to an appellate court for a new trial. His Honour noted that such an application is not strictly an appeal but rather an independent proceeding in which the moving party will fail unless the appellate court, as a tribunal of fact, finds that the onus of proving fraud has been discharged: *Nicholls v Carpenter* [1974] 1 NSWLR 369 at 374-375. Notwithstanding this, his Honour considered it preferable in general for the question of fraud to be tried in a new action. The reason for this was explained by the Privy Council in *Hip Foong Hong v H Neotia and Co* [1918] AC 888 at 894:

> where a new trial is sought upon the ground of fraud, procedure by motion and affidavit is not the most satisfactory and convenient method of determining the dispute. The fraud must be both alleged and proved; and the better course in such a case is to take independent proceedings to set aside the judgment upon the ground of fraud, when the whole issue can be properly defined, fought out, and determined.

See also *Jonesco v Beard* [1930] 2 AC 298 at 300-301 per Lord Buckmaster; *Austin v Austin* [1931] GLR 640; *Snowy Mountains Hydro-Electric Authority v Cicic* (1964) 81 WN (Pt 1) (NSW) 232; *McDonald v McDonald* (1965) 113 CLR 529 at 533 per Barwick CJ.

18 *Spies v Commonwealth Bank of Australia* (1991) 24 NSWLR 691 at 700 per Handley JA.

19 For example, see *McHarg v Woods Radio Pty Ltd* [1948] VLR 496 at 497; *Hillman v Hillman* [1977] 2 NSWLR 739 at 744; *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534 at 538 per Kirby P.

20 [1914] AC 932

> when fraud is ... used in Chancery in describing cases which were within its exclusive jurisdiction, it is a mistake to suppose that an actual intention to cheat must always be proved. A man may misconceive the extent of the obligation which a court of Equity imposes on him. His fault is that he has violated however innocently because of his ignorance, an obligation which he must be taken by the Court to have known, and his conduct has in that sense always been called fraudulent .... It was thus that the expression 'constructive fraud' came into existence ... What it really means in this connection is, not moral fraud in the ordinary sense, but breach of the sort of obligation which is enforced by a Court that from the beginning regarded itself as a Court of conscience.[21]

Fraud in equity therefore contemplates a wider concept of fraud than that recognised by the common law. As equitable fraud is not limited to conscious wrong-doing or over-reaching, it does not depend upon the defendant's subjective knowledge of the relevant facts. Rather, it depends upon whether what has happened, in the context in which it has happened, appears to the judicial conscience to be so inequitable that it should not be allowed to stand.[22] A court of equity can therefore grant a remedy for fraud which would not have been available to a court exercising a purely common law jurisdiction.[23]

There is no simple formula for determining what conduct or facts constitute equitable fraud. In substance, the issue is whether the situation or conduct is so unconscionable as to warrant the intervention of a court of conscience.[24] In this context the term 'unconscionable' is used in a broad sense interchangeably with the terms 'unconscientious', 'inequitable' or the phrase 'inconsistent with honesty and fair dealing'. Upon this construction, equitable fraud can be said to form the basis of relief for constructive trusts, misrepresentation, breaches of fiduciary duty, cases of undue

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21 Id at 954.

22 See *Logue v Shoalhaven Shire Council* [1979] 1 NSWLR 537 at 555, 559-561 per Mahoney JA.

23 For example, it can award full compensation to the plaintiff on terms that, on satisfaction of judgment, the defendant will succeed to any unrealised benefits which accrued to the plaintiff under the transaction which would or might reduce the plaintiff's loss. It can also declare and enforce a rescission where such relief would not have been available at common law. Orders of this nature, and others within equity's exclusive jurisdiction, are designed to afford more complete relief to a plaintiff than could be secured by an unconditional award of common law damages. See *Nocton v Lord Ashburton* [1914] AC 932 at 951-952; *Demetrios v Gikas Dry Cleaning Industries Pty Ltd* (1991) 22 NSWLR 561 at 573-574 per Meagher and Handley JJA.

24 *Logue v Shoalhaven Shire Council* [1979] 1 NSWLR 537 at 553 per Mahoney JA.

influence or pursuant to the doctrine of unconscionability. Yet each of these has flourished into a 'separate' equitable doctrine. There do remain, however, certain causes of action that retain the badges of equitable fraud. These include pressure in equity, the equitable jurisdiction to prevent a statute from being used as a cloak for fraud, frauds on a power and, most importantly for the present purposes, judgments fraudulently obtained.

B A suggested approach to fraud

As fraud in equity encompasses a broader concept of fraud than that recognised by the common law, the characterisation of the type of fraud sufficient to invite equitable intervention to set aside judgments will have practical implications for the pleading of the applicant's case. In their zeal for finality in litigation, some judges have required proof of nothing short of common law fraud, (that is, proof of dishonesty or at least recklessness) before granting equitable relief.[25] As the requirements for establishing common law fraud are stricter than those satisfying its equitable counterpart, adopting the former standard would reduce the likelihood of finality of litigation. However, to justify the common law standard by reference to a competing policy consideration is to fail to recognise that common to most, if not all, forms of equitable relief is a competing policy consideration, namely that propounded by the common law.

Moreover, there are good reasons why equitable fraud should be the relevant inquiry in cases of judgments fraudulently obtained. First, such an approach is consistent with equitable principle, namely that equity's intervention is premised on proof of conduct which, even though not consciously dishonest or reckless, nonetheless offends conscience. If, as suggested earlier, the basis for equitable relief in cases of misrepresentation, breach of fiduciary duty, undue influence or unconscionability, is equitable fraud, it is difficult to appreciate why the threshold to relief where a judgment has been fraudulently obtained should be any stricter. In the former cases, it is fraudulent conduct itself that forms the subject matter of the principal action. In the latter event, it is fraudulent conduct in the process of the trial which is in issue, that is, conduct directed at the integrity of the judicial process. The paramount importance of such integrity offers some basis for asserting that the threshold in the cases of judgments fraudulently obtained should be no stricter than the threshold in other cases grounded in equitable fraud. After all, in the words of the Privy Council in a leading case, '[a] judgment that is tainted and affected by

25 For instance, in the leading English case of *Jonesco v Beard* [1930] 2 AC 298, the House of Lords (at 305) was not prepared to set aside a judgment on the basis of 'some slip or omission in conduct of the argument' which meant that the actual facts were never before court. See also *Price v Stone* [1964] VR 106 at 109-110.

fraudulent conduct is tainted throughout, and the whole must fail'.[26] To recognise an equitable jurisdiction to relieve against fraud, but then limit its scope to fraud solely of a common law kind, is arguably inconsistent with principle.

Secondly, to focus entirely upon inequitable conduct neglects the second principal ground for equitable intervention, namely equity's proscription against unfair outcomes. As noted earlier, the equitable proceeding is two-dimensional in objective. It aims both to deprive persons of the fruits of unconscionable conduct, and to prevent a miscarriage of justice. The first objective is directed solely at the conduct of an individual. The second objective has a broader focus - the public interest that justice be done. Emphasis on the first objective to the exclusion of the second may naturally lead to the requirement that the applicant prove conscious dishonesty or recklessness as a precondition of relief. After all, it could be said that proof of any lesser unconscionable conduct does not outweigh the public interest in the finality of litigation. Similarly, it may not, in the eyes of some, justify the disgorging of benefits gained from the judgment sought to be impugned.

However, to suppose that it is only in cases where a party has been deceitful or reckless that a miscarriage of justice occurs is counter to logic. A miscarriage may be prompted by conduct falling short of fraud at law. To this end, taking account of the second objective may justify a broader (read equitable), concept of fraud. Moreover, the goal of the prevention of miscarriages of justice, encompassing as it does the public interest, may in some cases serve to outweigh the public interest in the finality of litigation. Since the objectives of the jurisdiction are to a large extent interrelated - the relevant conduct is the catalyst for both the enrichment of an undeserving individual and the miscarriage of justice - proof of equitable fraud should suffice to attract the intervention of equity where such fraud has caused a miscarriage of justice. Hence the adoption of the equitable notion of fraud in this context would operate as a de facto method of recognising the broader public interest.

III Controls on Abuse of Process

As noted above, the main concern with adopting equitable fraud as the threshold for relief is its impact on what has been called 'the overriding necessity of putting an end to litigation'.[27] Clearly if the sole threshold to upsetting a judgment were mere proof of some inequitable conduct, whether actual or constructive, that would

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26 *Hip Foong Hong v H Neotia and Company* [1918] AC 888 at 894 per Lord Buckmaster.

27 *Price v Stone* [1964] VR 106 at 109 per Gillard J.

indeed endanger the finality of disputes. Hence, there must be sufficient controls to prevent persons who cannot establish a miscarriage of justice from abusing process by resorting to independent actions alleging fraud. These controls are outlined below.

A Proof of fraud with specificity

First, except in exceptional cases, the mere allegation or proof of fraud will not be sufficient to attract such 'drastic' relief as the setting aside of a judgment. Allegations of fraud on which it is sought to set aside a judgment must be made with specificity.[28] The reason for this is that a court of equity will not condemn a person casually or by inexact proofs, indefinite testimony or indirect inferences.[29] For example, in *Spies v Commonwealth Bank of Australia*[30] an application to set aside a consent judgment failed when the appellant did not identify or particularise the fraudulent representation relied upon, the person by whom it had been made, why the representation was false or the respondent's servants/agents who had allegedly perpetrated the fraud.

B Probability that the action will succeed

Secondly, the person seeking the court's assistance must prove that it is probable that the action to set aside judgment will succeed, for a mere suspicion of fraud will not be entertained.[31] In *Wentworth v Rogers (No 5)*[32] Kirby P explained the reason for this:

> In a hard fought litigation, it is not at all uncommon for there to be a conflict of testimony which has to be resolved by a judge or jury. In many cases of contradictory evidence, one party must be mistaken. He or she may even be deceiving the court. The unsuccessful party in the litigation will often consider that failure in the litigation has been procured by false evidence on the part of the opponent and the

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28 See *Jonesco v Beard* [1930] 2 AC 298 at 300 per Lord Buckmaster; *McHarg v Woods Radio Pty Ltd* [1948] VLR 496 at 497; *McCann v Parsons* (1954) 93 CLR 418 at 425-426 per Dixon CJ, Fullagar, Kitto and Taylor JJ; *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 at 712 per Denning LJ; *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534 at 538 per Kirby P.

29 *Rajski v Bainton* (1990) 22 NSWLR 125 at 135-136 per Mahoney JA. See also *Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd* (1986) 65 ALR 683 at 691 per Gray J: 'such evidence must be weighty, and not trivial, and must go to important issues in the case, and not to peripheral matters.'

30 (1991) 24 NSWLR 691.

31 *Ronald v Harper* [1913] VLR 311 at 318; *McHarg v Woods Radio Pty Ltd* [1948] VLR 496 at 498 per Herring CJ.

32 (1986) 6 NSWLR 534

> witnesses called by the opponent. If every case in which such an opinion was held gave rise to proceedings of this kind, the courts would be even more burdened with the review of first instance decisions than they are.[33]

There remains some uncertainty as to the standard of proof that the applicant must satisfy. In this context, phrases such as 'reasonable probability'[34] and 'reasonable possibility'[35] have been used. Some judges have used these terms interchangeably.[36] In *Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd*,[37] Gray J held that if the 'reasonable probability' test requires the applicant to satisfy the court that he or she has a 51 per cent chance of success at the trial, then it is too stringent. His Honour's preference was for proof of a 'reasonable prospect of success', as distinct from some fanciful chance that the judgment may be set aside. Cussen J had expressed a similar view some seventy years prior in *Ronald v Harper*.[38] In *Spies v Commonwealth Bank of Australia*,[39] Handley JA interpreted the 'reasonable prospect of success' test as requiring the plaintiff to plead that since the judgment he or she had discovered fresh facts which raise a 'serious question to be tried'. This is curious in that, in its principal area of operation - interlocutory injunctions[40] - a serious question to be tried simply means that the claim be neither frivolous nor vexatious.[41] Significantly, in such cases, the courts have gone to some length to rid the 'serious question' test of any overtones of probability of success.[42]

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33 Id at 539. See further *Baker v Wadsworth* (1898) 67 LJQB 301; *Cabassi v Vila* (1940) 64 CLR 130 at 147-148 per Williams J; *Everett v Ribbands* (1946) 175 LT 143 at 145-146.

34 *Birch v Birch* [1902] P 130 at 136 per Vaughan Williams LJ; *Price v Stone* [1964] VR 106 at 108-109 per Gillard J.

35 *Birch v Birch* [1902] P 130 at 138 per Cozens-Hardy LJ.

36 For instance, see *McHarg v Woods Radio Pty Ltd* [1948] VLR 496 per Herring CJ.

37 (1986) 65 ALR 683 at 692.

38 [1913] VLR 311 at 320.

39 (1991) 24 NSWLR 691 at 700.

40 *Murphy v Lush* (1986) 65 ALR 651; *Queensland Industrial Steel Pty Ltd v Jensen* [1987] 2 Qd R 572.

41 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396; *Philip Morris (New Zealand) Ltd v Liggett & Myers Tobacco Co (New Zealand) Ltd* [1977] 2 NZLR 35 at 36.

42 See *Australian Coarse Grain Pool Pty Ltd v Barley Marketing Board of Queensland* (1982) 46 ALR 398; *Tableland Peanuts Pty Ltd v Peanut Marketing Board* (1984) 52 ALR 651 at 653; *A v Hayden (No 1)* (1984) 56 ALR 73 at 77-78; *Queensland v Australian Telecommunications Commission* (1985) 59 ALJR 562; *Castlemaine Tooheys Ltd v The State of South Australia*

One must wonder whether the above approach is merely an exercise in semantics. After all, that which is a 'reasonable probability', a 'reasonable prospect' or a 'reasonable possibility', varies according to the person appointed to make the assessment. All that can safely be said is that the standard of proof in cases of judgments allegedly obtained by fraud is not exceedingly onerous. Yet, in light of the fact that '[t]he principle that there must be an end to litigation is a powerful one',[43] it is odd that a relatively weak standard of proof is adopted. A better approach, it is suggested, is to apply a more rigorous standard of proof[44] in recognition of the importance of the finality of litigation policy, coupled with the equitable concept of fraud, so as to recognise the equitable origin and nature of the jurisdiction.

C Responsibility for fraud

Thirdly, the person who alleges that a judgment should be set aside on the ground of fraud must establish that the other party is responsible for the fraudulent conduct in such a way that it would be inequitable for that party to take the benefit of the judgment.[45] The defendant must somehow be 'connected' with the fraud alleged.[46] This must be shown by extrinsic evidence. For example, where the perjured evidence relied upon is that of a witness for the defendant, the plaintiff must establish that the defendant either procured the perjury or was privy to it, 'that is to say that the defendant knew the true state of affairs and knowing it, called a witness to give a false and perjured

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(1986) 161 CLR 148; *Richardson v Forestry Commission* (1988) 164 CLR 261 at 274-276.

43 *Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd* (1986) 65 ALR 683 at 691 per Gray J.

44 It is not unknown for equity to adopt stricter standards of proof as a method of balancing the interests of the parties to the action. For instance, the court will not order rectification in the absence of 'evidence of the highest nature' (*Craddock Bros Ltd v Hunt* [1923] 2 Ch 136 at 164 per Younger LJ), 'the most clear and strong evidence' (*Bishopsgate Insurance Australia Ltd v Commonwealth Engineering (NSW) Pty Ltd* [1981] 1 NSWLR 429 at 431), 'proof in clear and precise terms' (*Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973) 128 CLR 336 at 349 per Mason J; *Pukallus v Cameron* (1982) 56 ALJR 907 at 909 per Wilson J) or 'convincing proof' (*Pukallus v Cameron* (1982) 56 ALJR 907 at 909 per Wilson J; *Elders Trustee and Executor Co Ltd v EG Reeves Pty Ltd* (1987) 78 ALR 193 at 254), all of which indicate that the evidential requirement needed to counteract the inherent probability that the written instrument truly represents the parties' intentions is very high.

45 *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534 at 539 per Kirby P; *Spies v Commonwealth Bank of Australia* (1991) 24 NSWLR 691 at 700.

46 *Ronald v Harper* [1913] VLR 311 at 321 per Cussen J.

account'.[47] Similarly, in *Wentworth v Rogers (No 5)*,[48] Kirby P observed that:

> It is not sufficient to show that an agent of the successful party was convicted of giving perjured evidence in the former proceeding, the result of which it is sought to impeach. It must be shown that the agent, in so acting, was in concert with the party who derived the benefit of the judgment.[49]

D Fraud based on newly discovered facts

Fourthly, the courts have formulated the requirement that the claim must be based on newly discovered or fresh facts which, by themselves or in combination with previously known facts, would provide a reason for setting aside judgment.[50] P Kirby in *Wentworth v Rogers (No 5)*[51] explained the attitude of the courts:

> Parties ought not, by proceeding to impugn a judgment, to be permitted to relitigate matters which were the subject of the earlier proceedings which gave rise to the judgment. Especially should they not be so permitted, if they move on nothing more than the evidence upon which they have previously failed. If they have evidence of fraud which may taint a judgment of the courts, they should not collude in such a consequence by refraining from raising their objection at the trial, thereby keeping the complaint in reserve. It is their responsibility to ensure that the taint of fraud is avoided and the integrity of the court's process preserved.[52]

The requirement that the plaintiff discover new or fresh facts means that such discovery must have occurred *after* the judgment complained of. The plaintiff's claim will fail where the evidence reveals she or he knew of the facts establishing fraud before the final judgment sought to be set aside.[53] Therefore, even if the plaintiff can establish that evidence given by the defendant was perjured, the court

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47 *McHarg v Woods Radio Pty Ltd* [1948] VLR 496 at 499.

48 (1986) 6 NSWLR 534.

49 Id at 539.

50 *Boswell v Coaks (No 2)* (1894) 86 LT 365 at 366, 368; *Birch v Birch* [1902] P 130 at 136-138; *Ronald v Harper* [1913] VLR 311 at 318; *Cabassi v Vila* (1940) 64 CLR 130 at 147 per Williams J; *Everett v Ribbands* (1946) 175 LT 143 at 145-146; *McHarg v Woods Radio Pty Ltd* [1948] VLR 496; *McDonald v McDonald* (1965) 113 CLR 529 at 533 per Barwick CJ; *Ongley v Brdjanovic* [1975] 2 NZLR 242 at 245; *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534 at 538 per Kirby P.

51 (1986) 6 NSWLR 534.

52 Id at 538. See also at 540-541.

53 *Charles Bright & Co Ltd v Sellar* [1904] 1 KB 6; *Boughen v Able* [1987] 1 Qd R 138 at 140-143 per Connolly J, at 146 per Moynihan J.

will not set aside the judgment as having been fraudulently obtained where the plaintiff fails to establish a 'new discovery' or any 'fresh facts' as the basis of her or his claim.[54]

IV Perjured Evidence as Fraud

The most common form of fraud alleged in this context concerns the presentation of perjured evidence to the court, whether written or oral. Clearly, the presentation of false evidence by a party to the proceedings (or by a witness), would appear to come within the badge of fraud, in many instances common-law fraud. Yet, notwithstanding proof of perjury, the courts have shown a marked reticence to set aside judgments on this ground. The judicial attitude is typified by Williams J in *Cabassi v Vila*,[55] where his Honour stated:

> I have been unable to find any case in which a judgment has been set aside where the only fraud alleged was that the defendant or a witness or witnesses alone or in concert had committed perjury. In fact the court has said that except in very exceptional cases perjury is not a sufficient ground for setting aside a judgment.[56]

Therefore, although the procuring of perjured evidence *of itself* may justify the setting aside of a judgment, this is the exceptional, not the ordinary, case. Similarly, Herring CJ in *McHarg v Woods Radio Pty Ltd*[57] observed that:

> [n]o doubt Courts will subject to the closest scrutiny cases, where perjury solely is relied upon, and will require proof that by this means the defendant did perpetrate the fraud complained of.[58]

This would appear to be something of a smokescreen. The principal concern of the courts is to avoid the suggestion that proof of perjury *sans proof of its connection with the defendant,* will constitute fraud. This concern was well expressed by the New Zealand Court of Appeal in *Hurlstone v Steadman*:[59]

> Mere perjury on the part of a witness is not sufficient ... The case may be different where the perjury is that of a party himself, or the perjured evidence of other witnesses was tendered by the party with knowledge of its falsity. In such circumstances, it might be contended that the verdict or judgment had been procured by the fraud of that party; and, if so, an action would lie to set it aside.[60]

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54 See *McHarg v Woods Radio Pty Ltd* [1948] VLR 496.

55 (1940) 64 CLR 130.

56 Id at 147-148.

57 [1948] VLR 496

58 Id at 499.

59 [1937] NZLR 708

60 Id at 717 per Myers CJ.

If one of the parties obtains a judgment either by her own perjury or by inducing one or more of her witnesses to commit perjury, there could be no doubt that she obtains the judgment by fraud, and that judgment could be set aside upon fraud being proved.[61]

Thus an applicant who proves the defendant was privy to knowledge that the evidence presented was perjured, (or on the equitable basis of fraud, *should* have been privy to such knowledge) and also proves it is reasonably probable that the action to set aside judgment will succeed, will have fulfilled her or his onus.[62]

Perjury is not, however, the sole example of fraud that may cause a judgment to be set aside. For example, non-compliance with the rules of court may, in some circumstances, constitute equitable fraud. The Full High Court of Australia in *Commonwealth Bank of Australia v Quade*[63] observed that, although a case of failure by a party to comply with an order for discovery could be distinguished from one where the verdict had been procured by fraud or perjury, it could conceivably come within the category of malpractice or fraud, especially where the failure was deliberate or remained unexplained.

V Conclusion

The power to set aside judgments on the ground of fraud remains a useful means of protecting the integrity of the judicial process by rectifying miscarriages of justice. On the one hand, the courts do not wish to herald 'open season' regarding the challenging of judgments. To this end, there must exist effective safeguards against abuses of process, the substance of which have been discussed. On the other hand, where fraud has infected a judgment so that to let it stand would unjustly enrich a person guilty of fraudulent conduct and amount to a miscarriage of justice, the courts have entertained applications to set the judgment aside. The characterisation of equitable fraud as the relevant fraud serves to reflect this policy objective. Moreover, the achievement of this precarious balance is a suitable subject for equity, in that equity 'will use its powers in the manner most appropriate to suit the particular circumstances.'[64] Equity can mould its order to fit the circumstances of the case, taking into account the conduct of the defendant and the applicant, and also considering the public interest.

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61 Id at 729 per Ostler J.

62 *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534 at 539 per Kirby P.

63 (1991) 102 ALR 487 at 489.

64 *Hillman v Hillman* [1977] 2 NSWLR 739 at 747 per Helsham CJ in Eq.