SUPREME COURT OF QUEENSLAND

CITATION:	*AKS Investments Pty Ltd v Gazal* [2015] QSC 247
PARTIES:	**AKS INVESTMENTS PTY LTD ACN 078 821 173, AS TRUSTEE FOR THE SMITH FAMILY TRUST** (plaintiff) **v** **ADAM GAZAL** (defendant)
FILE NO:	11443 of 2014
DIVISION:	Trial Division
PROCEEDING:	Civil Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	28 August 2015
DELIVERED AT:	Brisbane
HEARING DATE:	19 March 2015
JUDGE:	Daubney J
ORDERS:	**1. The plaintiff's application for a stay of the proceeding is dismissed.** **2. There be judgment for the defendant against the plaintiff.** **3. The plaintiff shall pay the defendant's costs (including the costs of the application for a stay and the costs of the summary judgment application) to be assessed on the standard basis.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – where the defendant in the proceeding applies for summary judgment – where the plaintiff in the proceeding seeks to set aside an earlier judgment – where the plaintiff seeks to set aside an earlier judgment on the grounds that it was obtained by fraud – where the defendant is alleged to have knowingly given untruthful evidence – whether pursuant to rule 293 of the *Uniform Civil Procedure Rules 1999* (Qld) there be judgment against the plaintiff – whether the plaintiff has a real prospect of succeeding in the claim to set aside the primary judgment

– whether, in the alternative, proceedings in Supreme Court number 11443 of 2014 be permanently stayed.

CRIMINAL LAW – GENERAL MATTERS – OTHER GENERAL MATTERS – STAY OF CIVIL PROCEEDINGS PENDING CRIMINAL PROCEEDINGS – where the plaintiff seeks an order for a temporary stay of proceedings – where the sole director of the plaintiff company has criminal proceedings pending connected with engagement of the defendant after the result of the earlier judgment – whether pursuant to rules 367 and 658 of the *Uniform Civil Procedure Rules 1999* (Qld) this procedure be stayed until the conclusion of pending criminal proceedings.

Uniform Civil Procedure Rules 1999 (Qld), r 293

Agar & Others v Hyde (2000) 201 CLR 552

AKS Investments Pty Ltd & Anor v National Australia Bank & Anor [2012] QSC 223

AKS Investments Pty Ltd & Anor v National Australia Bank & Anor (No 2) [2012] QSC 282

Cabassi v Vila (1940) 64 CLR 130

Coldham-Fussell & Others v Commissioner of Taxation (2011) 82 ACSR 439

Hip Foong Hong v H Neotia & Co [1918] AC 888

Johns v Cosgrove [2002] 1 Qd R 57

McHarg v Woods Radio Pty Ltd [1948] VLR 496

Meek v Fleming [1961] 2 QB 366

Monroe Schneider Associates Inc & Anor v No 1 Raberem Pty Ltd & Ors (No 2) (1992) 37 FCR 234

Tombling v Universal Bulb Co Ltd [1951] WN 247

Wentworth v Rogers (No 5) (1986) 6 NSWLR 534

COUNSEL: W Sofronoff QC and P Tucker for the plaintiff
L Kelly QC and A Pomerenke QC for the defendant

SOLICITORS: Merthyr Law for the plaintiff
Minter Ellison for the defendant

[1] In proceeding BS8242 of 2009, the present plaintiff ("AKS"), as Trustee for the Smith Family Trust, sued the National Australia Bank ("NAB") and the present defendant ("Mr Gazal"), who is an employee of NAB, asserting that certain representations had

been made to AKS in connection with the proposed granting of a $20 million credit facility to AKS and that these representations founded actions for breach of contract, negligence, misleading and deceptive conduct and unconscionable conduct.

[2] By a judgment delivered on 21 August 2012 ("the primary judgment"), Applegarth J dismissed that action.[1] Applegarth J subsequently delivered a separate judgment with respect to the costs of that action.[2]

[3] In September and October 2012, AKS filed notices of appeal against those two judgments. In November 2012, the parties filed memoranda evidencing their agreement that the appeals be dismissed by consent with no order for costs of the appeals.

[4] AKS commenced the present proceeding against Mr Gazal by a claim and statement of claim filed on 27 November 2014. AKS claims for "an order setting aside the judgment of Applegarth J of 21 August 2012 dismissing the [AKS] claim against [Mr Gazal]", and for indemnity costs of the proceeding.

[5] The statement of claim pleads certain matters of evidence given at the 2012 trial by Mr Gazal and by another witness, Mr Clarke:

> "4. At the said trial, the defendant gave evidence that:
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> (a) in a conversation on 10 August 2007, he had informed Smith that the Bank required certain conditions to be attached to the grant of a credit facility of $20 million in favour of the plaintiff;
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> (b) Clarke was within earshot and heard the defendant make that statement to Smith;
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> (c) he had not first informed Smith about the Bank's said requirement on 23 October 2007;
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> (d) he had informed Smith in a telephone call on about 22 November 2007 that on 21 November 2007 the Bank had approved a margin loan in favour of the plaintiff but required the plaintiff to provide security over the land at 33 to 41 Hedges Avenue in order for the Bank to continue to provide the plaintiff with a $10 million credit facility;
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> (e) he did not say to Smith, in a telephone conversation on or about 10 December 2007, words to the effect that once the said securities then held by Westpac Bank had been transferred he could then put the $20 million facility into place;

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1 *AKS Investments Pty Ltd & Anor v National Australia Bank & Anor* [2012] QSC 223.
2 *AKS Investments Pty Ltd & Anor v National Australia Bank & Anor (No 2)* [2012] QSC 282.

(f) he did not take note of the words 'the $20 m facility you have set up for me' contained in an email dated 14 January 2008;

(g) on 12 March 2008 he had not said to Smith words to the effect that he, the defendant, had taken a risk and transferred the Westpac Facility when he knew that the Bank's credit department would not approve a $20 million facility without additional conditions;

(h) in response to the defendant's said statement, on 12 March 2008 Smith had not said that he did not think less of the defendant as a person, that it had cost Smith a lot of money and that the only thing that Smith would request of the defendant was that he should tell the truth in relation to what had happened.

5. At the said trial, Clarke gave evidence that:

(a) he had heard the defendant make the statement pleaded in paragraph 4(a) herein;

(b) on 12 March 2008 the defendant had not said to Smith words to the effect that he, the defendant, had taken a risk and transferred the Westpac Facility when he knew that the Bank's credit department would not approve a $20 million facility without additional conditions;

(c) in response to the defendant's said statement, on 12 March 2008 Smith had not said that it had cost Smith a lot of money and that the only thing that Smith would request of the defendant was that he should tell the truth in relation to what had happened."

[6] The statement of claim then asserts:

"8. The said evidence of the defendant and of Clarke was, to the knowledge of the defendant at the time he and Clarke gave that evidence, false.

Particulars of knowledge

1. On 26 January 2013, in a conversation between the defendant, Smith and one Michael Featherstone, at Batam, Indonesia, the defendant admitted to them that:

(b) The conversation alleged in paragraph 4(a) herein had never taken place;

(c) He had first informed Smith about the said conditions on 23 October 2007 by email;

(d) He had never made the statement pleaded in paragraph 4(d) herein;

(e) In fact, although the Bank had required the conditions to be attached to the offer of the said facility, the defendant believed that Smith would not accept them and, as a consequence, the defendant did not inform Smith about them but attempted to 'negotiate' their removal with others within the Bank;

(f) He had informed Smith that it was necessary to transfer the securities held by Westpac Bank (to secure a facility granted by that bank) to the Bank in order to get the $20 million facility set up and which had already been approved;

(g) On about 6 December, 2007, he told Smith words to the effect that all that remained to be done (to obtain the $20 million facility) was to have Smith's wife come to the Bank and sign the necessary documents;

(h) He had led Smith to believe that once Mrs Smith had signed the documents the $20 million facility would be available and that there were no conditions attached to the facility (of the kind referred to in evidence) other than signing formal documents and arranging for the securities held by Westpac Bank to be transferred to the Bank;

(i) In fact, when the defendant had caused the Bank to pay out the Westpac Bank facility and obtain a transfer of the said securities, the $20 million facility had not been finalised by him;

(j) By reason of the terms of the email which Smith sent to the defendant on 14 January 2008 requesting the release as security of land at 11 Apollo Avenue, the defendant knew that Smith believed that the $20 million facility had been approved subject to signing formal documents;

(k) On 18 January 2008, the defendant had informed his supervisor that Smith believed that the plaintiff had the benefit of a $20 million facility (subject to signing formal documents);

(l) On 12 March 2008 Smith had said words to the defendant to the effect that he, the defendant, had taken a risk and transferred the Westpac Facility when he knew that the Bank's credit department would not approve a $20 million facility without additional conditions and the defendant had agreed that that was so;

(m) On 12 March 2008, in response to the defendant's said agreement with Smith's statement, Smith did say words to the effect that he did not think less of the first defendant as a person, that it had cost Smith a lot of money and that the only thing that Smith would request of the defendant was that he should tell the truth in relation to what had happened.

2. That the defendant knew that Clarke's evidence was false is to be inferred from the fact that the defendant knew the true state of affairs.

9. The plaintiff first learned of the falsity of the defendant's and Clarke's evidence on 26 January 2013 during the conversation pleaded in paragraph 8 herein.

10. In the premises:

(a) the judgment of the Honourable Justice Applegarth dismissing the plaintiff's proceeding against the defendant was procured by the defendant's fraud;

(b) it is inequitable that the defendant should have the benefit of the judgment."

[7] In the course of argument, counsel for AKS informed me that paragraph 9 of the statement of claim would be amended to allege that AKS first obtained evidence of the

falsity of the impugned evidence on 26 January 2013 rather than pleading, as it presently does, that AKS first learned of the falsity on that date.[3]

[8] In January 2015, a defence was filed on behalf of Mr Gazal. That defence relevantly pleads that the statements and admissions by Mr Gazal, referred to in the particulars to paragraph 8 of the statement of claim, were made against his will and under circumstances of duress, that Mr Gazal maintains that the evidence he gave at the 2012 trial was true, and he "has not made any free and voluntary statement to the contrary".[4] The defence pleads a set of circumstances involving, amongst others, Mr Anthony Smith ("Mr Smith"), the managing director of AKS, by which Mr Gazal was subjected to verbal and physical threats and harassment and was "held against his will and proceeded under duress to make statements at the direction of Featherstone and Smith".[5]

[9] There are now two applications to be determined:

(a) Mr Gazal has applied, pursuant to r 293 of the *Uniform Civil Procedure Rules* 1999, for summary judgment against AKS;

(b) AKS has applied for a stay of the proceeding until the conclusion of the trial, or other disposition, of certain criminal charges against Mr Smith. Those charges, which include allegations of Mr Smith attempting to pervert the course of justice and retaliating against a witness, arise out of the same facts which are alleged in Mr Gazal's defence as the circumstances under which he was held against his will and made statements under duress.

[10] It is appropriate to deal first with the application for summary judgment. Before doing so, however, I will say a little more about the primary judgment.

The primary judgment

[11] Applegarth J pithily described the case before him in the opening paragraph of the primary judgment:

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3 Transcript 1-22.
4 Defence, para 10(b).
5 Defence, para 10(a)(v)G.

> "[1] This is a case about credit in more than one sense. The substantial issues are whether the defendants represented in 2007 that the first defendant ('NAB') would provide a proposed $20M credit facility to the first plaintiff ('AKS'), Mr Anthony Kevin Smith and Ms Simone Smith, and whether on and after 27 December 2007 represented that NAB had established the proposed $20M credit facility. The issue of whether or not these representations were made turns largely on the credit of witnesses."

[12] His Honour noted that the parties before him had accepted that determination of the various causes of action which AKS had pleaded against NAB and Mr Gazal turned on resolution of the same factual issues, and said:[6]

> "These issues are whether the pleaded representations were made and induced AKS to believe and act on the footing that it had available on and from 27 December 2007 a $20M credit facility that did not contain any additional conditions or restrictions on the purposes for which the additional $10M could be applied." (citation omitted).

[13] His Honour then summarised his approach to the documentary and oral evidence before him, noting that his finding on disputed questions of fact depended "in large measure, upon my assessment of the credibility and reliability of the oral evidence given by witnesses".[7] He then summarised the eight disputed questions of fact which required determination. Importantly, his Honour then identified the following further issues:

> "[6] If AKS establishes its case that the alleged representations were made and induced it to believe and act on the footing that it had available a $20M facility on and from 27 December 2007,[8] then additional issues arise as to whether, operating under the inducement of the representations, AKS purchased an additional $2M worth of MFS shares on 10 and 11 January 2008 when, had the representations not been made, it would not have purchased them and would have sold down its MFS shareholding by $10M. Within this causation/inducement issue is a subsidiary factual issue of whether Mr Smith would have issued instructions to his stockbroker to sell $10M worth of MFS shares at any price on 14 January 2008, and whether $10M worth of MFS shares could have been sold on or before Friday, 18 January 2008, which was the last day that MFS shares traded."

[14] It is unnecessary for me to set out the extensive reasons for judgment in fine detail. It is sufficient to note that his Honour comprehensively rejected the credibility of Mr Smith as a witness, noting amongst other things that, in his dealings with the bank, Mr Smith was "prepared to resort to untruths to get his way and to secure an advantage".[9] In

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6 At [4].
7 At [5].
8 Being the date upon which the Westpac mortgages which secured a $10M facility from Westpac were transferred to NAB.
9 At [126].

contrast, Applegarth J's assessment of both Mr Gazal and Mr Clarke was that they were impressive and reliable witnesses. In determining the numerous factual contests concerning dealings between Mr Smith and Mr Gazal, his Honour largely accepted Mr Gazal's evidence, and accepted Mr Clarke's corroboration.

[15] Applegarth J traversed the competing versions concerning the alleged representations in considerable detail, preferring, as I have said, Mr Gazal's version over Mr Smith's. He summarised his findings on these matters as follows:

> "[87] The findings of fact that I have made, including my findings about:
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> (a) what was said by Mr Gazal to Mr Smith on or about 10 August 2007 regarding the conditions that had been imposed on the proposed $20M facility;
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> (b) subsequent communications about building conditions, and what was communicated between Mr Gazal and Mr Smith on 23 to 25 October 2007;
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> (c) what was said by Mr Gazal to Mr Smith on or about 21 November 2007 to the effect that the $20M facility approval had been reduced to $10M; and
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> (d) the fact that Mr Gazal did not say the words attributed to him by Mr Smith on 10 December 2007,
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> lead me to reject AKS's case that by 10 December 2007 Mr Gazal, on behalf of NAB, represented, expressly or impliedly, that NAB would provide the proposed $20M facility to AKS, Mr Smith and Mrs Smith after the Westpac $10M facility had been closed. This '$20M Facility Representation' was not made. Mr Smith did not understand that a $20M facility would be provided once the Westpac securities were transferred to NAB. On the contrary, he understood, because Mr Gazal had told him on or about 21 November 2007, that the $20M facility approval had been reduced to $10M. Mr Smith also understood that there had been an impasse in establishing a $20M facility due to building conditions imposed by NAB's credit department. He had no reason to believe that this impasse had been overcome. He also understood that the transfer of the Westpac mortgages was being attended to because this was a requirement of NAB's credit department in respect of security for the Portfolio Facility that had been reduced from $20M to $10M. The fact that the bank's credit department was unhappy with the security position for the $10M facility was reiterated to Mr Smith by Mr Clarke in early December 2007. Mr Smith had agreed with Mr Gazal that they would revisit the $20M facility approval once the security was in order over all five lots. The $20M Facility Representation was not conveyed by Mr Gazal or anyone else on behalf of NAB to Mr Smith by 10 December 2007, or on any other relevant date. The $20M Facility Representation was not made and, accordingly, Mr Smith and AKS did not rely upon it in permitting the settlement with Westpac to proceed.
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> [88] It follows that because the $20M Facility Representation was not made the $20M Facility Establishment Representation also was not made. In settling

> matters with Westpac on 27 December 2007, employees of NAB did not represent that NAB had established the proposed $20M facility for AKS, Mr Smith and Mrs Smith. The settlement with Westpac occurred, as Mr Smith was told, in order to correct NAB's security position for the $10M facility that was then in place."

[16] Applegarth J also dealt with evidence as to dealings between the parties during and after January 2008, including the incident described as the "Ulliana letter contrivance" to which I will refer later.

[17] Further, his Honour undertook a detailed assessment of the probability or otherwise of the AKS case, finding:[10]

> "Apart from largely resting on the evidence of Mr Smith, whose evidence on disputed questions of fact I found to be not credible, AKS's case that Mr Smith was induced to believe and act on the footing that AKS had a $20M facility available to it on and from 27 December 2007 is improbable."

[18] Applegarth J also analysed the documentary evidence, and concluded that the alleged representations were not reflected in the documents.

[19] His Honour set out express findings of fact in relation to the contested issues and held that those findings of fact, including the conclusion that the pleaded representations were not made, effectively disposed of AKS's claim.[11] On the basis of those findings, his Honour briefly stated his reasons why each pleaded cause of action failed.

[20] Applegarth J then turned to the questions of causation and loss. It is necessary to quote this part of the primary judgment at length:

> "[165] The first substantial issue identified at the start of these reasons has been resolved against AKS. The defendants did not induce AKS to believe and act on the footing that it had available to it a $20M facility on and from 27 December 2007 that was not subject to conditions about the manner in which, or the purposes for which, the additional $10M could be drawn down. AKS did not purchase an additional $2M worth of MFS shares on 10 and 11 January 2008 in reliance upon the alleged representations and believing that it had an additional $10M that could be drawn upon for whatever purpose it may choose.
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> [166] AKS retained the ownership of the shares that it held as at 27 December 2007, and purchased an additional $2M worth of MFS shares on 10 and 11 January 2008 because of Mr Smith's judgment about the MFS shares and their prospects. He knew at the time that a $20M facility had yet to

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[10] At [140].
[11] At [152].

be established. He did not perceive that he had an immediate need for an additional $10M facility. In November and December 2007, and in January 2008, he continued to believe that MFS shares were undervalued. He made the strategic decision earlier noted to sell half of his shareholding in early December 2007. He went on holidays in December 2007 content with the strategy that he had adopted, having received the proceeds of sale of the MFS shares that he sold and with a surplus of funds. There was no pressure upon him to immediately increase the NAB facility to $20M. He expected that such a facility would be established and, on his own evidence, his expectations in that regard would have been met if a $20M facility had been established when he returned from holidays on 14 January 2011. He purchased the additional shares on 10 and 11 January 2008 when he knew that a $20M facility had yet to be established. He saw the acquisition of the additional shares as a significant 'buying opportunity', and this was because of his confidence that the share price would recover to his target of $6 per share. He did so knowing that AKS had a $10M facility available to it on and from 27 December 2007.

[167] It is strictly unnecessary to answer the question of what AKS would have done if the defendants had informed it that it had a $10M facility available to it on and from 27 December 2007. AKS knew this to be the fact. If, however, for argument's sake, it did not know this and the defendants had informed it of this fact then I am not persuaded that it would have acted any differently to the manner in which it acted in January 2008. I consider it likely that Mr Smith would still have purchased the additional shares on 10 and 11 January 2008 from the surplus funds that AKS had at its disposal, knowing that it had an additional $10M line of credit available to it. It would not have sold down the MFS shares that it had. It would have retained them, expecting them to increase in value and to provide substantial income by way of dividend.

[168] In summary, AKS has not established its case on causation.

[169] I am certainly not persuaded that Mr Smith, upon being told on 14 January 2008 that the $20M facility had not been established and that AKS only had a $10M facility would have instructed his broker to sell down another $10M worth of shares. It is most unlikely that Mr Smith would have issued an instruction that day to sell them down at any price. As he told the *Gold Coast Bulletin* a few days later, he believed that MFS shares were undervalued. It is unnecessary to address the detailed evidence given in relation to the issue of whether AKS could have sold $10M worth of MFS shares prior to 18 January 2008 if instructions had been given to sell $10M worth of shares because Mr Smith would not have given instructions on 14 January to sell another $10M worth of shares at any price. Given his perception of the share price and the $10M facility from NAB that was available to him, it did not make any sense to do so. He believed that once a half yearly announcement was made the shares would recover their price and that the $6 price that he was hoping for would be achieved.

[170] Shortly stated, the expert evidence of Mr Graves is that to sell $10M worth of MFS shares:

(a) the last possible moment a sell order could have been instigated before 18 January would have been prior to the commencement of trading on 15 January 2008; and

(b) the order would have been for 'very aggressive' selling, in effect to sell at any price.

[171] In other words, even on AKS's case, there was only a narrow time period within which Mr Smith would have had the opportunity to give instructions to sell the MFS shares at any price upon being told on the afternoon of 14 January 2008 that AKS only had a $10M facility available to it. I find that at no material time would Mr Smith have issued instructions to quickly sell $10M worth of MFS shares. His optimism about their likely increase in value makes it highly improbable that he would have given such an order on 14 or 15 January 2008, or at any other time.

[172] Another issue confronts AKS's case on issues of loss and damage. On its case, if it had not believed that it had a $20M facility available to it then it would have sold $10M worth of MFS shares. The $20M facility was characterised as a kind of insurance against the possibility of adverse margin calls. However, as the defendants submit, a problem with this argument is that if the MFS shares had crashed (as they did) and if Mr Smith was seriously counting on a $20M facility to protect him from margin loans (which he was not), then what would have happened was more or less what in fact happened. The MFS shares became valueless and the margin loans would have used up the $20M facility. Incidentally, the margin loans were secured only against the MFS shares, not the properties owned by Mrs Smith against which the $10M facility and any $20M facility were secured. But if a $20M facility had been available sooner than the $20M facility that was established on or about 24 January 2008, then NAB would have required the facility to be repaid. The course of events would have been much the same as they transpired. Mrs Smith would have been forced to sell the properties on Hedges Avenue which secured the facility. This is what happened. This was not what Mr Smith or Mrs Smith contemplated when the margin loans were taken out, but it would have occurred had a $20M facility been put in place sooner.

[172] As the defendants point out, in this sense, the security of the $20M facility to pay out margin calls was a 'false security because it was not cash owned by Mr Smith or AKS. It would be paying out one borrowing by making another borrowing which in turn had to be paid out.'

[173] I conclude that AKS has failed to establish its case on causation and loss. Had it established liability against the defendants it would have failed to establish that the defendants caused it to suffer the loss and damage alleged by it."

[21] Applegarth J summarised his findings, including his adverse conclusions with respect to the credibility of Mr Smith, in the conclusion to the primary judgment, and ordered that the claim by AKS be dismissed.

Application for summary judgment by the defendant

[22] Mr Gazal accepts, for the purposes only of the summary judgment application, that I should proceed on the basis that AKS will make good the allegations pleaded in the statement of claim. Mr Gazal contends, however, that even if those allegations are accepted, the present case to set aside the primary judgment on the basis of fraud has no realistic prospect of success and there should be summary judgment for Mr Gazal.

[23] Counsel for Mr Gazal pointed to numerous matters within the primary judgment in support of an argument that the failure of the AKS case was not merely the consequence of his Honour's findings on credibility as between Mr Smith, on the one hand, and Mr Gazal and Mr Clarke on the other, but failed for other independent reasons:

(a) The AKS case failed on causation – I have already set out his Honour's findings on that issue;

(b) Independently of Mr Gazal's evidence, and on the basis of Mr Smith's own evidence, Applegarth J found that Mr Smith knew that he would not have a $20 million facility available until the appropriate loan documentation had been signed and he knew this had not happened at any material time.[12] This finding, which had nothing to do with Mr Gazal's impugned evidence, was completely destructive of the AKS case;

(c) In any event, Applegarth J found that Mr Smith had engaged in dishonest conduct against NAB. This was the "Ulliana letter contrivance". This incident occurred in January 2008 at a time when, as Applegarth J found, Mr Smith knew that the extent of his existing NAB facility was $10 million, and he also knew that whilst he had been advised that there had been approval for a $20 million facility, this facility was not in place, that to establish it he would be required to sign formal documentation, and that any approval would be likely to be subject to building and other conditions. Mr Gazal was away on leave at the time. According to Applegarth J, "Mr Smith adopted a brazen approach to obtaining his way".[13] Mr Smith procured that his builder, Mr Ulliana, sign a letter which falsely represented that agreement had been reached for $5.5 million to be deposited into a bank

[12] See, for example, primary judgment at [151].
[13] At [102].

account controlled by Mr Smith's sister, and this deposit was to be held in trust for payments and deposits to cover construction commitments for a property which Mr Ulliana was to build for Mr Smith.

As his Honour found, this letter was completely false, and Mr Smith's true intention in procuring this letter was to gain access to funds "for whatever he pleased",[14] including the payment of margin calls in respect of shares held by AKS in a public company. Applegarth J said:

> "[104] Mr Smith's preparedness to procure a letter which falsely stated the facts, including the purpose to which the money would be put, was simply dishonest. It undermines his credibility. It also undermines a foundation of AKS's case. If Mr Smith honestly believed that a $20M facility was in place, subject to the same terms and conditions as the existing $10M facility, then he would not have needed to equip himself with the Ulliana letter in order to obtain the requested $5.5M.
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> [105] The letter was framed so as to assure the bank that the requested funds would be set aside for the construction of the house. This indicates that Mr Smith was aware of the conditions upon which the earlier $20M facility approval had been granted and the fact that the bank would not be prepared to advance further funds without some assurance that they would be used for the purpose of constructing the mansion. Mr Smith would not needed to have concocted the Ulliana letter if he had been told on 10 December 2007 that the $20M facility had been approved on the same terms and conditions as the existing facility. Mr Smith's resort to the Ulliana letter shows that he knew at all material times that he did not have such a $20M facility, and that the bank's preparedness to increase the existing $10M facility to $20M would depend upon the use of the funds to construct the mansion."

Later in the judgment, Applegarth J described Mr Smith's conduct as equipping himself "…with the letter in order to mislead the bank as to the use to which the funds would be put and to falsely assure them that the funds were needed to honour an agreement which had been reached with Mr Ulliana to deposit $5.5M into a bank account to be held on trust".[15]

(d) Also independent of the impugned evidence of Mr Gazal was evidence by another witness, Mr Atkinson, which was destructive of the AKS case. After describing the circumstances of the Ulliana letter, Applegarth J said:

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[14] At [103].
[15] At [109].

> "[106] Having equipped himself with the letter on Tuesday 22 January 2008 Mr Smith telephoned Mr Clarke and advised that he was on his way into the bank and wanted a bank cheque for $5.5M. He explained that the $5.5M was to cover the remaining construction of a house. Mr Clarke discussed the matter with Mr Atkinson and Mr Scott, and it was decided that Mr Atkinson and Mr Scott would deal with Mr Smith when he arrived. That occurred. Mr Atkinson explained to Mr Smith that he would not be getting a cheque for $5.5M for the builder. Relevantly, Mr Smith did not complain about this by alleging that he had an agreement for a $20M facility that permitted the withdrawal to take place. Discussions ensued and Mr Atkinson agreed to provide what was described as a letter of comfort. Mr Atkinson also obtained the approval of credit to the release of 11 Apollo Avenue as security. The discussion between Mr Atkinson and Mr Smith ended amicably. Mr Atkinson had an interest in MFS because of his own investment in that company. They discussed events leading up to the MFS crash. Mr Atkinson clearly recalls that Mr Smith said that he (Mr Smith) had been an idiot, and had held on to 'the MFS situation for too long'. He also said to Mr Atkinson that he should have had the $20M facility, to which Mr Atkinson responded 'well the QS conditions weren't met'. Mr Smith did not contest that and the discussion on that topic 'just disappeared'.
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> [107] During the conversation that day Mr Atkinson confirmed to Mr Smith that he had only ever had a $10M facility. Mr Smith said that the only reason he transferred his Westpac facility was to create one $20M line of credit. This was not true. The Westpac mortgages were transferred at NAB's request to provide proper security for the $10M facility following what Mr Smith had described on the Golf Day as the destruction of the bank's security when the existing houses were demolished. Mr Smith knew this because he approved this when he spoke to Mr Gazal on 21 November 2007 and again when he spoke to Mr Clarke in early December. On 22 January 2008 Mr Smith did not assert to Mr Atkinson that he had a $20M facility, that he had believed this to be the case or contradict Mr Atkinson, who accurately stated the fact the $20M facility had not come into place because the quantity surveyor conditions were not met."

(e) The claim in the present proceeding goes no further than asserting, on the basis of Mr Gazal's alleged confessions, that Mr Gazal himself gave untruthful evidence before Applegarth J. There is no allegation of collusion between Mr Gazal and Mr Clarke, nor any explanation for why Mr Clarke would give what is now described as false evidence before Applegarth J.

(f) The allegation of falsity of Mr Clarke's evidence is based only on Mr Gazal's alleged confessions. In any event, there was further evidence at the trial from Mr Clarke, which had nothing to do with Mr Gazal, concerning dealings directly between Mr Clarke and Mr Smith. One of the express bases for Applegarth J

rejecting the case that representations had been made relied on the evidence of dealings between Mr Smith and Mr Clarke. Applegarth J observed:

> "[Mr Smith] also understood that the transfer of the Westpac mortgages was being attended to because this was a requirement of NAB's credit department in respect of security for the Portfolio Facility that had been reduced from $20M to $10M. The fact that the bank's credit department was unhappy with the security position for the $10M facility was reiterated to Mr Smith by Mr Clarke in early December 2007."[16]

(g) Even if Mr Gazal gave false evidence in respect of the matters particularised in the current AKS statement of claim, it does not automatically follow that Mr Smith is converted into a reliable or credible witness. Applegarth J found several instances which had nothing to do with Mr Gazal's impugned evidence but which were demonstrative of Mr Smith's dishonesty in advancing the claims of AKS:

(i) The Ulliana letter contrivance;

(ii) The original prosecution in the primary proceeding of a purported claim by AKS, as trustee of the Georgie Smith Trust, which Applegarth J described as "extraordinary" and one which "…probably was intended by Mr Smith and AKS to exert pressure upon the defendants to settle".[17] The claim was, as his Honour said, "nonsense", but was persisted with for more than a year before being discontinued. Applegarth J said:

> "[123] The preparedness of Mr Smith to have AKS institute and persist in such an unmeritorious and exaggerated claim is to his discredit.
>
> [124] The bank called his bluff and the second plaintiff's claim was discontinued. However, Mr Smith's preparedness to advance such a claim suggests a preparedness to make claims without a proper basis. I am persuaded that the claims in which he has persisted are of such a kind."

[24] Further, and in any event, it was argued for Mr Gazal that, in principle, even if Mr Gazal made the alleged confessions, this is an insufficient basis at law to have the judgment of Applegarth J set aside. It was argued, by reference to authority, that:

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[16] At [87].
[17] At [121].

(a) the mere fact that Mr Gazal perjured himself is insufficient to enable the setting aside of the judgment;

(b) the present case is not one of the exceptional sorts of cases which have been recognised as capable of leading to the setting aside of a judgment;

(c) regard must be had to the interests of finality;

(d) AKS availed itself of the right to appeal and then discontinued;

(e) even if there was fraud by Mr Gazal by the giving of false evidence, his fraud was not such, and was not of such materiality, as would have probably affected the result.

[25] For AKS, on the other hand, it was contended that:

(a) there is ample authority for the proposition that a judgment obtained by perjury can be set aside in an action for that purpose;

(b) the appeal was dismissed by consent before AKS obtained evidence of Mr Gazal's alleged confessions. Had this evidence become available while the appeal was on foot, AKS would have applied for a new trial on the grounds of fresh evidence;

(c) determination of important factual issues at trial turned directly on the evidence which is impugned by Mr Gazal's alleged confessions. For example:

(i) An important issue at trial was whether Mr Gazal informed Mr Smith of the conditions being imposed by the credit department in the course of a telephone call on 10 August 2007. Mr Gazal said at trial that he did; Mr Smith denied this at trial.

(ii) Another important issue was whether Mr Gazal informed Mr Smith of the conditions attaching to approval of a margin loan. Mr Smith's evidence at trial was that he was not told of this by Mr Gazal; Mr Gazal's evidence was to the contrary;

(iii) Yet another important issue was whether Mr Gazal had told Mr Smith on about 10 December 2007 that Mr Gazal was in a position to put the $20 million credit facility in place without conditions (which was the position which had been sought by AKS since May 2007). Mr Smith's evidence at trial was that Mr Gazal said this; Mr Gazal's evidence was to the contrary.

[26] Counsel for AKS provided me with a careful and detailed exegesis, by reference to the impugned items of Mr Gazal's evidence, of the competing versions given at trial, and also summarised the findings made by Applegarth J in consequence of the acceptance by his Honour of Mr Gazal's versions of those events. It was submitted:[18]

> "45. The trial judge noted from the outset that credit was a critical issue.[19] The first credit issue decided adverse to AKS concerned the alleged conversation of 10 August 2007. The finding on that issue became a springboard for subsequent findings,[20] which in turn supported other findings.[21]
>
> 46. It cannot be said that the false evidence of Gazal and Clarke was not material to the Judgment, or that there was not the real possibility of a different outcome at trial.
>
> 47. As to the contention that there were matters decided by the trial judge that were uninfluenced by the perjury and which, by themselves, were sufficient to found the Judgment, again, when a judgment has been procured by fraud the whole of the judgment is impugned.[22]
>
> 48. Even though there may exist a residual discretion not to set aside such a judgment, that is a matter for trial. It is not possible to assume that causative issues would be decided in the same manner if the fraud had been exposed, even if those issues are apparently separated from the relevant fraud.[23]"

[27] In relation to Applegarth J's adverse findings concerning the Ulliana letter, the finding that Mr Smith knew that until formal documentation had been executed the $20 million facility would not be established, and the finding that AKS would not have sold down further MFS shares if Mr Gazal had informed Mr Smith that the limit of the credit facility was $10 million, it was contended that these findings need to be viewed in the light of Mr Gazal's alleged confessions of the particular items of false evidence, of evidence that Mr Smith had given referring in communications with Mr Gazal to the

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18 Defendant's written submissions.
19 Judgment, paras [1], [2], [5].
20 See Judgment, paras [46], [53].
21 See Judgment, para [107].
22 *Hong v. H Neotia & Company* [1918] AC 888 at 894; *Cabassi v. Vila* (1940) 64 CLR 130 at 147 per Williams J.
23 See *Johns v. Cosgrove* [2002] 1 Qd R 57 at 92 – 94 per Thomas JA. See also *Pacific Dawn v. Mitchell* [2003] QCA 526, and subsequently [2010] QSC 243 and [2011] QCA 098.

$20 million facility "that you [Gazal] have set up for me [Smith]",[24] and the fact that when margin calls were made, Mr Gazal did not tell Mr Smith that the $20 million facility had not been set up but suggested that Mr Smith attend at the bank the following week to "have a chat" to Mr Gazal's boss. Mr Smith's evidence at trial was that he was concerned by this remark because Mr Gazal had never previously made such a suggestion, and that he then sought to draw down the $20 million facility in case NAB sought to collapse it.

[28] It was argued by reference to the evidence given at trial that Mr Smith's motivations for the Ulliana letter were, in fact, different from those found by the trial judge, but his stated motives should be accepted in light of Mr Gazal's false evidence. In any event, it was argued that "attempted disentanglement of the trial judge's findings on single issues is fraught with danger".[25]

[29] Similar arguments were advanced in relation to the findings concerning Mr Smith's knowledge that the $20 million would not be established until formal documentation had been executed and that AKS would not have sold down shares to meet margin calls.

[30] AKS's case on the summary judgment application was summarised as follows:

> "56. This is a case in which the plaintiff had appealed against the judgment at trial. The appeal was against credit findings. It was abandoned and dismissed by consent. There can be little doubt, on the authorities, that had the appeal not been dismissed by consent, and had the plaintiff obtained this new evidence, it would have sufficed to grant a new trial on the ground of fresh evidence. Now, the only remedy is to invoke the equitable jurisdiction to set aside the judgement on the ground that it was obtained by fraud. The procedure is different but the basis of the application would have been identical in either case.
>
> 57. It is a matter for the trial judge in this proceeding to determine whether this, or other matters, furnish 'exceptional circumstances'. The contention that distinct findings made by the trial judge can be disentangled from the presumed false evidence, and the copious credit findings predicated them, should be rejected."

Disposition of the summary judgment application

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[24] Defendant's submissions, para 50(d).
[25] Defendant's submissions, para 52.

[31] Under r 293, the Court has a discretion to order summary judgment for a defendant if the Court is satisfied:

(a) the plaintiff has no real prospect of succeeding on all or part of its claim; and

(b) there is no need for a trial.

[32] The rule is expressed in clear and plain language and it "requires no judicial gloss to understand its meaning".[26]

[33] In approaching the application of r 293, I am conscious of the appropriate caution to be adopted on an application for summary judgment, for the reasons identified by Gaudron, McHugh, Gummow and Hayne JJ in *Agar & Others v Hyde* (omitting references):[27]

> "Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes. The test to be applied has been expressed in various ways, but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way."

[34] A proceeding may be brought to set aside a judgment which has been obtained by fraud – "Equity has a broad jurisdiction to unravel fraud and set to rights its consequences".[28] (citation omitted).

[35] A judgment alleged to have been procured by fraud will not, however, be set aside merely for the asking. Reference to the public interest in finality of litigation has seen the development of strict principles which circumscribe the jurisdiction to set aside for fraud. These principles are essayed in numerous authorities, including the judgment of Kirby P (with whom Hope and Samuels JJA agreed) in *Wentworth v Rogers (No 5),*[29] and the judgment of the Full Federal Court in *Monroe Schneider Associates Inc & Anor v No 1 Raberem Pty Ltd & Ors (No 2).*[30]

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[26] *Coldham-Fussell & Others v Commissioner of Taxation* (2011) 82 ACSR 439 per White JA at [98].
[27] (2000) 201 CLR 552 at [57].
[28] *Monroe Schneider Associates Inc & Anor v No 1 Raberem Pty Ltd & Ors (No 2)* (1992) 37 FCR 234 at 240.
[29] (1986) 6 NSWLR 534 at 538-539.
[30] (1992) 37 FCR 234 at 240-242.

[36] The present claim by AKS is founded on one particular species of fraud, namely the alleged perjury of Mr Gazal and Mr Clarke as witnesses at the trial before Applegarth J.

[37] In *Cabassi v Vila,*[31] Williams J said (excluding footnotes):[32]

> "In *Charles Bright & Co. Ltd. v. Sellar* the Court of Appeal pointed out that actions to set aside a judgment on the ground of fraud do not invite the court to re-hear upon the old materials, but 'fresh facts are brought forward, and the litigation may be well regarded as new and not appellate in its nature, because not involving any decision contrary to the previous decision of the High Court.' 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** (See *Flower v. Lloyd*; *Baker v. Wadsworth*, but in view of the allegation in the statement of claim that the evidence did deceive and fraudulently mislead the court I shall assume the plaintiff could establish such special circumstances." (emphasis added)

[38] In *Wentworth v Rogers (No 5)*, Kirby P said:[33]

> "Fourthly, although perjury by the successful party or a witness or witnesses may, if later discovered, warrant the setting aside of a judgment on the ground that it was procured by fraud, and **although there may be exceptional cases where such proof of perjury could suffice, without more, to warrant relief of this kind, the mere allegation, or even the proof, of perjury will not normally be sufficient to attract such drastic and exceptional relief as the setting aside of a judgment**: *Cabassi v Vila* (at 147, 148); *Baker v Wadsworth* (1898) 67 LJQB 301; *Everett v Ribbands* (at 145, 146). The other requirements must be fulfilled. In 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 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. For this reason, and in defence of finality of judgments, a more stringent requirement than alleged perjury alone is required." (emphasis added)

[39] See also *Monroe Schneider Associates Inc v No 1 Raberem Pty Ltd* at 242.

[40] In *Johns v Cosgrove,*[34] Thomas JA, with whom de Jersey CJ and McMurdo P agreed, said:

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31 (1940) 64 CLR 130.
32 At 147-148.
33 At 539.
34 [2002] 1 Qd R 57.

> "[95] The authorities suggest, however, that it will be a rare case where a party who was shown to have been privy to fraud which has misled the court in proceedings resulting in a judgment in that party's favour will be permitted to retain the benefit of the judgment. It was observed in *McCann v. Parsons* that 'there was never any hesitation at common law to use the power to grant a new trial, once it appeared from further evidence that the verdict had been obtained by putting forward a false case'. As all the members of the court acknowledged in *McDonald* above, fraud cases stand on a different footing to other 'fresh evidence' cases." (citations omitted).

[41] In *McHarg v Wood Radio Pty Ltd,*[35] Herring CJ said:[36]

> "Now it is true that Williams J. in *Cabassi v Vila* (*supra*), at pp. 147-8, says, that he has 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. But from what follows in his judgment I understand him to assent to the proposition that the circumstances may be such as to warrant a finding that a fraud, that would justify the setting aside of a judgment, has been perpetrated by the procuring of perjured evidence and nothing more. The facts alleged in the statement of claim in *Luxford v. Reeves*, [1941] V.L.R. 118, would seem to afford an instance in which such a finding was justified. That case came before the Court on motion for judgment in default of defence, so that the Court had to deal with the matter on the basis of the allegations contained in the statement of claim, but it would appear that in that case a manifest fraud had been perpetrated solely by means of perjury. No doubt Courts will subject to the closes scrutiny cases, where perjury solely is relied upon, and will require clear proof that by this means the defendant did perpetrate the fraud complained of. And so, where the perjured evidence relied upon is that of a witness for the defendant, the plaintiff must establish to the Court's satisfaction that the defendant either procured the perjury or was privy to procuring 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 account : *Daniell's Chancery Practice* (8th ed.), vol. II, pp. 1332-3."

[42] *McHarg's* case was an application to strike out a statement of claim as disclosing no reasonable cause of action. Accordingly, the only question was whether the pleading in that case was sufficient to sustain an action to have a judgment set aside for fraud. Herring CJ gave the plaintiff in that case leave to re-plead.

[43] The initial question for me, however, is not whether the pleaded facts are sufficient to found the action brought by AKS. It is, whether, on an assumption that the pleaded facts are accepted, AKS has any real prospect of succeeding in its claim to have the primary judgment set aside. The pleaded facts can be accepted, for present purposes only, as giving rise to a *prima facie* case of perjury at trial by Mr Gazal and Mr Clarke. But, as is clear on the authorities to which I have referred, a mere finding of perjury is

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35 [1948] VLR 496.
36 At 498-499.

not normally sufficient to attract the "drastic and exceptional relief",[37] of setting aside the judgment. Even if AKS had sought, on appeal, to lead fresh evidence about the "confession", and it had been accepted that that the making of the "confession" constituted a fresh fact which, by itself or in combination with previously known facts, would provide a reason for setting aside the judgment, AKS would also necessarily have had the burden of establishing that "the new facts are so evidenced and so material that it is reasonably probable that the action [to set aside the judgment] will succeed".[38]

[44] Determination of an action to set aside a judgment procured by perjury pits against one another the highly desirable principles of finality of litigation and probity of the court process.

[45] An example of that tension is found in *Meek v Fleming*.[39] In that case, a press photographer had brought a civil case against an inspector of police claiming damages for assault and wrongful imprisonment. The photographer's claim was dismissed. The evidence at trial was, on the one hand, the photographer's version of the incident in question and, on the other, the defendant's version, which was supported by other uniformed police officers. The contest at trial was described by Holroyd Pearce LJ as follows:[40]

> "If the plaintiff's story was correct, the defendant arrested him without proper cause, used considerable violence to him which caused physical injury, and without justification locked him up for some hours instead of charging him straight away and releasing him. If the defendant's story was correct, he acted with propriety; he was justified in arresting the plaintiff, and the subsequent violence (which was far less than the plaintiff alleged) was wholly occasioned by the plaintiff's own violence and resistance."

[46] It subsequently emerged that, after the photographer had issued his writ and before the trial, the defendant had been dealt with by the police disciplinary board for being party to an arrangement in respect of a completely unrelated matter to practising a deception on a court of law in the course of his duty as a police officer, and he was demoted to the rank of sergeant. These facts were known to his legal advisers but the decision was made (for which counsel took responsibility) not to make these facts known to the court

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37 To adopt the terminology used by Kirby P in *Wentworth v Rogers (No 5)* at 539.
38 *Wentworth v Rogers (No 5)* at 539.
39 [1961] 2 QB 366.
40 At 374.

in the photographer's trial. In fact, as was found, deliberate steps were taken in the course of the photographer's trial to give the impression that the defendant still had the rank of inspector. Moreover, significant emphasis was placed on the defendant's status and high police rank in submissions by the defendant's counsel at the trial. Holroyd Pearce LJ observed that the "fact that the defendant's advisers were prepared to act as they did showed the great importance which they attached to the facts concealed".[41]

[47] When the facts emerged about the defendant's demotion, and the circumstances thereof, the photographer appealed, seeking an order for a new trial, and moved for leave to adduce fresh evidence.

[48] Holroyd Pearce LJ said (omitting citations):[42]

> "How then does the matter stand now that the truth has come out? This court is rightly loth to order a new trial on the ground of fresh evidence. Interest reipublicae ut sit finis litium. The cases show that this court has given great weight to that maxim. There would be a constant succession of retrials if judgments were to be set aside merely because something fresh that might have been material has come to light. In the case of fresh evidence relating to an issue in the case, the court will not order a new trial unless such evidence would probably have an important influence on the result of the case, though such evidence need not be decisive: *Rex v. Copestake, Ex parte Wilkinson*, per Scrutton L.J., and *Ladd v. Marshall*. Such evidence must also, of course, be apparently credible and such that it could not have been obtained with due diligence. But in the present case the fresh evidence is agreed, and it could not have been found out with due diligence since there was no reason to suspect it. In the present case, therefore, these two latter considerations are not in issue.
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> Where, however, the fresh evidence does not relate directly to an issue, but is merely evidence as to the credibility of an important witness, this court applies a stricter test. It will only allow its admission (if ever) where 'the evidence is of such a nature and the circumstances of the case are such that no reasonable jury could be expected to act upon the evidence of the witness whose character had been called in question" (*per* Tucker L.J. in *Braddock v. Tillotson's Newspapers Ltd.*), or where the court is satisfied that the additional evidence *must* have led a reasonable jury to a different conclusion from that actually arrived at in the case': *per* Cohen L.J. Mr. Neville Faulks claims that the fresh evidence in the present case satisfies even that strict test. But whether that be so, it is not necessary for us to decide.
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> Where the judge and jury have been misled, another principle makes itself felt. Lord Esher M.R. in *Praed v. Graham* said: 'If the court can see that the jury in assessing damages have been guilty of misconduct, or made some gross blunder, or have been misled by the speeches of the counsel, those are undoubtedly sufficient grounds for interfering with the verdict.'"

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41 At 377.
42 At 377-378.

[49] His Lordship then discussed *Tombling v Universal Bulb Co Ltd*,[43] which was a case in which it was found that a failure to reveal that a witness was serving a term of imprisonment for a motoring offence when he gave his evidence was not a failure which revealed a premeditated line of conduct. Holroyd Pearce LJ continued:[44]

> "Nor was conviction for a motoring offence so relevant on credibility as the demotion of a chief inspector (who is a party to the case) for an offence which consisted in deceiving a court of law as to the accurate facts relating to an arrest. There is no authority where the facts have been at all similar to those of the present case, but in my judgment the principles on which we should act are clear.
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> Where a party deliberately misleads the court in a material matter, and that deception has probably tipped the scale in his favour (or even, as I think, where it may reasonably have done so), it would be wrong to allow him to retain the judgment thus unfairly procured. Finis litium is a desirable object, but it must not be sought by so great a sacrifice of justice which is and must remain the supreme object. Moreover, to allow the victor to keep the spoils so unworthily obtained would be an encouragement to such behaviour, and do even greater harm than the multiplication of trials.
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> In every case it must be a question of degree, weighing one principle against the other. In this case it is clear that the judge and jury were misled on an important matter. I appreciate that it is very hard at times for the advocate to see his path clearly between failure in his duty to the court, and failure in his duty to his client. I accept that in the present case the decision to conceal the facts was not made lightly, but after anxious consideration. But in my judgment the duty to the court was here unwarrantably subordinated to the duty to the client. It is no less surprising that this should be done when the defendant is a member of the Metropolitan Police Force on whose integrity the public are accustomed to rely."

[50] Willmer LJ observed:[45]

> "The course which the defendant took resulted in the judge and the jury, as well as the plaintiff and his advisers, being deceived into thinking that the defendant was, and remained, a high-ranking officer of unblemished reputation. In view of the nature of the charges brought against him the character of the defendant was, in my judgment, a matter of vital importance for the proper determination of the case. We now know not only that the defendant has been reduced in rank to station sergeant, but that this was done in consequence of a disciplinary offence which involved the deception of a court of law. This is, therefore, the second occasion on which the defendant's conduct has had the result of deceiving the court. It is in these circumstances that the plaintiff now asks for an order for a new trial, basing himself on the submission that there has been a miscarriage of justice.
>
> We are not dealing here with an ordinary case of an application to adduce fresh evidence. The plaintiff's contention involves something much more fundamental, and I regard this case as a wholly exceptional one, as was, I think, conceded in argument by Mr. Durand, counsel for the defendant. The rules which are ordinarily applied where an application is made to adduce further evidence on appeal are

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43 [1951] WN 247.
44 At 379-380.
45 At 380-381.

> those set out by Denning L.J. in *Ladd v. Marshall*. Where the fresh evidence sought to be adduced is directed solely to credit, the rules are even more stringent, as was pointed out by Tucker and Cohen L.JJ. in *Braddock v. Tillotson's Newspapers Ltd* in the passages to which my Lord has already referred. These rules are based upon the maxim that it is in the public interest that there should be an end to litigation. But in my judgment the application of this maxim cannot be pressed to the extent of allowing a miscarriage of justice to go uncorrected." (omitting citations)

[51] Willmer LJ also distinguished the case from *Tombling*, saying:[46]

> "But here we are concerned with evidence relating to the character of one of the parties to the suit, and it is a case in which the character of the parties was of peculiarly vital significance, so that failure to disclose the defendant's record amounted in effect to presenting the whole case on a false basis."

[52] Pearson LJ said:[47]

> "In the present case the fresh evidence only affects the credit of the defendant, and does not relate directly to any issue in the case. Accordingly it would not be right to order a new trial unless there is some feature of paramount importance outweighing the grave disadvantage of protracting the litigation."

[53] Pearson LJ then identified the feature in that case as the considered decision to conceal from the court the fact that the defendant had been demoted for an offence involving deception of a court, describing this decision as "utterly wrong" and having "deplorable results".[48]

[54] Both Willmer LJ and Pearson LJ quoted the following statement by Lord Buckmaster in *Hip Foong Hong v H Neotia & Co*.[49]

> "In all applications for a new trial the fundamental ground must be that there has been a miscarriage of justice. If no charge of fraud or surprise is brought forward, it is not sufficient to show that there was further evidence that could have been adduced to support the claim of the losing parties; the applicant must go further and show that the evidence was of such a character that it would, so far as can be foreseen, have formed a determining factor in the result. Such considerations do not apply to questions of surprise, and still less to questions of fraud. A judgment that is tainted and affected by fraudulent conduct is tainted throughout, and the whole must fail."

[55] The circumstances in *Meek v Fleming* are completely distinguishable from the present. It was clearly an exceptional case, which involved a deliberate and demonstrable

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[46] At 382.
[47] At 383.
[48] At 383.
[49] [1918] AC 888 at 894.

deception of the court. There is no such element present in this case. The most that can be said, even on the AKS pleading, is that Mr Gazal and Mr Clarke gave false evidence at the trial in the particular respects identified in the statement of claim.

[56] If this action to set aside the judgment of Applegarth J were to proceed, the essential question at trial would go to the materiality of the perjured evidence to his Honour's judgment. In *Monroe Schneider Associates Inc v No 1 Raberem Pty Ltd*, the Full Federal Court expressed it as follows:[50]

> "But it is necessary to establish the perpetration of the fraud alleged and the fraud must be 'directly material' to the judgment. Evidence going to a collateral issue, such as the credit of witnesses who gave evidence and were cross-examined at the trial may well lack the necessary materiality, given the reluctance of the courts to interfere only on the grounds of perjury. **In other cases, the question is whether the alleged fraud can be said to have probably affected the result**." (emphasis added)

[57] Earlier in that judgment, the Full Federal Court had cited with approval a summary of the "stringent principles established by the authorities to confine the jurisdiction" to impeach an earlier judgment on the grounds of fraud. That summary set out the following requirements:[51]

"(a) *evidence newly discovered since the trial;*

(b) evidence that could not have been found by the time of the trial by exercise of reasonable diligence;

(c) evidence so material that its production at the trial would probably have affected the outcome; and when the fraud charged consists of perjury, then:

(d) the evidence must be so strong that it would reasonably be expected to be decisive at a rehearing, and if unanswered must have that result."

[58] So, on the present summary judgment application, the fundamental question is, at the very least, whether AKS has any real prospect of establishing that the assumed perjury

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[50] At 242.
[51] At 241.

of Mr Gazal and Mr Clarke (in the respects particularised in the statement of claim) "probably affected the result" before Applegarth J.

[59] For the reasons that follow, I have concluded that AKS does not have any real prospect of satisfying that test.

[60] First, and fundamentally, the impugned evidence of Mr Gazal and Mr Clarke could only have been material to his Honour's findings on liability, i.e. the findings on the making of the representations. That evidence had no effect on, and formed no part of the process of reasoning which led to, the conclusion that AKS had failed to prove causation. So much is apparent from his Honour's reasons on that issue, which I have set out at length above. Indeed, at [167] his Honour posited the best case on liability which would have been available to AKS and still concluded, for reasons which had nothing to do with the evidence of Mr Gazal or Mr Clarke, that AKS would have acted in the same way.

[61] Similarly, and equally fundamentally, his Honour's conclusions that AKS had not proved loss were in no way dependent on or affected by any of the evidence of Mr Gazal or Mr Clarke, let alone the impugned evidence.

[62] To put the matter beyond doubt, Applegarth J expressly said at [173]:

> "Had [AKS] established liability against the defendants it would have failed to establish that the defendants caused it to suffer the loss and damage alleged by it."

[63] True it is, as counsel for AKS pointed out, that the authorities support the proposition that "a judgment that is tainted and affected by fraudulent conduct is tainted throughout, and the whole must fail".[52] But that is an expression of the consequence which flows from a finding that a judgment ought be set aside for fraud. The present inquiry precedes the application of that consequence, and is directed to the very question as to whether the judgment is fatally tainted by fraud. As I have said, that requires, in a case of perjury, an inquiry as to whether the perjury probably affected the result.

[64] The finding by Applegarth J, completely independent of his findings on the question of liability, was that AKS would have lost the case for failing to prove causation and loss.

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[52] *Hong v H Neotia & Co* [1918] AC 888 at 894; *Cabassi v Vila*, per Williams J at 147.

On that basis, AKS has no, let alone any real, prospect of establishing that the assumed perjury of Mr Gazal and Mr Clarke probably affected the result before Applegarth J.

[65] Secondly, whilst it is clear that Applegarth J's assessments of the credibility of each of Mr Smith and Mr Gazal (corroborated by Mr Clarke) figured significantly in his Honour's findings on liability, acceptance of Mr Gazal's evidence and corresponding rejection of Mr Smith's evidence was by no means the only basis for his Honour finding that AKS had not proved its case on liability. Indeed, completely independent of the evidence of Mr Gazal (and Mr Clarke), and in reliance on Mr Smith's own evidence, his Honour made the following findings at [110]:

> "On Thursday 24 January 2008 Mr and Mrs Smith signed the documentation that was necessary to increase the credit limit from $10M to $20M. As previously noted, Mr Smith acknowledged that he knew and believed that formal documentation of this kind had to be signed to obtain a $20M facility and until the documentation was signed he did not have a $20M facility. No such documentation was signed in respect of a $20M facility until 24 January 2008. **Accordingly, on Mr Smith's own evidence, he could not have believed that a $20M facility (even one subject to additional conditions) was in place prior to the documentation being signed on 24 January 2008**." (emphasis added)

[66] Those findings, of themselves, would have been sufficient to dispose of the AKS case on liability.

[67] Moreover, even if it be accepted that Mr Gazal and Mr Clarke perjured themselves in the respects asserted in the statement of claim, it does not automatically follow that AKS would probably have proven its case on liability. Nor does it follow that his Honour would have formed any less adverse view of Mr Smith's credibility as a witness.

[68] As to the first of those points, there was, quite apart from the competing versions of Mr Smith and Mr Gazal, a significant body of evidence which ran counter to the AKS case at trial. Not the least of this was the documentary evidence carefully analysed by Applegarth J and which, as his Honour expressly found, contained no reflection of any of the representations which underpinned the AKS case.

[69] Similarly, the impugned evidence of Mr Gazal (and Mr Clarke) had, and could have had, no impact on the adverse view of Mr Smith formed by his Honour in relation to Mr

Smith's dealings with another bank officer, Mr Atkinson. They met on 22 January 2008 (after Mr Smith had procured the Ulliana letter). His Honour's findings with respect to that meeting include:[53]

> "On 22 January 2008 Mr Smith did not assert to Mr Atkinson that he had a $20M facility, that he had believed this to be the case or contradict Mr Atkinson, who accurately stated the fact that the $20M facility had not come into place because the quantity surveyor conditions were not met."

[70] I accept the submission made by counsel for Mr Gazal that his Honour's acceptance of Mr Atkinson's version of events at that meeting was directly inconsistent with and destructive of the AKS case.

[71] Moreover, apart from his analysis of the evidence, his Honour undertook a detailed and careful review (at [140] – [146]) of the probability or otherwise of the AKS case. His Honour's seminal finding on the improbability of the case is set out above at [17]. It is, if I may respectfully say, a compelling analysis.

[72] As to the second point, the adverse assessment of Mr Smith's credibility was not founded solely on a preference of Mr Gazal as a witness over Mr Smith. His Honour identified a number of bases, quite independent of the evidence of Mr Gazal (and the corroborating evidence of Mr Clarke), which led him to discount Mr Smith's credibility. The prime example, to use Applegarth J's phrase, was the Ulliana letter contrivance. Counsel for AKS sought to advance an argument to the effect that Mr Smith's motivation for procuring the Ulliana letter was different to that attributed to him by the trial judge in reliance on the impugned evidence of Mr Gazal and Mr Clarke, and referred me to the explanation given in his evidence at trial as to his reason for procuring the letter. That submission, however, is tantamount to Mr Smith saying:

> *I acted dishonestly in procuring the Ulliana letter, but I did so for a 'justifiable' reason (i.e. to use it as a concocted excuse for drawing down on a $20 million facility) rather than for the 'sinister' reason (i.e. to trick the bank into lending $5.5 million purportedly to pay to a builder for construction of a house).*

The submission cannot be accepted. On any view of it, Mr Smith's procurement of the false Ulliana letter impacted extremely badly on his credibility. Moreover, his fabrication of the letter was essentially destructive of the AKS case. At its core, the

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[53] At [107].

AKS case was that Mr Smith understood that he had available to him a $20 million facility for any purpose. If that $20 million facility had truly been available, then he could have drawn down on it without the necessity of fabricating the Ulliana letter. As Applegarth J:[54]

> "Mr Smith's resort to the Ulliana letter shows that he knew at all material times that he did not have such a $20M facility, and that the bank's preparedness to increase the existing $10M facility to $20M would depend upon the use of the funds to construct the mansion".

[73] It is of course correct, as was submitted by counsel for AKS, that there were a number of factual issues at trial which turned on the trial judge's acceptance of the evidence which is impugned by the present proceeding. The prime example of that was the issue of whether Mr Gazal informed Mr Smith of the conditions being imposed by the credit department in the course of the telephone call on 10 August 2007. As it transpired in the primary judgment, however, even though Applegarth J preferred Mr Gazal's evidence at trial in respect of that particular factual issue, it would have made no difference to the outcome. After dealing with subsequent events, Applegarth J said:[55]

> "If, contrary to my earlier findings, Mr Smith was not told on 10 August 2007 that the $20M facility was subject to conditions relating to the building, as at 23 October 2007 he and AKS were disabused of any belief that all the conditions in relation to the $20M facility had been satisfied and that everything was in place for the $20M facility to be established."

[74] In any event, as I have said, Applegarth J made express findings which were completely destructive of the AKS case which were based on the evidence of Mr Smith himself, and which were not in any way dependent on his acceptance of the evidence of Mr Gazal and Mr Clarke.

[75] Having regard to the matters to which I have just referred, I am not at all satisfied that AKS has a real prospect of establishing that a different result would probably have been reached on the question of liability if Mr Gazal and Mr Clarke had not committed the alleged perjury.

[76] As to the contention advanced on behalf of AKS that, if it had known of Mr Gazal's "confession" when the appeals were pending, it would have sought to lead fresh

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[54] At [105].
[55] At [58].

evidence and obtain a new trial, it is sufficient to say that AKS would have encountered precisely the same insuperable obstacles in pursuing such a course as it faces on the present application – see, in that regard, my observations in [43] above.

[77] It necessarily follows from all that I have said that I am satisfied that AKS has no real prospect of succeeding in this claim to set aside the primary judgment.

[78] No argument was advanced to me on behalf of AKS as to why there is otherwise any need for a trial of the claim. Indeed, it is clear that there is no need for such a trial.

[79] Accordingly, there will be summary judgment for the defendant, Mr Gazal.

Application for a stay

[80] It was not in issue that, if I determined the summary judgment application in favour of the defendant, it would be unnecessary for me to deal with the application for a stay of proceeding brought on behalf of AKS.

Costs

[81] In argument before me, counsel for the parties agreed that costs should follow the event.

Conclusion

[82] There will be the following orders:

1. The plaintiff's application for a stay of the proceeding is dismissed;

2. There be judgment for the defendant against the plaintiff;

3. The plaintiff shall pay the defendant's costs (including the costs of the application for a stay and the costs of the summary judgment application) to be assessed on the standard basis.