Nourse & Anor v Fresh Express Australia Pty Ltd & Ors
[2009] NTSC 73

PARTIES:	GEOFFREY WAYNE NOURSE AS LIQUIDATOR OF WALKER NOMINEES PTY LTD (ACN 009 632 311) And: WALKER NOMINEES PTY LTD (IN LIQUIDATION) (ACN 009 632 311) v FRESH EXPRESS AUSTRALIA PTY LTD (ACN 065 867 218) And: BRANIR PTY LTD (ACN 061 718 876) And: TOVEHEAD PTY LTD (ACN 003 745 140)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION

FILE NOS:	153 of 2003 (30320300) consolidated with 30 of 2004 (20405160) and 169 of 2003 (20323231)
DELIVERED:	23 December 2009
HEARING DATES:	2, 6, 7 & 30 April 2009 and 1 & 7 May 2009
JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

Corporations Act

Bradvica v Radulovic [1975] VR 434
Broad v Commissioner of Stamp Duties [1980] 2 NSWLR 40
Davies v Pagett (1986) 10 FCR 226
Day v RAC Motoring Services Limited [1999] 1 All ER 1007
Evans v Bartlam [1937] AC 473
Grimshaw v Dunbar [1953] 1 QB 408
Kostokanellis v Allen [1974] VR 596 at 603
Norman v Federal Commissioner of Taxation (1963) 109 CLR 9
Shackell v Howe, Thornton & Palmer (1909) 8 CLR 170
Taylor v Taylor (1979) 143 CLR 1
Woodleigh Nominees Pty Ltd v CBA (1999) 150 FLR 460

REPRESENTATION:

Counsel:

Plaintiffs:	N Christrup
First Defendant:	R K Newton
Second and Third Defendants:	J Kelly SC

Solicitors:

Plaintiff:	Minter Ellison
First Defendant:	Halfpennys
Second and Third Defendants:	Cridlands

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Geoffrey Wayne Nourse & Anor v Fresh Express Australia Pty Ltd & Ors
[2009] NTSC 73
No 153 of 2003 (20320300) consolidated with 30 of 2004 (20405160)
& 169 of 2003 (20323231)

BETWEEN:

GEOFFREY WAYNE NOURSE AS LIQUIDATOR OF WALKER NOMINEES
(ACN 009 632 311)
First Plaintiff

AND:

WALKER NOMINEES PTY LTD (IN LIQUIDATION)
(ACN 009 632 311)
Second Plaintiff

AND:

FRESH EXPRESS AUSTRALIA PTY LTD
(ACN 065 867 218)
First Defendant

AND:

BRANIR PTY LTD
(ACN 061 718 876)
Second Defendant

AND:

TOVEHEAD PTY LTD
(ACN 003 745 140)
Third Defendant

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 23 December 2009)

Introduction

[1] The first defendant has applied to set aside a judgment in default made against it in favour of the second and third defendants.

[2] On 9 October 2008, the Court made the following orders: (1) the first defendant's defence to the second and third defendants' third party notice dated 6 June 2007 is struck out; (2) judgment in favour of the second and third defendants in respect of their third party claim against the first defendant for the amount of $190,199.00 plus interest to be assessed; (3) the first defendant to pay the second and third defendants' costs of the third party proceeding against the first defendant; and (4) liberty to apply to bring the matter back on short notice to resolve the matter of interest.

[3] The orders were made because the first defendant failed to comply with an order of the Court that the first defendant make further and better discovery to the second and third defendants.

The history of the proceedings and the conduct of the first defendant

[4] Before dealing with the merits of the first defendant's application, I have found it useful to set out the history of the proceedings.

[5] The first defendant is a produce merchant that sells fresh produce including mangoes from a stand at the Sydney Markets in New South Wales. The second and third defendants grew mangoes on Tipperary Station in the Northern Territory as a commercial enterprise. The second plaintiff operated a business which picked and packed mangoes grown in the Northern Territory and delivered them interstate for sale. In the mango season in 2000 the second plaintiff picked and packed the second and third defendants' mangoes and delivered them to the first defendant who sold the mangoes in Sydney.

[6] During 2000 the second plaintiff got into financial difficulty. On 2 March 2001 the administration of the second plaintiff began and on 7 June 2001 the creditors of the second plaintiff resolved to wind up the company and the administrators became liquidators of the company.

[7] On 29 September 2003, the second plaintiff, in liquidation, filed a writ in proceeding No 153 of 2003 claiming an amount of $374,011 from the second and third defendants. The gist of the second plaintiff's claim against the second and third defendants was that the second and third defendants had breached a written contract dated 1 September 2000 under which the second plaintiff picked and packed mangoes on Tipperary Station and delivered them interstate for sale. The second plaintiff claimed the second and third defendants had failed to pay for the work done under the contract by the second plaintiff its servants and agents.

[8] On 3 October 2003, the second and third defendants filed a writ in proceeding No 169 of 2003 claiming $190,199 plus interest and costs from the first defendant. The gist of the second and third defendants' claim against the first defendant was as follows: between August and November 2000, under an agreement or series of agreements between the second and third defendants (by their agent, the second plaintiff) and the first defendant, the second and third defendants agreed to supply mangoes to the first defendant and the first defendant agreed to purchase mangoes from the second and third defendants; under the agreement the second and third defendants delivered mangoes to the first defendant; the first defendant sold the mangoes and in breach of the agreement the first defendant failed to pay the second and third defendants the price of the mangoes to the extent of $190,199.

[9] On 2 February 2004, the first plaintiff filed a writ in proceeding No 30 of 2004 claiming $190,199 plus interest from the first defendant. The gist of the first plaintiff's cause of action was as follows: on or about 13 November 2007 the second plaintiff and the first defendant entered into a transaction whereby the second plaintiff paid the first defendant $190,199 in relation to an unsecured debt owed by the second plaintiff to the first defendant; the payment was a voidable transaction for the purpose of s 588FE(2) of the *Corporations Act* because the transaction was an unfair preference within the meaning of s 588FA(1) of the *Corporations Act*.

[10] On 16 October 2006, the three proceedings were consolidated and on 20 March 2007 the first and second plaintiffs filed a statement of claim in the consolidated proceeding. An amended statement of claim was filed on 15 May 2007.

[11] On 30 May 2007, the second and third defendants filed a defence and counterclaim in the consolidated proceeding and on 6 June 2007 they filed an amended defence and counterclaim.

[12] On 6 June 2007, the second and third defendant's commenced third party proceedings against the first defendant. They claimed $190,119 plus interest. The gist of the second and third defendants' claim against the first defendant was as follows: the second and third defendants grew mangoes; the second plaintiff was the agent of the second and third defendants and as their agent the second plaintiff sold their mangoes, rendering invoices in the names of the second and third defendants; the second plaintiff delivered some of the second and third defendants' mangoes to the first defendant and rendered invoices to the first defendant in the name of the second and third defendants; the invoices totalled at least $190,199; the second and third defendants have not received the sum of $190,119 from the first defendant and the first defendant is indebted to the second and third defendants for that amount.

[13] On 2 November 2007, the first defendant filed its defence against the first plaintiff's claim in the consolidated proceeding. By way of defence the first

defendant pleaded that on 13 November 2000 the second plaintiff and the first defendant entered into a transaction whereby the second plaintiff paid the first defendant $190,199 in relation to an unsecured debt owed by the second plaintiff to the first defendant. At the time the payment was made by the second plaintiff to the first defendant, the second plaintiff was not insolvent within the meaning of s 588FC of the *Corporations Act*. Alternatively, the payment is not voidable because the first defendant became a party to the transaction in good faith and there were no reasonable grounds which would lead either the first defendant or a reasonable person in the first defendant's circumstances to suspect that the second plaintiff was insolvent. The first defendant denied that the payment of $190,199 occurred by way of set off. The first defendant did not plead in its defence that it had an equitable charge or lien over the funds which totalled $190,199.

[14] On 2 November 2007, the first defendant also filed its defence to the first and second defendants' third party notice. Apart from admitting that the second and third defendants grew mangoes and pleading that the first defendant sold the mangoes received from the second and third defendants on consignment for a commission of 12.5 per cent, the defence contained bare denials of the second and third defendants' claim.

[15] On 11 December 2007, the first defendant filed a list of documents in the consolidated proceeding.

[16] On 18 April 2008, the plaintiffs filed an amended statement of claim in the consolidated proceeding. In the amended statement of claim the plaintiffs claim[1] an order under s 588FF(1)(a) or (c) of the *Corporations Act* directing the first defendant to repay the sum of $190,199, interest and costs. The gist of the amended claim against the first defendant is: on 2 March 2001 the administration of the second plaintiff began; on 7 June 2001 the creditors of the second plaintiff resolved to wind up the company; on 13 November 2000 the second plaintiff and the first defendant entered into a transaction whereby the second plaintiff paid the first defendant $190,199 as part payment of an unsecured debt owed by the second plaintiff to the first defendant; the payment occurred by way of set off; thereby the second plaintiff and the first defendant were parties to a transaction within the meaning of s 588FA(1)(a) of the *Corporations Act*; the transaction was entered into during the six months ending 2 March 2001; at the time the transaction was entered into the company was insolvent; the transaction resulted in the first defendant receiving more than the first defendant would receive from the second plaintiff for the debt owed to it by the second plaintiff if the transaction was set aside and the first defendant were to prove the debt in the winding up of the company; the transaction is an unfair preference or insolvent transaction and is voidable under s 588FE(2) of the *Corporations Act*.

[1] Alternatively to the relief sought against the second and third defendants.

[17] The first defendant has not filed a defence to the plaintiffs' amended statement of claim.

[18] In their amended statement of claim, the plaintiffs claim the sum of $374,011 from the second and third defendants or alternatively, the sum of $193,812 as a debt due. The gist of the plaintiffs' claim against the second and third defendants is as follows: the second and third defendants grew mangoes for commercial sale; by agreement made between the second plaintiff and the second and third defendants the second plaintiff agreed to pick, package, market and freight mangoes owned and grown by the second and third defendants; it was a term of the contract that the second and third defendants would pay the second plaintiff an amount fortnightly in arrears equal to $11 inclusive of GST for each tray of mangoes produced; in about October, November and December 2000 the second plaintiff performed its obligations under the agreement by picking, packing, freighting and marketing 34,001 trays of mangoes in Sydney and Melbourne; the second plaintiff rendered invoices upon the second and third defendants for its work; the total value of the invoices was $374,011 inclusive of GST; and the second and third defendants have not paid any amount to the second plaintiff. The plaintiffs claim the whole amount of the debt not the balance of the debt less an assigned book debt.

[19] On 9 May 2008, there was a case management hearing before Riley J. His Honour made the following orders: (1) the first defendant is to file and serve its notice of defence on the plaintiffs on or before 23 May 2008; (2) the first

defendant is to file and serve its notice of defence on the second and third defendants on or before 23 May 2008; (3) the plaintiffs and the first defendant are to file and serve supplementary lists of documents on or before 20 May 2008; (4) the plaintiffs and the first defendant are to file and serve their witness statements on or before 20 June 2008; (5) the second and third defendants are to file and serve their witness statements on or before 27 June 2008; and (6) the matter is listed for a three day hearing in the September/October sittings of the Court with a date to be fixed.

[20] On 4 June 2008, the second and third defendants filed a further amended defence and counterclaim to the plaintiffs' amended statement of claim. In the further amended defence and counterclaim the first and second defendants plead, among other things, as follows. If the transaction between the second plaintiff and the first defendant was an unfair preference or an insolvent or voidable transaction and the sum of $190,199 is repayable by the first defendant to the first plaintiff, then the first plaintiff holds the sum on trust for the second and third defendants. The trust arises under a written agreement between the second plaintiff and the second and third defendants dated 1 September 2000. Under the agreement, the second and third defendants appointed the second plaintiff their agent when arranging payment for certain produce on behalf of the second and third defendants. There were terms of the agreement that: (a) the second plaintiff would ensure all sales of mangoes to purchasers would be accompanied by an invoice in a form specified by the second and third defendants; (b) the

invoice would specify and the second plaintiff would ensure all payments for the produce were paid directly to the second and third defendants' specified bank account or otherwise as advised from time to time by the second and third defendants; (c) any sale of mangoes to a third party arranged by the second plaintiff would only be made on the condition that payment would be made to the second and third defendants within 21 days of delivery of the mangoes to the third party, and at a price specified by the second and third defendants; (d) the second plaintiff guaranteed payment to the second and third defendants and was ultimately responsible for ensuring that all payments were made promptly and directly to the second and third defendants; (e) the second plaintiff was not entitled to any commission in respect of the sales of mangoes, and if received, would hold such commission on trust for the second and third defendants, and would immediately account to them for such commission. In the circumstances, any moneys received by the second plaintiff from the sale of the mangoes were held on trust for the second and third defendants and the first plaintiff is liable to account to the second and third defendants for any such moneys. In breach of the agreement the second plaintiff caused and/or permitted $190,199 to be withheld by the first defendant from the second and third defendants and set off against moneys owed by the second plaintiff to the first defendant.

[21] On 12 June 2008, there was an unsuccessful settlement conference and the first defendant was ordered to pay the second and third defendants' costs of the settlement conference that were thrown away.

[22] On 30 June 2008, De Silva Hebron, who were on the record of the Court as the solicitors for the first defendant, filed a summons seeking an order they be granted leave to cease to act on behalf of the first defendant. In support of their application De Silva Hebron relied on three affidavits sworn by Mr Matthew Garraway on 29 June 2008, 3 July 2008 and 10 July 2008 respectively. Mr Garraway was the solicitor who had the carriage of the proceeding on behalf of the first defendant.

[23] In his three affidavits Mr Garraway deposed as follows.

Mr Andrew Musumeci is the sole director of the first defendant. The first defendant had not complied with the terms of the retainer it had with De Silva Hebron. On 12 May 2008 De Silva Hebron advised the first defendant of the orders made by the Court on 9 May 2008. De Silva Hebron did not have appropriate instructions to comply with the Court's orders of 9 May 2008. The first defendant's registered office is 'Stand 546' A Shed Sydney Markets NSW 2129 and its principal place of business is "Stand 5-6 "A" Shed" Sydney Markets NSW 2129.

[24] Annexure A to Mr Garraway's affidavit sworn on 3 July 2008 was a letter from De Silva Hebron to Mr Musumeci. The letter put the first defendant on

notice that after De Silva Hebron ceased to act they would be proceeding to recover their long outstanding debt from the first defendant.

[25] On 17 July 2008, Master Coulehan made the following orders: (1) leave is granted to De Silva Hebron to cease to act for the first defendant; and (2) the address for service of the first defendant is as stated in the draft notice of ceasing to act, Stand 546A Shed, Sydney Markets NSW 2128. On 17 July 2008, De Silva Hebron filed a notice of ceasing to act for the first defendant.

[26] On or about 15 August 2008, the solicitors for the second and third defendant sent a letter to the first defendant. The letter was addressed to the address given in the notice of ceasing to act filed by De Silva Hebron. The letter referred to the list of documents filed by the first defendant on 11 December 2007 and it sought further and better discovery of the following documents within 14 days from the date of the letter:

> 1. All documentation received or prepared by the first defendant in the years 2000, 2001 and 2002 concerning the receipt of mangos from the second plaintiff, whether as trading as Royal Palms Plantation or otherwise, and from the second and third defendants as the Tipperary Group of Stations or otherwise, including all correspondence, notes, emails, receipts, invoices, delivery dockets, consignment notes, packing notes, load sheets, delivery schedules, payment calculations, grading reports, cheques and cheque butts;
>
> 2. All financial records of the first defendant for the years 1999/2000, 2000/2001 and 2001/2002, including profit and loss statements, annual financial reports, tax returns, ledger records and bank statements;

3. All documentation prepared in respect of the claimed commission of 12.5 per cent purported to have been deducted from on-selling mangos received from the second plaintiff and/or the second and third defendants.

[27] On 18 August 2008, there was a call over of civil matters before Angel J. There was no appearance on behalf of the first defendant. The Court noted that first defendant was still in default of the orders made by the Court on 9 May 2008 including the order to provide further discovery. The matter was put over to the November 2008 list of the Court. It was noted that the consolidated claims which did not involve the first defendant had settled.

[28] On 9 September 2008, the unresolved claims between the parties were listed for trial for five days commencing on 17 November 2008.

[29] On 9 September 2008, the second and third defendants filed a summons seeking an order that the first defendant make further and better discovery as requested by the second and third defendants by letter dated 15 August 2008 within seven days. The summons was supported by two affidavits of Ms Fiona Tillmann sworn on 9 September 2008 and 11 September 2008 respectively and an affidavit of service of Mr Darrell Willenberg sworn on 11 September 2008. In her affidavit of 9 September 2008 Ms Tillman stated that the first defendant had failed to respond to her letter dated 15 August 2008.

[30] In his affidavit of service Mr Willenberg stated that at 2.18pm on 10 September 2008 he served a copy of the summons and the affidavit of Ms Tillman sworn on 9 September 2008 by leaving copies of the documents

with an adult female who was present at the first defendant's registered place of business, the Sydney Markets, Parramatta Road, Flemington in New South Wales. At the time of service, Mr Willenberg asked the lady, "Is this the registered office of Fresh Express Australia Pty Ltd and are you authorised to accept these documents?" To which she replied "Yes. This is Fresh Express. I can accept them. My name is Cathy Musumeci. I am the receptionist."

[31] In her affidavit of 11 September 2008 Ms Tillmann stated as follows. She was informed by Mr Willenberg that he was unable to affect service of the summons and affidavit on the address noted by the Court as the address for service of the first defendant. When he arrived at that location the stall was boarded up. He found another stall at the Sydney Markets, No 189, which had the first defendant's name written on it and he served the summons at that address.

[32] The second and third defendants' application for further and better discovery was heard on 11 September 2008. There was no appearance on behalf of the first defendant and the Court made the following orders: (1) effective service on the first defendant of all Court documents, other than those requiring personal service, be made by filing the documents in the Registry of the Supreme Court; (2) the first defendant make further and better discovery as requested by the second and third defendants by letter dated 15 August 2008 within seven days; and (3) the further and better discovery the subject of order two is to be verified by affidavit.

[33] The order for further and better discovery was served on the first defendant at 3.43 pm on 12 September 2009. The order was served by Mr Willenberg who left a copy of the order with Ms Sahar El-Ahamad who was present at the first defendant's place of business at the Sydney Markets. Ms El-Ahamad told Mr Willenberg she had authority to accept service of the order.

[34] On 23 September 2008, the second and third defendants filed a summons seeking the orders referred to in par [2] above. The summons and supporting affidavit were served on the first defendant at 9.03 am on 24 September 2008. The documents were served by Mr Willenberg who left copies of the documents with Ms Sahar El-Ahamad who was present at the first defendant's place of business at the Sydney Markets. Ms El-Ahamad told Mr Willenberg that she had authority to accept service of the documents.

[35] On 25 September 2008, the second and third defendants' application for judgment in default was mentioned in Court for the first time. There was no appearance on behalf of the first defendant and the application was adjourned for one week to give the first defendant more time to respond to the summons.

[36] On 29 September 2008, Ms Tillman sent a letter by registered mail to the first defendant. The letter advised the first defendant that the second and third defendants' application for judgment in default had been adjourned to

2 October 2008. The letter was addressed to the address stated on the notice of ceasing to act.

[37] On 2 October 2008, Mr Musumeci had a meeting with the first defendant's Sydney solicitor, Mr David, and with its counsel, Mr Newton.

[38] On 2 October 2009, the second and third defendants' application for judgment in default was mentioned in Court again. The application was adjourned for a further week. There was no appearance on behalf of the first defendant.

[39] On 9 October 2009, the second and third defendants' application for judgment in default was heard by the Court. There was no appearance by the first defendant. In support of the application for judgment the second and third defendants relied on an affidavit of Ms Tillmann sworn on 24 September 2008. In her affidavit Ms Tillmann deposed that the first defendant had failed to comply with the order of the Court for further and better discovery.

[40] On 9 October 2009, the Court made the orders referred to in par [2] above. The orders were served on the first defendant at 10.35 am on 20 October 2008. The orders were served by giving a copy of the orders to Mr Musumeci who was present at the first defendant's registered place of business at Stall 5-6 Shed A at the Sydney Markets. When he served the document Mr Willenberg asked Mr Musumeci "Is this the registered office of Fresh Express Australia Pty Ltd, and are you authorised to accept these

documents that I now show you?" Mr Musumeci replied "Yes this is the registered office of Fresh Express Australia. I can accept them. My name is Andrew Musumeci."

[41] On 24 October 2008, the trial dates were vacated.

[42] On 17 November 2008, the second and third defendants filed a summons seeking an order that the first defendant pay the amount of $26,810.24 by way of pre-judgment interest to the second and third defendants. The question of interest has not been resolved.

[43] On 2 December 2008, the first defendant filed a summons seeking to set aside the judgment in default. The summons was supported by an affidavit of Mr Musumeci sworn on 27 November 2008. The first defendant's summons was filed by Halfpennys solicitors who filed a notice of acting on 22 January 2009

[44] On 4 December 2008, Thomas J made the following directions about the first defendant's application to set aside the judgment in default: (1) the second and third defendants and the first and second plaintiffs have until the close of business on 30 January 2009 to file and serve any affidavits on which they intend to rely; (2) the first defendant and the first and second plaintiffs have until close of business on 13 February 2009 to file and serve any affidavits in reply; and (3) the matter is adjourned to a date no earlier than 16 March 2009 and is referred to the Registrar to fix a date.

[45] The first defendant's application was heard by the Court on 2, 6, 7 and 30 April 2009 and additional written submissions were filed on 1 and 7 May 2009.

[46] At the time the first defendant's application was heard, the first defendant was in default of the orders of the Court made on 9 May 2008. It had failed to file and serve its defence to the plaintiffs' claims on or before 23 May 2008, failed to file and serve its defence to the second and third defendants' third party claim on or before 23 May 2008, failed to file its supplementary list of documents on or before 20 May 2008, and failed to file and serve its witness statements on or before 20 June 2008. The first defendant was also in default of the order of the Court made on 11 September 2008 that the first defendant provide further and better discovery within 7 days of that date. Further, the first defendant failed to file any further affidavit material on which it sought to rely by 23 February 2009 in accordance with the orders of Thomas J made on 4 December 2008. The first defendant's further affidavit was not filed until 27 April 2009.

[47] During the entire course of the proceedings prior to filing its application to set aside the judgment in default, which is a period of more than five years, the first defendant had only filed two holding defences and an incomplete list of documents.

The principles applicable to setting aside a judgment in default

[48] The Court has inherent jurisdiction to recall its own judgment where the judgment has been obtained in default and allow the merits of the proceeding to be litigated[2]. Accordingly, the Court has the power to revoke a judgment obtained by a party's failure to act in accordance with an order of the Court[3].

[49] The circumstances relevant to the Court's discretion to set aside a judgment in default include: (a) whether the defendant has a defence on the merits; (b) the reason for the default of the defendant in consequence of which the judgment was obtained; (c) whether the defendant has shown a preparedness to remedy its default; (d) whether the application to set aside the judgment was made promptly after the judgment came to the knowledge of the defendant; and (e) whether, if the judgment was set aside, the party in whose favour the judgment was made would be prejudiced in any respect which could not be adequately compensated for by a suitable award of costs and the giving of security[4].

[50] An applicant who applies to set aside a judgment in default is ordinarily required to file an affidavit of merits which discloses a defence. It is not sufficient that the applicant swears as to his belief in the existence of a defence. The affidavit must set out all of the defences on which the

[2] *Taylor v Taylor* (1979) 143 CLR 1 at 16; *Bradvica v Radulovic* [1975] VR 434 at 441.
[3] *Evans v Bartlam* [1937] AC 473.
[4] *Evans v Bartlam* [1937] AC 473; *Grimshaw v Dunbar* [1953] 1 QB 408; *Davies v Pagett* (1986) 10 FCR 226.

defendant intends to rely and the facts by which he or she seeks to establish them. An affidavit merely exhibiting the defence proposed to be served is insufficient.

[51] An applicant is not required to show that his or her defence is bound to succeed. A prima facie defence is sufficient[5]. The test is whether the applicant has raised an arguable defence which carries some degree of conviction[6]. However, the Court will not set aside a judgment in default if the defendant has no possible defence, for then, setting aside the judgment would serve no useful purpose[7]. The primary consideration is whether the defence has merits to which the Court should have regard. Prima facie, the Court will not let a judgment in default stand if merit is shown[8].

[52] A defence on the merits and an explanation for the default are neither a necessary nor sufficient basis for the exercise of the discretion of the Court to set aside a judgment in default. However, a party who seeks the indulgence of the Court that the proceedings continue despite its failure to obey an order of the Court must satisfy the Court that justice requires its default be overlooked[9].

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[5] *Evans v Bartlam* [1937] AC 473.
[6] *Day v RAC Motoring Services Limited* [1999] 1 All ER 1007.
[7] *Evans v Bartlam* [1937] AC 473 at 481 – 2.
[8] *Evans v Bartlam* [1937] AC 473 at 489 per Lord Wright; *Kostokanellis v Allen* [1974] VR 596 at 603.
[9] *Woodleigh Nominees Pty Ltd v CBA* (1999) 150 FLR 460 at 468.

The proposed defence of the first defendant

[53] In support of its application, the first defendant relies on a defence pleaded in a proposed amended defence annexed to an affidavit of Mr Musumeci's sworn 27 April 2009. The proposed defence pleads as follows:

> 1. As to paragraph 1 of the statement of claim:
>
> (a) The first defendant admits that the second and third defendants grew mangoes at all material times.
>
> (b) The first defendant in or about 2000 received mangoes from the second and third defendants on consignment whereby the first defendant was entitled to on sell aforesaid mangoes for a 12.5 per cent commission.
>
> (c) The first defendant otherwise denies the allegations contained in paragraph 1 and says it was acting as the agent of the second and third defendants at all material times.
>
> 2. The first defendant admits that mangoes were delivered by Walker Nominees Pty Ltd ("Walker Nominees") to the first defendant but does not admit the balance of the allegations in paragraph 2.
>
> 3. As to paragraph 3 the first defendant denies any indebtedness to the second and third defendants and says:
>
> (a) Walker Nominees at all material times was a contractor to the second and third defendants for the purpose of picking and marketing mangoes in the 2000 mango season.
>
> (b) The first defendant provided financial accommodation to Walker Nominees in the sum of $300,000 so as to enable Walker Nominees to fulfil its contractual obligations to the second and third defendants on the footing the first defendant would be reimbursed from the remuneration Walker Nominees would receive from the second and third defendants for enhancing the value of the mangoes of the

second and third defendants by picking, packing and consigning them to Sydney.

(c) The first defendant was authorised by the second and third defendants to deduct $10.50 per carton of mangoes consigned to it by Walker Nominees on behalf of the second and third defendants and to hold the money so deducted to the account of Walker Nominees in payment of picking, packing and consignment charges owed by the second and third defendants to Walker Nominees.

Particulars

A facsimile dated 16 October 2000 from the second and third defendants to Mr Andrew Musumeci of the first defendant.

(d) Walker Nominees authorised the first defendant to retain the said sum of $10.50 per carton of the said consigned mangoes for the purpose of repaying the said financial accommodation provided by the first defendant to Walker Nominees.

Particulars

(i) Telephone conversation between Lynn Walker and Andrew Musumeci on or about 13 November 2000.

(ii) Conversation between Lynn Walker, Andrew Musumeci and Carmen Attard on or about 31 January 2001.

(e) The first defendant deducted the said sum of $10.50 per carton pursuant to the authority referred to in (c) and (d) above and thereafter appropriated such moneys to its own use in the total sum of $190,199.80 as it was entitled to do so.

(f) Upon deduction of the sum of $10.50 per tray of mangoes in accordance with the mandate referred to (c) above the second and third defendants ceased to have any interest in the sum so deducted.

(g) At all material times the first defendant had the benefit of an equitable assignment lien or charge in respect of the entitlements of Walker Nominees for picking, packing and consequent charges in respect of mangoes of the second and third defendants consigned to the first defendant.

4. Further and in the alternative the first defendant has against each of Walker Nominees, the second defendant and the third defendant, is entitled to an equitable lien or charge over the proceeds of the sale of the mangoes consigned to the first defendant by Walker Nominees on behalf of the second and third defendants by reason of the said financial accommodation having been applied in and about the picking, packing and freighting of the said mangoes.

[54] The gist of the defence appears to be as follows. First, the first defendant sold the second and third defendants' mangoes on consignment for a commission of 12.5 per cent. Money which will become payable by an agent to his principal as purchase money on the sale of goods of the principal consigned to the agent for sale, constitutes a debt to become due by the agent to the principal[10]. Secondly, there was an equitable assignment by the second and third defendants to the second plaintiff of part of the future debt which would become owing by the first defendant to the second and third defendants. That is, there was an equitable assignment of part the net future proceeds of the sale of the second and third defendants' mangoes which would otherwise become payable by the first defendant to the second and third defendants upon the receipt of the purchase price for their mangoes. Thirdly, upon receipt of the proceeds of sale by the first defendant the assignment of the relevant part of the proceeds of sale to the second plaintiff became effective. Fourthly, the second plaintiff released

[10] *Shackell v Howe, Thornton & Palmer* (1909) 8 CLR 170.

the first defendant from payment of that part of the first defendant's debt which was assigned to the second plaintiff by the second and third defendants[11] and the first defendant became entitled to payment of that part of the proceeds of sale which had otherwise been assigned to the second plaintiff. So far as it goes, this aspect of the proposed amended defence is consistent with the defence of the first defendant filed on 2 November 2007 in response to the plaintiffs' claim.

[55] However, the pleading of the proposed amended defence is defective. No consideration is pleaded for the assignment by the second and third defendants to the second plaintiff of the relevant part of the future debt which would be owed by the first defendant to the second and third defendants. An equitable assignment of part of a future chose in action must be supported by consideration since such an assignment only operates as a contract to assign when the subject matter comes into existence[12].

[56] Further, the relevance to any ground of defence of the matters pleaded in subparagraphs 3(a) and (b) of the proposed amended defence is not specified. If the matters pleaded in those paragraphs are material matters then the significance of those matters to any ground of defence should be pleaded. Further still, no material facts are pleaded which would support the allegations of an equitable lien or charge that are pleaded in paragraphs 3(g) and 4 of the proposed amended defence.

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[11] *Broad v Commissioner of Stamp Duties* [1980] 2 NSWLR 40.
[12] *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9 at 24.

The facts by which the first defendant seeks to establish its defence

[57] As to the merits of the proposed amended defence, the first defendant relies on two affidavits of Mr Musumeci sworn on 27 November 2008 and 27 April 2009 respectively. The contents of Mr Musumeci's affidavit sworn on 27 November 2008 are summarised in pars [58] to [92] below.

[58] Mr Musumeci is the sole director and secretary of the first defendant. Since 1997 the first defendant has operated a produce stand from the Sydney Market in New South Wales from which the first defendant sells fresh produce including mangoes supplied from the Northern Territory.

[59] The first defendant had a practice of buying fruit crops from growers and then engaging third parties such as the second plaintiff to pick and pack those crops on behalf of the first defendant and despatch them to the first defendant in Sydney. In about February 2000 the first defendant engaged the second plaintiff to pick mango crops owned by the first defendant and pack and freight them. The second plaintiff's agreed charge was $10.50 per tray of mangoes.

[60] On or about 14 February 2000, Mr Musumeci received a telephone call from Ms Lynn Walker, the managing director of the second plaintiff. They had a conversation to the following effect:

> MS WALKER: Andrew, money is tight for me at the moment because we are owed a lot of money. I was wondering if you could advance me some money *on account* [emphasis added] and you could get it

back as we do the work. If you do that I will be able to guarantee you some additional supply.

MR MUSUMECI: It depends.

MS WALKER: Royal Palms can supply you over 120,000 trays of mangoes in addition to the ones you already own and which we are picking for you. The sources of supply are: Tipperary, from whom I have obtained a pick and pack contract; my existing growers; and Royal Palms. I need $205,000 to pay out some of [the second plaintiff's] existing debts. I am chasing some of my debtors who owe me in excess of $225,000. I have engaged the services of a lawyer and to give you comfort, I have asked my accountant to prepare some financial records for you to consider.

MR MUSUMECI: Lynn, I'm happy to consider, can you please put together a letter of your proposal and I will get back to you.

[61] On 14 February 2000, Ms Walker sent the first defendant a letter in support of her request to be advanced some money on account on the basis the second plaintiff could supply the first defendant with more than 120,000 trays of mangoes in the 2000 mango season. The letter contained information about: the second plaintiff's proposal to supply further mangoes to the first defendant, debts owed to the second plaintiff by third parties, the steps the second plaintiff was taking to recover those debts, a debt of $204,295.37 owed by the second plaintiff to TPFM (Territory Produce Freight Management), and the equipment needs of the second plaintiff. Of the 120,000 additional trays of mangoes that Ms Walker stated the second plaintiff could supply the first defendant, only 20,000 to 40,000 trays of mangoes were to be supplied by the second and third defendants.

[62] Ms Walker made no suggestion in her letter that any loan monies that were lent to the second plaintiff by the first defendant could be recovered by the first defendant deducting the second plaintiff's fees of $10.50 per tray of mangoes for work done from the net proceeds of sale of the second and third defendants mangoes which would become payable by the first defendant to the second and third defendants. This is not surprising as no arrangements had been made at this time for the first defendant to sell the second and third defendants' mangoes.

[63] At about the same time Ms Walker invited Mr Musumeci to a meeting in Darwin with Mr Sanjeev Gupta, a director of the second and third defendants.

[64] On 17 February 2000, the solicitor for the first defendant, Mr Fred David, sent a facsimile to Ms Walker outlining the terms on which the first defendant was prepared to lend the second plaintiff the sum of $205,000. The terms and conditions of the loan were as follows:

1. The first defendant is prepared to advance the sum of $205,000 to the second plaintiff.

2. The period of the loan is 12 months. The 12 months shall commence from the date that the monies have been advanced to you. The loan can be repaid earlier within the said period without any penalty to the borrower.

3. Interest shall accrue from the date that the money shall be advanced to the second plaintiff at 10 per cent per annum. The borrower shall be the second plaintiff trading as Royal Palms Plantation.

4. The guarantor shall be the directors of the second plaintiff at the time.

5. For the advancement of the monies to the second plaintiff, the company shall guarantee to the first defendant approximately 120,000 trays of mangoes in the mango season for the year 2000.

6. The first defendant during this period shall have the exclusive right over the Royal Palms brand name and packaging. This will ensure that the 120,000 trays will be delivered to the first defendant as agreed.

7. All costs incidental to any legal fees to be paid by the first defendant at the time of the drawing these documents and thereafter shall be incurred by the second plaintiff. The initial legal fees and appropriate disbursement shall be deducted from the moneys being advanced to the second plaintiff.

[65] On or about 23 February 2000, Ms Walker sent a facsimile to the solicitor for the first defendant accepting the first defendant's loan terms save for the

ownership of the Royal Palms brand name. Subsequently, a written loan agreement and deed of guarantee was prepared by the solicitors for the first defendant and sent to Ms Walker. A few days after 9 March 2000 Ms Walker executed the loan agreement and the deed of guarantee on behalf of the second plaintiff. Neither the loan agreement nor the deed of guarantee was annexed to the affidavits sworn by Mr Musumeci. The loan monies were subsequently forwarded to the second plaintiff by the first defendant.

[66] The disclosed terms of the loan by the first defendant to the second plaintiff make no mention of any requirement for the first defendant to be able to deduct $10.50 per tray of mangoes for work done by the second plaintiff from the net proceeds of the sale of the second and third defendants mangoes which would become payable by the first defendant to the second and third defendants. There is no mention whatsoever of the second and third defendants in the terms of the loan.

[67] During the Course of the 2000 mango season the first defendant received numerous requests from the second plaintiff for additional financial assistance to allow it to continue to fulfil its pick, pack and freight contracts with the first defendant in respect of fruit owned by the first defendant. The subject matter of these requests was usually money paid for wages and repairs or purchase of equipment. The first defendant paid those monies as an advance payment with the objective of ensuring the continued provision by the second plaintiff of picking packing and freighting services for the

first defendant. On numerous occasions those requests took the form of Ms Walker telephoning Mr Musumeci and requesting money for a particular purpose connected with picking packing and freighting for the first defendant. The conversations were generally to the following effect: "Andrew I need more money for [whatever the expense was]. You can get it back out of our charges for picking, packing and freight." The first defendant would then make arrangements to pay the requested funds to the second plaintiff. In making the additional payments Mr Musumeci was ensuring the ongoing ability of the second plaintiff to handle the first defendant's mangoes.

[68] In April 2000, Mr Musumeci attended a meeting with Mr Sanjeev Gupta and Ms Walker. At the time Mr Gupta was a director of the second and third defendants. At the meeting Mr Musumeci, Mr Gupta and Ms Walker had the following conversation:

> MS WALKER: Sanjeev, Andrew is a wholesale merchant operating out of Sydney Markets under the company of Fresh Express Australia Pty Limited. I have informed Andrew that you have provided my company with the rights to pick pack and market your mangoes. I have also informed Andrew that you've estimated that you can supply approximately between 20,000 to 40,000 trays.
>
> SANJEEV: Yes and I have received a fax proposal. Thank you.
>
> MS WALKER: I also want to clarify one thing, my company charges $10.50 per tray for picking, packing and freight *and will be deducted by Fresh Express* [emphasis added], and the balance of the net price

will be paid directly to you and the reason for this Sanjeev, I have been burnt in the past. People owe me a lot of money, which I am suing to collect and I don't want any problems with our relationship.

SANJEEV: I can't see a problem with that.

[69] Before the start of the 2000 mango season Mr Musumeci sent a proposal to the second and third defendants to receive mangoes on consignment for sale in either Sydney or Melbourne and to be paid a commission for doing so. The proposal was for the first defendant to market and sell the mangoes produced by the second and third defendants on consignment. The trade terms proposed by the first defendant involved a handling fee of 12.5 per cent for produce sold and marketed in Sydney. Mr Musumeci states that the proposal was accepted by the second and third defendants.

[70] The proposal contained no requirement that the first defendant be authorised to deduct from the proceeds of sale of the second and third defendants' mangoes any money that was payable by the second and third defendants to the second plaintiff for the picking, packing and freight of the mangoes. The only charge mentioned is the payment of the handling fee or commission of 12.5 per cent.

[71] The pleadings of the second and third defendants reveal that on 1 September 2000 a written agreement was made between the second plaintiff and the second and third defendants. Under the agreement the second plaintiff was to pick and pack the second and third defendants' mangoes and freight them interstate.

[72] Consignments of mangoes from the second and third defendants to the first defendant commenced shortly after 3 October 2000. The first defendant sold the mangoes and credited the account of the second and third defendants with the purchase price of the mangoes less the agreed sale commission of 12.5 per cent.

[73] In paragraph 20 of his affidavit sworn on 27 November 2008 Mr Musumeci deposes that, acting in reliance upon the acceptance of the first defendant's proposal to the second and third defendants and the authority to retain the second plaintiff's charges referred to in par [68] above, the first defendant advanced the Tipperary Group $200,000 on 3 October 2000 and another $100,000 on 24 October 2000.

[74] On or about 16 October 2000, the first defendant received a letter by facsimile. The letter appears to be on the letter head of the Tipperary Group of companies which include the second and third defendants. The letter was not signed by Mr Gupta but by Mr Gaurav Malhotra, a manager who was employed by the Tipperary Group of Stations. The letter states as follows:

> As per discussions with Sanjeev and Lyn Walker we would like to confirm that we authorize Fresh Express to deduct $10.50 per carton for the picking, packing and freight to be deducted from Tipperary Group of Station's Mangoes that are delivered to Fresh Express in Sydney on behalf of Royal Palms.

[75] The second and third defendants dispute the authenticity of the letter dated 16 October 2000. The letter appears to have been facsimiled to the first

defendant from the offices of the second plaintiff not the offices of the second and third defendants.

[76] There is no evidence the second plaintiff provided any consideration for the authorisation contained in the letter.

[77] The authority contained in the letter dated 16 October 2000 relates to the proceeds of future sales of the second and third defendants' mangoes. At tab 7 of annexure AM1 to the affidavit of Mr Musumeci sworn on 27 November 2009 is a copy of the first defendant's creditor's transaction report in relation to the second and third defendants. The transaction report shows that as at 16 October 2000 the second and third defendants were indebted to the first defendant in the amount of $196,378.30. All receipts from the sale of mangoes up to that time were applied in payment of the first defendant's commission of 12.5 per cent and in repayment of the money advanced to the second and third defendants by the first defendant. As at 16 October 2000 no deductions of $10.50 per tray of mangoes for the second plaintiff's charges for picking, packing and freighting the second and third defendants' mangoes had been made by the first defendant from the proceeds of sale of the second and third defendants' mangoes.

[78] The document at tab 7 of annexure AM1 further reveals that at no stage after 16 October 2000 did the first defendant deduct the sum of $10.50 from the proceeds of sale of the second and third defendants' mangoes. The proceeds of sale of the second and third defendants' were applied first in the

repayment of moneys advanced by the first defendant to the second and third defendants and secondly in payment of the commission charged by the first defendant. The balance of the money was then held to the account of the second and third defendants.

[79] In paragraph 22 of the his affidavit sworn on 27 November 2008 Mr Musumeci states:

> On or about 13 November 2000 I received a telephone call from Ms Walker during which words to the following effect were spoken:
>
> MR MUSUMECI: I need your authority to retain your charges to Tipperary from the sale proceeds.
>
> MS WALKER: Andrew, I am authorising you from the net price of Tipperary mangoes for this season, as indicated to your previously in my letter of 14 February 2000, being part of the picking, packing and freight costs that Walker Nominees has incurred on behalf of Tipperary Farm to be paid to Fresh Express as part of the money that Walker Nominees owes to Fresh Express.
>
> MR MUSUMECI: That's fine. Can you please send me a letter of authorisation to do that?
>
> MS WALKER: Fine I will do that.

[80] Contrary to the statement of Ms Walker referred to in par [79] above, Ms Walker's letter of 14 February 2000 makes no mention of any authority to deduct any funds from the net price of the second and third defendants' mangoes. Nor would you expect it to as even on the first defendant's case there had been no discussion with Mr Gupta at that time about the matter.

[81] On 13 November 2000, Mr Musumeci received a letter from Ms Walker. The letter makes no mention of any previous arrangement. It simply states:

> I authorise you as my agent to deduct the money that is still owed by you to Tipperary Group of Stations.
>
> This money is part of the picking, packing and freight costs I have incurred since I have been picking fruit at Tipperary Farm.
>
> Whatever money you hold is to be offset against the money that you have advanced to me.

[82] The document at tab 7 of annexure AM1 to Mr Musumeci's affidavit shows that as at 13 and 14 November 2000 the first defendant owed the second and third defendant's the sum of $48,994.05.

[83] At the end of the 2000 mango season the first defendant had received a total of 28,230 trays of mangoes from the second and third defendants. The total amount the first defendant should have deducted in accordance with the purported authorisation granted to it by the second plaintiff was $296,415. However, after the $300,000 advancement to the second and third defendants by the first defendant was taken into account, the balance remaining otherwise payable to the second and third defendants was only $190,199.80.

[84] On 31 January 2001, Mr Musumeci had a meeting with Ms Walker and Ms Carmen Attard in Sydney. During that meeting the Ms Walker said, "You will recall when you came to Darwin we met Sanjeev and it was agreed at the meeting I could charge $10.50 per tray for the picking, packing

and marketing of [the second and third defendants'] produce. I note you have sold approximately 28,000 trays for [the second and third defendants] and out of that [the second and third defendants] owe me $294,000. Please adjust that from Walker Nominees account." Mr Musumeci replied "That's fine, I will do that." The statement of Ms Walker which is deposed to by Mr Musumeci is not corroborated by Ms Attard's fax at tab 11 of annexure AM1.

[85] On 2 February 2001 Mr Fred David, the solicitor for the first defendant, caused a facsimile to be sent to Mr Sanjeev Gupta. In the facsimile Mr David stated:

> We act on behalf of Fresh Express (Australia) Pty Limited.
>
> We understand that you have a business relationship with our client particularly the sole director and shareholder of our client's company, Mr Musumeci.
>
> Ms Lynn Walker and Graham Walker, who are the directors and shareholders of Walker Nominees Pty Ltd, approached our client approximately over a year ago seeking funds to continue their business activities in picking and packing mangoes.
>
> As you are aware Walker Nominees operates in the Northern Territory and has a substantial exposure in the mango industry and has connections in bringing about supplies of mangoes to companies like our client.
>
> On the assurance that our client would receive a substantial supply of mango, our client advanced Walker Nominees the sum of $205,000. After the first initial advancement our client advanced further sums of money amounting to approximately $750,000. The only security that our client received was a personal guarantee from the directors of Walker.

The $750,000 advanced to Walker Nominees we understand was used to pay the following at Tipperary:

(a) wages for picking and packing;

(b) purchase of second hand spray blaster used to spray mango trees;

(c) purchase of six picking aids, four of which are at Tipperary;

(d) $10,000 was used to rewire the electrical grader.

It should be noted that while visiting Sydney Ms Walker instructed Mr Andrew Musumeci that our client could retain the sum of $190,199 being the monies owed to her by Tipperary.

We have been instructed by our client that the only amount remaining by Walker Nominees is approximately the sum of $265,000.

We understand from our client's instructions they are holding the sum of $190,000 in their account to be paid to you. We are further made to understand that you in turn will be passing the said sum to Walker Nominees for the work that they have carried out for you. We have advised our client that if you are in agreement our office can prepare a dead of assignment of the debt from Fresh Express (Australia) Pty Limited to you for the sum that has been held by our client in your favour. This is quite legal and companies always arrange this between each other.

In your case you will be buying the debt for the sum $190,199 and the balance of the debt our client will pursue on a personal level with Walker Nominees and its guarantors. We would appreciate if you would be kind enough to pass this letter to your legal representatives and should they have any further questions please do not hesitate to contact our Mr Fred David who is a partner of this firm and works exclusively on the accounts of Fresh Express (Australia) Pty Limited.

[86] The contents of the letter dated 2 February 2001 are a little ambiguous. However, the solicitor's for the first defendant appear to have offered to assign $190,199 of the total debt of $265,000, which the second plaintiff

owed the first defendant, to the second and third defendants in consideration for the second and third defendants allowing the first defendant to retain the sum of $190,199 being the balance of the proceeds of sale the first defendant held on their behalf. If the proposal was accepted it was suggested the second and third defendants could then set off the assigned debt against any amount the second and third defendants owed the second plaintiff for picking and packing their mangoes and freighting them interstate.

[87] The proposal was inconsistent with the defence now sought to be relied on by the first defendant. It is also an admission that as at 2 February 2000 the whole of the sum of $190.199 was being held by the first defendant to the benefit of the second and third defendants and that none of the second plaintiff's charges of $10.50 per tray of mangoes had been deducted from the proceeds of sale of the second and third defendants' mangoes.

[88] On 28 March 2002, Mr Neville Henwood, the solicitor for the second and third defendants, replied by letter to the letter from Mr David. In his letter Mr Neville Henwood stated the second and third defendants declined the first defendant's offer that they buy the debt due to the first defendant as outlined in Mr David's facsimile and he requested that payment of the $190,199 be forwarded to the second and third defendants within 7 days.

[89] On 7 May 2001, Mr David sent a further facsimile to Cridlands Lawyers. In his facsimile he stated:

> We refer to the above matter and to your letter dated 28 March 2001 received by this office on 2 April 2001. We apologise that we have not corresponded with you earlier.
>
> As you are aware on 2 February 2001 we were instructed to write to your client by facsimile putting out client's case to your client for the moneys that have been advanced by our client's company to Walker Nominees. Moreover, you will further note that your client had the sum of $190,199 in our client's account to be paid to your client. Our client had previously an authority from Walker Nominees in writing confirming that our client could take the said money and accordingly Walker Nominees would adjust its debt against your client. Unfortunately our client had misplaced the said authority and on that basis we were instructed to intervene and obtain your client's consent by way of a proposal put in our letter to your client on 2 February 2001.
>
> Since your letter our client has made all efforts to locate the authority that Walker Nominees had forwarded to our client and accordingly it has now been discovered which was forwarded on 14 November 2000. For your reference we enclose a copy of the said letter.
>
> You will note, that the letter was facsimiled on 14 November 2000 from Royal Palms Plantation to our client authorising our client to take the $190,199 against the debt that is due and payable to our client in the sum of $265,000. We are made to understand that your client had previously consented to this arrangement should our client receive those instructions from Walker Nominees in writing. On that basis our client now wishes to withdraw the said money that is held in your client's account for the adjustments that need to be paid to our client.
>
> Should your instructions be otherwise please forward your concerns to this office and we shall obtain our client's further instructions about this matter. Should we not receive a response from you with 14 days we assume that his matter is resolved and on that basis we will close our file without any further correspondence with your office.

[90] The contents of this letter are more consistent with the matters pleaded in the first defendant's proposed amended defence.

[91] On 25 June 2001, Cridlands replied to the facsimile of Mr David dated 17 May 2001. Of relevance, in his reply Mr Henwood stated:

> ….
>
> We note your comments in relation to the written authority from Walker Nominees to your client regarding the sum of $190,199 held by your client for the benefit of Tipperary and thank you for providing a copy of that document to us.
>
> Our client's position is that it was not within Walker Nominees capacity to provide that authority in relation to moneys due to our client. Further, the appointment of an administrator to Walker Nominees Pty Ltd means that our client's position will be prejudiced by accepting your client's proposition since, as we understand it, our client cannot be in a better position in the administration (or any subsequent winding up) than your client now is. In particular, we do not believe our client is entitled to set off the relevant amount even if the debt is assigned as you have suggested. Rather, it will be limited to proving and ranking in the administration on the same basis as your client would. Unless creditors are paid in full (which we understand will not occur), our client will suffer a loss.
>
> In those circumstances, we again request that the sum of $190,199 be forwarded to our client. To the extent Fresh Express will experience some shortfall in what it will recover, our client hopes that an ongoing business relationship between Fresh Express and the Tipperary Group will go some way towards compensating for that shortfall.
>
> ….

[92] In paragraph 29 of his affidavit sworn on 27 November 2008 Mr Musumeci deposes that in early 2001 the second and third defendants demanded payment of the sum of $190,199 and the first defendant declined to make that payment because the sum represented a debt owed by the second and third defendants which the second plaintiff with the consent of the second

and third defendants had agreed could be collected by the first defendant from the proceeds of consignment sales by the first defendant.

[93] As to the merits of the proposed defence of the first defendant, Mr Musumeci deposes as follows in his affidavit of 27 April 2009.

[94] The facts alleged in the proposed amended defence are true and correct. No denials are made therein other than in respect of matters which are not correct. No non-admissions have been made in respect of matters or facts known by Mr Musumeci to be true.

[95] Further in paragraph 12 of his affidavit sworn on 27 April 2009 Mr Musumeci states "I respectfully say the first defendant has a good defence on the merits and ought to be let in to file an amended defence and to have a hearing on the merits. The first defendant now seeks to amend its previous defence to rely on additional documentary material located in October 2008 and certain legal advice which has now been given to the first defendant. The Court did not have the benefit of that additional material when it decided to strike out the defence and give judgment in favour of the second and third defendants."

[96] On the evidence contained in the affidavits of Mr Musumeci, counsel for the first defendant, Mr Newton, submits the following factual position is reasonably arguable:

(1) Walker Nominees had a contract to pick and pack mangoes grown by the second and third defendants.

(2) Walker Nominees requested the first defendant to provide financial assistance to carry out that contract and to repay debts owed by Walker Nominees to the second and third defendants.

(3) $205,000 was initially advanced by the first defendant to Walker Nominees. During the course of the 2000 mango season the first defendant received numerous additional requests to fund the picking, packing and freighting obligations of Walker Nominees and made additional advances. It is to be inferred that repayment was to occur from revenue raised by Walker Nominees for picking and packing activities for the second and third defendants.

(4) In April 2000 the first defendant made a proposal to the second and third defendants that the mangoes being picked and packed for them by Walker Nominees should be sold by the first defendant on consignment for which commission would be charged. That proposal was accepted.

(5) Various consignment sales were carried out by the first defendant for the second and third defendants and moneys being proceeds of sale totalling $300,000 were remitted to the second and third defendants.

(6) On 16 October 2000 by prior arrangement between Ms L Walker of Walker Nominees and Mr Sanjeev Gupta of the second and third defendants the second and third defendants authorised the first defendant to retain $10.50 per carton of mangoes sold by the first defendant being the picking and packing charges payable by the second and third defendants for each such carton. Ms Walker then directed and authorised the first defendant to retain those same moneys by way of reduction of the amounts advanced by the first defendant to enable it to carry on picking and packing activities for the second and third defendants. The inference to be drawn is that this was a manifestation of an intention that the first defendant would have the benefit of the amount deducted pro tanto the indebtedness of Walker Nominees to the first defendant and that this was not some form of revocable mandate.

(7) In January 2001 Walker Nominees indicated to the first defendant it was owed $294,000 by the second and third defendants and that the first defendant should apply to adjust for that amount obviously in reference to the funds payable to Walker Nominees at the rate of $10.50 per carton and retained

by the first defendant with the authority of the second and third defendants.

Are the facts contended for by the first defendant reasonably arguable?

[97] A number of significant facts sought to be relied on by the first defendant in support of the proposed amended defence are not reasonably arguable on the evidence adduced by the first defendant.

[98] The evidence of Mr Musumeci does not reasonably arguably establish the second plaintiff requested the first defendant to provide financial assistance to the second plaintiff so it could carry out its contract with the second and third defendants. Nor does it reasonably arguably establish that the second plaintiff requested financial assistance to repay debts it owed to the second and third defendants. There is no evidence the second plaintiff was indebted to the second and third defendants. The second plaintiff initially requested financial assistance to pay a debt of $204,295.37 which it owed to TPFM for freight charges incurred during the 1999 mango season. As to why the other advances were sought by the second plaintiff, the evidence of Mr Musumeci is as set out in par [67] above. The additional advances had nothing to do with the second plaintiff's contract with the second and third defendants.

[99] It cannot reasonably arguably be inferred that the second plaintiff was to repay the monies advanced to it by the first defendant from revenue raised by the second plaintiff in return for picking and packing the second and third defendants' mangoes. According to Mr David's letter dated 2 February 2001, the first defendant loaned or advanced the second plaintiff in excess

of $950,000 which is more than 150 per cent of the gross proceeds of sale of the second and third defendants' mangoes. The first defendant and the second plaintiff only ever contemplated that the mangoes supplied by the second and third defendants would make up about 25 per cent of the total amount of mangoes to be delivered by the second plaintiff to the first defendant. There is no evidence to suggest the second and third defendants had any knowledge of the financial assistance the first defendant provided to the second plaintiff. The first defendant's proposal which was accepted by the second and third defendants made no mention of any such arrangements. There was no mention of the loans that the first defendant made to the second plaintiff or the nomination of a fund for the repayment of the loan moneys in the alleged discussions between the Mr Musumeci, Ms Walker and Mr Gupta in April 2000. The loan of $205,000 was unsecured and not repayable for 12 months and therefore not repayable during the 2000 mango season. The loans were made for the principal purpose of enabling the second plaintiff to fulfil its contractual obligations to the first defendant. The loans were to be repaid and indeed the vast proportion of the loans was repaid by the second plaintiff as it did the work it was contracted to do for the first defendant. The letters of the solicitors for the first defendant referred to in pars [85] and [89] above reveal that at the end of the 2000 mango season of the $955,000 or thereabouts lent to the second plaintiff only $296,000 remained outstanding. Despite the contents of the letter dated 16 October 2000 the first defendant did not deduct $10.50 per tray

from the proceeds of the sale of the second and third defendants' mangoes. It was not until 13 November 2000 that Mr Musumeci sought repayment out of the proceeds of sale of second and third defendants' mangoes. There is no evidence to suggest that the second and third defendants were notified of this request by the first defendant. No contact or communication was made with the second and third defendants about such matters until Mr David's letter of 2 February 2001.

[100] The evidence as to the date when the first defendant made its proposal to the second and third defendants is contradictory. Mr Musumeci deposes that he sent the first defendant's proposal to the second and third defendants at the beginning of the 2000 mango season which is September 2000 not April 2000. The proposal makes not mention of the second plaintiff whatsoever.

[101] It is not reasonably arguable that moneys being the proceeds of sale totalling $300,000 were remitted to the second and third defendants by the first defendant. It is the evidence of Mr Musumeci that the first defendant advanced $300,000 to the second and third defendants. $200,000 was advanced on 3 October 2000 and a further $100,000 was advanced on 24 October 2000. The purpose of these advance payments was clear enough. During the 2000 mango season the first defendant would take delivery of the second and third defendants' mangoes and have custody of the proceeds of sale. The advance payments were payments by way of security for those proceeds. The proceeds of sale of the second and third defendants' mangoes were then applied in repayment of the advances.

[102] It is not reasonably arguable that there was a prior arrangement made between Ms Walker and Mr Gupta that the second and third defendants authorised the first defendant to retain $10.50 per tray of mangoes sold by the first defendant being the picking and packing charges payable by the second and third defendants to the second plaintiff for each tray of mangoes. At the time of the meeting between Ms Walker, Mr Musumeci and Mr Gupta in April 2000 the contract between the second plaintiff and the second and third defendants had not been finalised; nor had the consignment arrangements between the first defendant and the second and third defendants. The words spoken by the parties during the meeting in April 2000, which are referred to in par [68] above, do not establish that the second and third defendants accepted the first defendant's proposal and they do not establish the prior arrangement sought to be relied upon. The words attributed to Mr Gupta, "I can't see a problem with that", are not a clear and unequivocal acceptance of the proposition that "[the second plaintiff's] charges $10.50 per tray for picking, packing and freight and will be deducted by [the first defendant] and the balance of the net price will be paid directly to you". The discussions are self evidently preliminary discussions of a non-binding nature. The discussion is not referred to in the first defendant's proposed amended defence.

[103] It is not reasonably arguable that the letter dated 16 October 2000 from the second and third defendants to the first defendant is the manifestation of an intention that the first defendant was to have the benefit of the amounts of

$10.50 deducted from the proceeds of sale of the second and third defendants' mangoes. There is no evidence that as at 16 October 2000 the second and third defendants knew that the second plaintiff was indebted to the first defendant or that the second and third defendants were aware the second plaintiff had instructed the first defendant to retain such amounts of money. The letter itself does not state that the first defendant may retain the $10.50 per carton of mangoes that is to be deducted from the proceeds of sale. The first time any consideration was given to the first defendant retaining the amount of $10.50 per carton from the proceeds of sale of the second and third defendants' mangoes was on 13 November 2000 when Mr Musumeci asked Ms Walker for her authority for the first defendant to retain the second plaintiff's charges from the proceeds of sale of the mangoes.

[104] Further, it is not reasonably arguable that the evidence of Mr Musumeci establishes the matters pleaded in par 3(b) and par 3(e) of the proposed amended statement of claim. The evidence does not establish that the first defendant provided financial accommodation to the second plaintiff so as to enable the second plaintiff to fulfil its contractual obligations to the second and third defendants on the footing the first defendant would be reimbursed from the remuneration the second plaintiff would receive from the second and third defendants. The first defendant provided financial accommodation to the second plaintiff so that the second plaintiff could supply the first defendant with 120,000 trays of mangoes and for the reasons set out in

par [67] above. At no stage prior to or during the year 2000 mango season were the second and third defendants advised that the first defendant had provided financial accommodation to the second plaintiff nor were the second and third defendants advised of any requirement for the first defendant to be reimbursed from the remuneration the second plaintiff would receive for picking and packing the second and third defendants' mangoes.

[105] There is no evidence that the first defendant deducted the sum of $10.50 per tray from the proceeds of sale of the second and third defendants' mangoes. To the contrary, the evidence of Mr Musumeci establishes that at all material times the only amounts deducted from the proceeds of sale of the second and third defendants' mangoes was the sum of $12.50 being the first defendant's commission and money for repayment of the advances that the first defendant made to the second and third defendants. The balance of the proceeds of sale was held in the first defendant's account to be paid to the second and third defendants.

[106] There is no evidence the second and third defendants received any consideration from the second plaintiff for the authorisation contained in the letter dated 16 October 2000. The plaintiffs have sued the second and third defendants for the whole of their outstanding debt.

[107] I do not accept the evidence of Mr Musumeci that, acting in reliance upon both the second and third defendants acceptance of the first defendant's

proposal and the authority to retain the second plaintiff's charges of $10.50 per tray of mangoes, the first defendant advanced the second and third defendants $200,000 on 3 October 2000 and another $100,000 on 24 October 2000. Nor do I accept that Mr Musumeci acted in reliance upon the authority to retain the second plaintiff's charges. The sum of $200,000 was advanced before the letter dated 16 October 2000 was received by the first defendant and the second plaintiff did not authorise the first defendant to retain their charges of $10.50 per tray of mangoes until 13 November 2000. The unsecured advance or prepayment of the sum of $300,000 is utterly inconsistent with any such reliance. Once the first defendant made those payments to the second and third defendants it lost any security that it otherwise may have obtained by deducting the second plaintiffs charges of $10.50 per tray from the proceeds of sale to be paid to the second and third defendants. Further, at no stage did the first defendant deduct the first second plaintiff's charges from the proceeds of sale of the second and third defendants' mangoes.

Consideration of the merits of the proposed amended defence

[108] Mr Newton made three arguments in support of the proposed defence of the first defendant. First, Mr Newton submitted to the Court that, given the circumstances in which the $10.50 was deducted by the first defendant with the approval of second plaintiff and the second and third defendants, an equitable assignment arose in favour of the first defendant on each occasion the proceeds of sale of a tray of mangoes came into the hands of the first

defendant. The authorisation by the second and third defendants to deduct the $10.50 per tray of mangoes and the corresponding authority by the second plaintiff to appropriate those sums pro tanto the indebtedness of the second plaintiff amounted to an irrevocable appropriation of those monies in favour of the first defendant. The assignment was not of a presently existing chose in action and could not operate as an assignment at law.

[109] The submission cannot be sustained. It conflates and mischaracterises each of the steps that is said to have occurred. There was no equitable assignment in favour of the first defendant. The second plaintiff could not assign the debt, which the second and third defendants are alleged to have assigned to it, to the first defendant. A creditor cannot assign a debt to the debtor[13]; and in any event no amount of $10.50 was deducted from the proceeds of sale of each tray of mangoes.

[110] Further, because the alleged assignment from the second and third defendants to the second plaintiff was an equitable assignment of future debts it had to be supported by valuable consideration and no consideration is pleaded in the proposed amended defence and no evidence was adduced of any such consideration.

[111] Secondly, Mr Newton argued that the provision of the finance by the first defendant to the second plaintiff to enable it to carry out picking and packing services for the second and third defendants and the derivation of

[13] *Broad v Commissioner of Stamp Duties* [1980] 2 NSWLR 40.

income from the provisions of such services with a concurrent understanding that the first defendant could recoup its loan from that income makes it unconscionable for the second plaintiff to depart from that understanding. Equity will uphold the position of the first defendant by treating the subject income as subject to an equitable charge or lien.

[112] The second argument of Mr Newton cannot be sustained. The evidence of the first defendant does not reasonably arguably establish that the first defendant provided finance to the second plaintiff to enable it to carry out picking and packing services for the second and third defendants or that there was a concurrent understanding that the first defendant could recoup its loan from the income that the second plaintiff made by picking and packing the second and third defendants' mangoes. According to the evidence of Mr Musumeci: the first defendant lent money to the second plaintiff so that it could obtain access to 120,000 trays of mangoes and so that the second plaintiff could fulfil its contractual obligations to the first defendant; and it was only on 13 November 2000 that the first defendant first requested it be permitted to recoup its loan from the moneys payable by the second and third defendants to the second plaintiff and, more specifically, out of the proceeds of sale of the second and third defendants' mangoes that were held by the first defendant. Further, there is no evidence that the first defendant deducted the second plaintiff's charges of $10.50 per tray of mangoes from the proceeds of sale of the second and third

defendants' mangoes. There is no reasonably arguable factual foundation for the equitable charge or lien contended for by Mr Newton.

[113] The third argument of Mr Newton is that the first defendant has acted to its detriment on a common understanding or assumption with both the second plaintiff and the second and third defendants as to the right of the first defendant to be repaid out of the service charges deducted from the proceeds of the sale of mangoes sold by the first defendant on consignment for the second and third defendants. Equity will come to the relief of a party who has acted to his detriment on the basis of an assumption in relation to which the other party to the transaction has played such a part in the adoption of the transaction that it would be unfair or unjust if he were left free to ignore.

[114] Before dealing with Mr Newton's third argument it is to be noted that, despite the additional time which was allowed so the first defendant could draft its proposed amended defence and file its further affidavit material, the defence is not pleaded in the proposed amended defence. Further, the following elements usually need to be established by the party alleging an estoppel[14]: (1) a false assumption or expectation by an 'innocent' party as to a fact, event, relationship or entitlement; (2) the 'guilty' party has induced the 'innocent' party to form or act on the assumption or expectation whether by making a representation or a promise or by acquiescence or otherwise; (3) the 'innocent' party acts or abstains from acting on the assumption or

[14] These elements are usefully summarised in A Leopold *"Estoppel: Recent Developments"* (1991) 7 Aust Bar Rev 49 at 60 – 61.

expectation; (4) the guilty party ought to have known or it was within his reasonable expectation that the 'innocent' party would so act; (5) an attempt by the 'guilty party' to act contrary to the assumption or expectation; and (6) injustice or unconscionability arsing from the conduct of the guilty party.

[115] The third argument of Mr Newton is again misconceived. The evidence of Mr Musumeci does not reasonably arguably establish any material facts upon which the allegations of an estoppel may be maintained. There is no evidence that: the first defendant acted on a false assumption; or that the second and third defendants induced the first defendant to form such an assumption or played a part in the adoption of such an assumption; or that the second and third defendants ought to have known about any such assumption. The second and third defendants played no part in the first defendant's decision to loan money to the second plaintiff. The reasons the loans were made by the first defendant to the second plaintiff are set out in par [60], [61], [64] and [67] above. There is no evidence which establishes that the second and third defendants were aware of the fact that the first defendant had provided finance to the second plaintiff. The evidence of Mr Musumeci does not reasonably arguably establish that the first defendant relied on any common understanding with both the second plaintiff and the second and third defendants as to the right of the first defendant to be repaid out of the second plaintiff's service charges which were to be deducted from the proceeds of the sale of mangoes sold by the first defendant on

consignment for the second and third defendants. It does not even establish that such an understanding was in place before the first defendant made the loans to the second plaintiff. The second plaintiff's creditors transaction report which is at tab 5 of annexure AM1 to the affidavit of Mr Musumeci sworn on 27 November 2000 shows that the first defendant had loaned the second plaintiff in excess of $700,000 before the first defendant received the letter dated 16 October 2000; and that the first defendant loaned the second plaintiff in excess of a further $150,000 before 13 November 2000 when Mr Musumeci asked the second plaintiff for its authority for the first defendant to deduct loan repayments from the proceeds of sale of the second and third defendants mangoes. Any understanding as to the rights of the first defendant to be repaid its loans out of the second plaintiff's service charges which were to be deducted from the proceeds of sale of the second and third defendants' mangoes could have only come into existence after 13 November 2000 by which time most of the loan money had already been advanced to the second plaintiff. The first defendant did not make any deductions for the second plaintiff's service charges for picking and packing mangoes from the proceeds of sale of the second and third defendants' mangoes.

The evidence about the other discretionary factors

[116] As to the other discretionary factors, Mr Musumeci deposes as follows in his affidavit of 27 November 2008.

[117] On or about 14 September 2007, the first defendant instructed Mr David De Silva from De Silva Hebron to act on behalf of the first defendant. On 7 May 2008 the parties attended mediation before Master Coulehan. An application for costs of the mediation was made by both the first and second plaintiffs and the second and the third defendants against the first defendant and costs were awarded against the first defendant. As a result of the outcome of the costs application Mr Musumeci felt his Darwin solicitors were not acting in the best interests of the first defendant and he was in the process of terminating their services when he was informed that the solicitors had ceased to act on behalf of the first defendant.

[118] On or about 12 September 2008, unknown to Mr Musumeci some documents were left at the offices of the first defendant on behalf of the second and third defendants in support of an application for judgment against the first defendant.

[119] In paragraph 58 of his affidavit sworn on 27 November 2008 Mr Musumeci stated that on or about 2 October 2008 Mr Musumeci had a conversation with Mr David and with Mr Robert Newton of counsel in Sydney. Mr Musumeci then requested Mr John Stewart of Ward Keller to act on behalf of the first defendant.

[120] The contents of an email from Mr Stewart to Mr David dated 24 October, which is at tab 25 to annexure AM1 of Mr Musumeci's affidavit sworn on 27 November 2008, reveal a different scenario. The email reveals that: Mr

Stewart was contacted on 2 October 2008; Mr Stewart sent an email to Mr David on 2 October 2008; there was a further discussion between Mr Stewart and Mr David on 3 October 2008 during which Mr David informed Mr Stewart that Mr David expected the first defendant would instruct Ward Keller directly; and Mr Stewart heard nothing further from either Mr Musumeci or Mr David between 3 October 2008 and 24 October 2008.

[121] Following Mr Musumeci's meeting on 2 October 2008, Mr David attempted to contact De Silva Hebron to obtain copies of various documents so those documents could be forwarded to Mr Stewart. On 24 October 2008 Mr David received an email from Mr Stewart advising him that default judgment may have been obtained against the first defendant.

[122] As a result of Mr Stewart's advice, at 3.05 pm on 24 October 2008 Mr David sent a facsimile to Cridlands advising them that the first defendant was in the process of obtaining their file from De Silva Hebron and should any default judgment be obtained an application would be made to set aside the judgment. At the time Mr David sent the facsimile, he was in possession of a letter from Cridlands to the first defendant dated 16 October 2008. In his facsimile, Mr David states "We act on behalf of Fresh Express Australia Pty Ltd in Sydney. We have been provided with a copy of your letter dated 16 October 2008." The letter and a copy of the default judgment of the Court were served on Mr Musumeci by Mr Willenberg at 10.35 am on 20 October 2008.

[123] On 24 October 2008, Ms Tillman sent a facsimile to Mr David confirming that judgment had already been obtained and stating that all relevant documents had been served on the first defendant.

[124] In paragraph 63 of his affidavit sworn on 27 November 2008 Mr Musumeci deposes:

> "On or about 25 October 2008 I was asked by Mr David to see whether I had received any correspondence from Cridlands. After a number of days of searching I discovered that a letter from Cridlands was delivered to the office of the first defendant in the Sydney Markets dated 16 October 2008 making reference to a judgment obtained on 9 October 2008. In that letter it attached a number of documents which I later passed on to Mr David."

[125] Mr Musumeci goes onto state as follows. The period between September and April is the busiest period in the year for the first defendant as it is the mango and rockmelon season. During this season I am frequently absent from the first defendant's office visiting growers or customers in various parts of the country. It was not until Mr Musumeci instigated a thorough search of the first defendant's office that Mr Musumeci discovered the letter dated 16 October 2008. The judgment was obtained in circumstances which did not come to the attention of the first defendant.

[126] In his affidavit of 27 April 2009 Mr Musumeci deposes as follows about the other matters going to the exercise of the Court's discretion to set aside the judgment in default.

[127] He instructed his legal representatives to prepare the proposed amended defence and further list of documents which are annexed to the affidavit of 27 April 2009. In early October 2008, after he was requested to do so by Mr David, Mr Musumeci instigated a thorough search of the first defendant's offices with a view to locating additional documents relating to this matter. In the course of that search he located a number of documents which had been misfiled. Those documents are discovered in the further list of documents which is annexure B to the affidavit of 27 April 2009.

[128] Mr Musumeci did not read the letter of 15 August 2008 until early January 2009 when he located and read affidavit of Fiona Tillman of 9 September 2008. The letter is incorrectly addressed. As at 15 August 2008 the address for the first defendant was Stand 189 – 190 Shed B. Stands 5 & 6 at Shed A, Sydney markets was a previous address of the first defendant. The first defendant moved back to Stands 5 & 6 at Shed A in about November 2008. Mr Musumeci did not receive any telephone calls that might have alerted him to the contents of the letter.

[129] At all times during 2007 and 2008 Mr Musumeci was the principal manager of the first defendant. At the time the first defendant conducted a substantial wholesale produce business at the Sydney Markets. The day to day operations of the business were carried on by administrative sales staff. At the same time Mr Musumeci was also engaged in the management of a multi-site franchised fruit juice station business. His commitments in the two businesses kept him away from the first defendant's offices a great deal

of the time. In mid 2008 Mr Musumeci was also very pre-occupied with major litigation in Sydney affecting the first defendant.

[130] During his absences from the offices of the first defendant Mr Musumeci relied heavily on the first defendant's administrative staff to draw his attention to important correspondence or other documents coming to their attention. He is quite certain the letter of 15 August 2008 was not drawn to his attention before January 2009 when he read the affidavit of Ms Tillman. He discovered additional documents during searches he and other staff carried out from October 2008.

[131] Mr Musumeci states that it did not come to his attention until about October 2008 that there was any sense of urgency in connection with these proceedings or that there had been any kind of serious default by the first defendant in compliance with the orders or directions of the Court. Any non-compliance was inadvertent on the part of the first defendant. It was not the intention of the first defendant to be disobedient, obstructive or disrespectful towards the court.

[132] Mr Musumeci states the he was completely unaware of the pending application by the second and third defendants to strike out the first defendant's defence and obtain judgment in default. He received no telephone calls or correspondence which alerted him to the existence of that application. Had he been aware of the application he would have instructed the first defendant's lawyers to oppose the application.

Consideration of the other discretionary factors

[133] Mr Musumeci's evidence about the reasons for the first defendant's default and the preparedness of the first defendant to remedy its default is most unsatisfactory. The facts deposed to in the various affidavits of service have not been denied.

[134] Mr Musumeci does not depose that he was unaware of the orders the Court made on 9 May 2008. Mr Garraway deposes that on 12 May 2008 De Silva Hebron advised the first defendant of those orders. The orders included an order that the first defendant provide further and better discovery, an order that the first defendant file its witness statements by 20 June 2008 and an order that the matter be listed for a three day hearing in the September/October 2008 sittings. Those orders should have given him a sense of urgency in relation to these proceedings.

[135] Mr Musumeci does not depose to any steps the first defendant took to retain other solicitors in Darwin between the date when De Silva Hebron ceased to act and the date when he requested Mr Stewart to act for the first defendant. Further, Mr Musumeci failed to take steps to retain Ward Keller following his meeting with Mr David and Mr Newton on 2 October 2008.

[136] Mr Musumeci's statement that "On or about 12 September 2008, unknown to me, some documents were left at the offices of the first defendant on behalf of the second and third defendants in support of an application for judgment against the first defendant" is a peculiar statement. He does not state how it

is he knows that the documents were served at the offices of the first defendant on 12 September 2008 and the statement is incorrect. On 12 September 2009 Mr Willenberg served the order of the Court that the first defendant make the further and better discovery requested by the second and third defendants in their letter dated 15 August 2008. He did so by handing the documents to Ms Sahar El-Ahamad. I find Mr Musumeci is dissembling in this regard.

[137] Mr Musmeci does not depose how it was that he came to meet with Mr David and Mr Newton on 2 October 2008. However, as at that date the first defendant had been served with the second and third defendant's application for further and better discovery, the order of the Court that the first defendant provide further and better discovery and the second and third defendants' application for judgment in default; and a letter advising the first defendant that the application for judgment had been adjourned to 2 October 2008 had been sent by registered post on 29 September 2008. Further, at the meeting on 2 October 2008 he was advised by his lawyers to locate any additional documents relating to this matter. That is, he was advised to take steps so that further and better discovery could be provided by the first defendant. He was advised to do so before judgement was entered.

[138] Mr Musumeci does not state why Mr David did not contact the solicitors for the second and third defendant on 2 October 2008 or why he and his Sydney solicitors did not respond to the solicitors for the second and third

defendants before 24 October 2008. It seems the reason for this is that it was left to Mr Musumeci to contact Mr Stewart and he elected not to do so.

[139] I do not accept Mr Musumeci's evidence that it was only after 25 October 2008 that Mr Musumeci found Cridlands letter dated 16 October 2008. Mr Musumeci provided the letter to Mr David on or before 24 October 2008. Mr David refers to the letter in the facsimile he sent to Cridlands on 24 October 2008. The letter was served on Mr Musumeci by Mr Willenberg on 20 October 2008.

[140] In the letter of 16 October 2008 Ms Tillman stated:

> We refer to previous correspondence sent to you concerning our client's application to strike out the defence of Fresh Express and obtain default judgment.
>
> Please find by way of service a copy of a general form of order dated 9 October 2008 containing the orders made by Justice Southwood in this matter.
>
> You will see that our client has obtained judgement against Fresh Express Australia Pty Ltd (Fresh Express) in the amount of $190,199. Our client seeks payment of this amount within 14 days from the date of this letter.
>
> Please note that pursuant to Supreme Court Order 59, the amount of $190,199 carries interest from the date of judgment (9 October 2008) at a rate of 10.5 per cent per annum. According to our calculations this amounts to a daily interest amount of $54.70. Our client also seeks payment of interest on the judgment amount of $190,199 until such time as it is paid by Fresh Express.
>
> Our client has also obtained an order for Fresh Express to pay its costs in relation to the pursuit of the third party notice dated 6 June 2007. We will write to you shortly providing detail of our client's costs. Please note that if an agreement as to the amount and payment of client's costs cannot be reached, our client will be forced to

> commence additional proceedings in the Supreme Court of the Northern Territory for what is referred to as a taxation of its costs.
>
> It is therefore in the interests of Fresh Express to pay the judgement sum of $190,199 as soon as possible in addition to the interest component. If fresh express fails to pay the judgment sum and the interest thereon within the 14 days specified above, we will seek instruction from our client to take recovery action accordingly.
>
> Reaching an agreement as to our client's costs is also in the interests of Fresh Express, as whatever amount is ultimately agreed upon or determined by the Court will attract interest from 9 October 2008 at the rate of 10.5 per cent per annum.

[141] By 24 October 2008 both Mr Musumeci and Mr David knew that the second and third defendants had obtained judgment in default against the first defendant.

[142] I do not accept Mr Musumeci's evidence that it was not until he instigated a thorough search of the first defendant's office that he discovered the letter dated 16 October 2008. The letter and the judgment of the Court were served on Mr Musumeci by Mr Willenberg on 20 October 2008 and Mr Musumeci gave the letter to Mr David on or before 24 October 2008. Nor do I accept Mr Musumeci's evidence that the judgment in default was obtained in circumstances which did not come to the attention of the first defendant. Even on his own evidence, Mr Musumeci knew by 2 October 2008 that the first defendant was being pressed to provide further and better discovery to the second and third defendants. He had met with his Sydney lawyers to obtain advice about the matter and arrangements had been made for him to instruct Ward Keller in Darwin.

[143] Mr Musumeci's evidence about his absences from the offices of the first defendant is also most unsatisfactory. I do not accept it. His evidence is vague and lacking in detail. Mr Musumeci does not specifically depose that both Ms Sahar El-Ahamad and Ms Cathy Musumeci failed to bring the various Court documents which were served on the first defendant to his attention; nor has he produced any evidence about what they did with the documents after they received them. He does not explain how it is that the various documents did not come to his attention; nor does he explain how it is that he being busy led to the Court documents being ignored despite the fact that employees of the first defendant had accepted service of the documents.

[144] Mr Musumeci does not state why the first defendant has failed to provide full and adequate discovery or why the first defendant failed to comply with the orders of the Court dated 9 May 2009.

[145] Mr Musumeci's affidavit of 27 November 2008 did not have a proposed further and better list of documents attached to it. In his affidavit sworn on 27 April 2009, Mr Musumeci does not state the proposed further list of documents, which is annexure B to the affidavit, comprises all of the documents in the first defendant's possession that fall within the description of documents contained in the letter dated 15 August 2008. The further list of documents does not list any invoices supplied by or on behalf of the second and third defendants, profit and loss statements, annual financial reports, tax returns, ledger records or bank statements and Mr Musumeci

does not depose that no such documents were in the possession of the first defendant.

Conclusion

[146] In all of the circumstances I am not satisfied the first defendant has raised an arguable defence which carries some degree of conviction. The proposed amended defence does not have any merits to which the Court should have regard. The first defendant has provided no good reason for the first defendant's default in complying with the order of the Court that the first defendant provide further and better discovery to the second and third defendants. The first defendant has not shown a true preparedness to remedy its default. It has still not done so. Justice does not require that the first defendant's default be overlooked. The first defendant has contumeliously disregarded the orders of the court.

[147] The first defendant's application to set aside the judgment in default should be dismissed. I will hear the parties further as to costs.
