

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT

Not Restricted

S ECI 2022 00272

FORIS GFS AUSTRALIA PTY LTD (ACN 150 651 004)

1st plaintiff

AND

FORIS AU PTY LTD (ACN 640 770 958)

2nd plaintiff

v

THEVAMANOGARI MANIVEL AND OTHERS

Defendants

JUDGE: Elliott J
WHERE HELD: Melbourne
DATE OF HEARING: 6 and 13 May 2022
DATE OF JUDGMENT: 13 May 2022
DATE OF REASONS: 26 August 2022
CASE MAY BE CITED AS: Foris GFS Australia Pty Ltd v Manivel
MEDIUM NEUTRAL [2022] VSC 482
CITATION:

PRACTICE AND PROCEDURE – Default judgment – Judgment in default of appearance – Relief sought beyond the statement of claim – Declaratory relief – Substituted service – Sending an email “with” documents – Service by way of a link to a shared online drive – *Supreme Court (General Civil Procedure) Rules 2015* (Vic) rr 6.07, 21.01, 21.03, 21.04, 59.01.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the plaintiffs	Mr M McKillop	Cornwalls
For the 7 th defendant	No appearance	

Signed by AustLII

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A. Introduction

A.1 Default judgment ordered

- 1 Foris GFS Australia Pty Ltd and Foris AU Pty Ltd (“the Plaintiffs”) are part of the corporate group that operates the cryptocurrency trading platform “Crypto.com”.
- 2 On 6 May 2022, the Plaintiffs applied for default judgment against the seventh defendant, Thilagavathy Gangadory (“Gangadory”). Gangadory had failed to file an appearance. After the Plaintiffs addressed numerous material problems with their application as originally made, on 13 May 2022 default judgment was ultimately granted in favour of the first plaintiff and orders were made accordingly (“the Default Judgment”). Although formal reasons are not strictly necessary on an application for a default judgment, in light of some of the issues that arose, it is appropriate that reasons be published.

A.2 Background

- 3 The Plaintiffs made claims against a total of 8 defendants. The proceeding relates to a mistaken payment allegedly made to the first defendant, Thevamanogari Manivel (“Manivel”). It was alleged that in May 2021, instead of refunding \$100.00 as intended, \$10,474,143.00 was erroneously transferred (“the Wrongful Payment”) to Manivel after an account number was accidentally entered into the payment amount field by a representative of the second plaintiff. Extraordinarily, the Plaintiffs allegedly did not realise this significant error until some 7 months later, in late December 2021.
- 4 After making various enquiries of the Commonwealth Bank of Australia (“the Commonwealth Bank”),¹ the first plaintiff commenced this proceeding by writ in early February 2022. The following day, without notice to Manivel, it sought freezing orders over Manivel’s bank account and her assets in an amount reflecting the Wrongful Payment. On 7

¹ The bank account belonging to Manivel into which the Wrongful Payment was made was with the Commonwealth Bank. The Commonwealth Bank was joined at the outset as the second defendant but no substantive final relief was sought against it.

February 2022, freezing orders were made against Manivel.² However, the Plaintiffs made subsequent applications to join additional defendants and sought freezing orders in respect of each of them. The Plaintiffs produced evidence to the effect that Manivel had transferred the bulk of the Wrongful Payment by various payments to the third to eighth defendants. As a result, a large body of evidence has been put before the court. Naturally, references to the facts of this case based on such uncontested evidence are necessarily open to challenge if Gangadory ever seeks to set aside the Default Judgment.³

5 The Plaintiffs allege Manivel purchased a property located at 19 Liewah Circuit, Craigieburn (“the Craigieburn Property”) on behalf of Gangadory. The purchase price of \$1,350,000.00 and all other costs and expenses associated with the purchase of the Craigieburn Property were paid allegedly using the Wrongful Payment. Gangadory subsequently became the registered proprietor of the Craigieburn Property on 21 February 2022.

6 Gangadory resides in Malaysia. She is Manivel’s sister.

7 On 1 March 2022, the Plaintiffs sought and obtained freezing orders against Gangadory, including in respect of the Craigieburn Property. The following day, at the request of the Plaintiffs, Manuel’s solicitor provided Gangadory’s contact details to them, including her Malaysian residential address and her personal email address.⁴

A.3 Service

8 On and after 2 March 2022, the Plaintiffs attempted to serve Gangadory with the freezing orders, along with other documents relevant to the proceeding, but were unsuccessful. As a result, an application for substituted service was made. Evidence of various previous attempts at service was relied upon. As part of the evidence in support of that application, an email from Gangadory on 8 March 2022 was tendered. That email was sent to Manivel’s

² Included in those orders made was an order that the second plaintiff be joined as a party to the proceeding.

³ As to the appropriateness of the court relying on evidence on an application for default judgment, see par 30(5) below.

⁴ There was a minor typographical error in the Malaysian residential address provided, which was rectified in later communications.

solicitors in response to an email from them to Gangadory on the same day,⁵ which had attached an affidavit of assets of another defendant. Gangadory's reply email simply read, "Received, thank you".⁶ Further, it would appear that around this time the existence of this proceeding had also come to Gangadory's notice more generally. In correspondence concerning the correct spelling of Gangadory's name, the Plaintiffs' solicitors were informed by Manivel's solicitors that Gangadory was seeking legal advice and indicated Gangadory's legal representative would be in contact with the Plaintiffs' solicitors "shortly regarding service".

9 On 11 March 2022, orders were made by Osborne J, including:

4. Pursuant to rule 6.10 of the [*Supreme Court (General Civil Procedure) Rules 2015* (Vic) ("the Rules")] service by the [P]laintiffs of the following documents:
 - (a) these orders;
 - (b) orders of the Hon. Justice Elliott dated 1 March 2022;
 - (c) the freezing order dated 1 March 2022 made against [Gangadory] (at annexure B of the orders of the Hon. Justice Elliott dated 1 March 2022);
 - (d) transcript of the hearing on 1 March 2022;
 - (e) fourth further amended writ dated 7 March 2022;
 - (f) further amended statement of claim dated 9 March 2022;
 - (g) affidavit of Kalash Mohan made on 2 February 2022;
 - (h) affidavit of Kalash Mohan made on 6 February 2022;
 - (i) affidavit of Adrian Lee made on 8 February 2022;
 - (j) affidavit of Adrian Lee made on 16 February 2022;
 - (k) affidavit of Adrian Lee made on 24 February 2022 (ex parte);
 - (l) affidavit of Bianca Josephine Quan made on 28 February 2022; and

⁵ The email was copied to a large number of others involved in the case, including a number of the Plaintiffs' solicitors.

⁶ The reply email was copied to all of the same recipients.

- (m) summons dated 28 February 2022 (collectively, “Court Documents”).

may be effected on [Gangadory] by:

- (a) sending an email with the Court Documents to [email address];
- (b) sending the Court Documents by prepaid post to: [the Craigieburn Property and a residential property in Truganina, Victoria which was the address of Gangadory recorded on the certificate of title for the Craigieburn Property];
- (c) sending the Court Documents by prepaid international post to “[address], MALAYSIA”.

- 5. Service of the [Court] Documents on [Gangadory] is taken to be effected [5] business days after the [P]laintiffs by their solicitors have sent each of the forms of communication set out in order 4.⁷

(Collectively, “the Substituted Service Orders”).

- 10 In obtaining the Default Judgment, the Plaintiffs relied upon evidence concerning service both before and after the Substituted Service Orders, which included:

- (1) An email sent on 2 March 2022 to Gangadory listing documents being provided, with a OneDrive⁸ link in the body of the email containing the documents listed (“the 2 March Email”).
- (2) A process server’s attempt on 6 March 2022 to serve Gangadory at the Craigieburn Property.
- (3) An email sent on 8 March 2022 to Gangadory requesting confirmation of receipt of the 2 March Email.
- (4) Evidence of the mailing of the Court Documents by post on 15 March 2022 to the Craigieburn Property and the address in Truganina which was recorded on the certificate of title for the Craigieburn Property, together with the address in

⁷ Notwithstanding the terms of this order, when an application to seek default judgment was originally foreshadowed not long after the 5 days had expired, I decided it was appropriate to wait until 42 days after service had lapsed before allowing that application to be made: see rr 7.06, 8.04(e).

⁸ OneDrive is a file hosting platform.

Malaysia at which Gangadory is believed to reside.

- (5) A further email sent on 15 March 2022 to Gangadory listing the Court Documents and containing a OneDrive link in the body of the email (“the 15 March Email”).

11 The 2 March Email was addressed to Gangadory and referred to the fact that the solicitors who sent the 2 March Email were acting for the Plaintiffs. After noting that a freezing order had been made against Gangadory on 1 March 2022, the email stated that a OneDrive link was provided by way of service of the documents individually listed. Immediately following this list was a link to the 12 documents referred to in the 2 March Email.⁹ Finally, details of the next scheduled court hearing on 4 March 2022 were given, together with various contact details and links for that hearing. Those details included the names and telephone numbers of each of my associates (who were identified as such in the 2 March Email), together with my chambers’ email address. Obviously, for the reader to obtain access to the documents themselves, it was necessary to click on the OneDrive link.

12 The 15 March Email followed the same approach in serving the Court Documents upon Gangadory. It provided another OneDrive link to the Court Documents, being all the documents referred to in the Substituted Service Orders.¹⁰ The other means by which substituted service was ordered to occur were also implemented on 15 March 2022.

A.4 Events after substituted service

13 Despite her reply email to Manivel’s solicitors and her apparent indication to them that she would be in contact,¹¹ Gangadory has not responded to any of the correspondence from the Plaintiffs’ solicitors.

14 Shortly before 6 May 2022, the Plaintiffs’ solicitors invited the court to deal with the matter

⁹ These included the third further amended writ filed on 2 March 2022 and the amended statement of claim filed on 23 February 2022.

¹⁰ See par 9 above.

¹¹ See par 8 above.

on the papers. That invitation was declined. Amongst other difficulties, the default judgment as then sought was inconsistent with the matters pleaded (including the relief sought) in the further amended statement of claim dated 9 March 2022 as served upon Gangadory (“the Statement of Claim”). The application was adjourned to 13 May 2022 so that the Plaintiffs could address various issues that were raised by the court.¹²

15 In relation to the application in the form ultimately made, an issue raised by the court concerned whether service had been properly effected in accordance with the Substituted Service Orders. The issue related to the provision of the Court Documents by a OneDrive link in the 15 March Email.¹³

16 Connected to this issue was the fact that by the time of this application the relevant link had expired and accordingly the court could not verify for itself that the link did, in fact, contain the Court Documents. In this regard, further evidence was put before the court explaining that the policy of the Plaintiffs’ solicitors was for OneDrive links to expire automatically after 30 days for security reasons. It was further explained that the total size of the documents available by the OneDrive link in the 15 March Email was 26.5 megabytes, which exceeded the email provider’s default size limit of 10 megabytes.¹⁴

B. Orders sought

17 In broad terms, on the second occasion the Plaintiffs sought judgment in default of appearance, the orders sought were:

- (1) An order that Gangadory pay the first plaintiff the sum of \$1,350,000.00.
- (2) A declaration that the Craigieburn Property was acquired by Gangadory on

¹² The relief then sought was in favour of both the Plaintiffs, notwithstanding the pleaded claim made by them was in the alternative: see *RT Company Pty Ltd v Minister of State for the Interior* (1957) 98 CLR 168, 169.7, 170.2 (Dixon CJ). Further, the proposed orders required Gangadory to take certain steps in Australia within 7 days, which was problematic given the evidence indicated she resided (and would continue to reside) in Malaysia. Various other issues were raised, the detail of which is not necessary to discuss.

¹³ See also r 6.07(1)(f), (2.2), (2.3), (2.4).

¹⁴ The email was sent using the Microsoft product known as Outlook. A webpage published by Microsoft on the issue of sending large files on Outlook was tendered. See also r 6.07(2.4).

trust for the first plaintiff.

- (3) Orders allowing the first plaintiff to take steps to sell the Craigieburn Property.
- (4) An order that Gangadory pay interest to the first plaintiff calculated from 1 March 2022 to the date of judgment.
- (5) An order that Gangadory pay the Plaintiffs' costs.

18 In seeking orders that judgment be entered only in favour of the first plaintiff, the Plaintiffs accepted that it was not open to the court to enter judgment in favour of both of them. This was because the claims made against Gangadory were made in the alternative. The Plaintiffs submitted, correctly, that it was open to them to elect (consistent with the allegations in the Statement of Claim) which plaintiff moved for judgment.¹⁵ Naturally, in making such an election, the claim made by the other plaintiff must be treated as being abandoned (at least unless and until the Default Judgment is set aside).¹⁶

C. Submissions

19 The Plaintiffs submitted that the court could be satisfied that the first plaintiff was entitled to relief as sought based upon its case as pleaded in the Statement of Claim,¹⁷ and thus on the facts that could be taken as admitted for the purposes of this application. These relevantly included that:

- (1) The first plaintiff is incorporated and entitled to sue in its own name.
- (2) At all times since at least 11 May 2021, Manivel held a bank account with the Commonwealth Bank.
- (3) The second plaintiff was party to a number of agreements whereby a

¹⁵ The Plaintiffs' primary claim as pleaded was that the first plaintiff was entitled to judgment.

¹⁶ *Macquarie Bank Ltd v Beaconsfield* [1992] 2 VR 461, 466.6, 468.3-472.3 (Ormiston J); *RT Company Pty Ltd v Minister of State for the Interior* (1957) 98 CLR 168, 169.9 (Dixon CJ); *Currie v May* [1914] VLR 17, 18.9-19.1 (Hodges J).

¹⁷ Being the pleading the subject of the Substituted Service Orders.

contractor (“the Service Provider”) provided a payments service and held the funds disbursed in the making of the Wrongful Payment on its behalf.

- (4) By a further agreement on 15 October 2021, those agreements were novated, assigned and transferred from the second plaintiff to the first plaintiff (“the Novation Agreement”).
- (5) On 12 May 2021, the Wrongful Payment was made by the Service Provider through funds held on trust on behalf of the second plaintiff.
- (6) The Wrongful Payment was made by mistake and was instead intended to be in the amount of \$100.00.
- (7) The Wrongful Payment was discovered during an audit on 23 December 2021.
- (8) Manivel retained the proceeds paid to her account held with the Commonwealth Bank.
- (9) On 13 May 2021, Manivel disbursed \$10,100,000.00 to an account held jointly with the third defendant (“the Joint Account”).¹⁸
- (10) On 31 January 2022, Manivel transferred \$430,000.00 from the Joint Account to Raveena Vijian, her daughter (“the Raveena Funds”).
- (11) In February 2022, Manivel purchased the Craigieburn Property as a gift for Gangadory, partly with the funds held in the Joint Account and partly with the Raveena Funds.
- (12) On 21 February 2022, Gangadory became the registered proprietor of the Craigieburn Property.
- (13) The Craigieburn Property was purchased with funds from the Wrongful

¹⁸ Although not referred to in the Statement of Claim, the evidence of Manivel was that she was in a “romantic relationship” with the third defendant.

Payment.

(14) Gangadory was unjustly enriched by receiving the purchase price of the Craigieburn Property, being disbursed proceeds of the Wrongful Payment.

(15) By reason of the terms of the Novation Agreement, the first plaintiff is entitled to make the claim for restitution of the purchase price of the Craigieburn Property.

(16) Gangadory holds the Craigieburn Property for the benefit of the Plaintiffs.

20 By the prayer for relief in the Statement of Claim, the Plaintiffs claimed:

(1) The sum equal to the purchase price of the Craigieburn Property from Gangadory payable to either the first plaintiff or the second plaintiff.

(2) A declaration that the Craigieburn Property is held on trust by Gangadory for the benefit of the Plaintiffs.

(3) Orders requiring the Craigieburn Property to be transferred to, or alternatively sold for the benefit of, the Plaintiffs.

(4) Costs.

(5) Such further or other orders as the court thinks fit.

21 Consistent with the Statement of Claim, on this application the first plaintiff sought an order for declaratory relief to record its interest in the Craigieburn Property. It was submitted that such relief was appropriate as there was a legal controversy as to the ownership of the Craigieburn Property held in the name of Gangadory.

22 The Plaintiffs submitted that it was open for the court to make a declaration without a contradictor appearing before the court. They submitted that as Gangadory had been served (personally or by substituted service) and had been given the opportunity to appear and oppose the making of the declaration, her absence was no bar to declaratory relief being granted. The Plaintiffs noted that there was no clear authority on this point in Victoria. Thus,

they referred to authority which supported the proposition that it may be appropriate to make a declaration if there was a party who had an interest in opposing the declaratory relief sought,¹⁹ even if that party chose not to contest the declaration knowing it was being sought.²⁰

23 The first plaintiff also submitted that it was entitled to interest notwithstanding it was not claimed in the Statement of Claim. It relied on rule 21.03(1)(a)(ii), which enables interest to be awarded *from the commencement of the proceeding* to the date of judgment at rates payable on judgment debts during that time.²¹

24 In relation to whether service had been validly effected, the Plaintiffs submitted that in accordance with the terms of the Substituted Service Orders, this turned on what it meant for an email to be sent “with” the Court Documents. They submitted that the answer could not be that the Court Documents were required to be included in the body of the email, because the documents required to be sent exceeded the file size limit of an email. In consequence, the Plaintiffs submitted that a link to a shared online drive containing all of the Court Documents was sufficient to satisfy the order. In addition, the Plaintiffs relied on the further evidence that the link was working at the time the 15 March Email was sent, and for 30 days thereafter.

D. Rules and legal principles

D.1 The power to award default judgment

25 Order 21 of the Rules addresses judgment in default of appearance or pleading. In relation to default of appearance, rule 21.01 provides:

(1) This Rule applies only to a proceeding commenced by writ.

¹⁹ *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* (2012) 201 FCR 378, 387 [30] (Greenwood, Logan and Yates JJ); *IMF (Australia) Ltd v Sons of Gwalia Ltd (administrator appointed)* (2004) 211 ALR 231, 244 [47] (French J).

²⁰ *Ibid*; *Fair Work Ombudsman v Lohr* (2018) 356 ALR 424, 431-432 [19] (Bromwich J), citing *Geneva Laboratories Ltd v Prestige Premium Deals Pty Ltd (No 4)* (2016) 120 IPR 133, 148-149 [76]-[82] (Bromwich J).

²¹ No interest was claimed for any period prior to the commencement of the proceeding.

- (2) Where a defendant does not file an appearance within the time limited, the plaintiff may enter or apply for judgment against that defendant in accordance with this Order unless Rule 2.07(1) of Chapter II applies.²²
- (3) Judgment shall not be entered or given for the plaintiff unless there is filed—
 - (a) a notice to the Prothonotary requesting the Prothonotary to search for an appearance by the defendant;
 - (b) an affidavit proving service of the writ on the defendant; and
 - (c) where the plaintiff applies for judgment in accordance with Rule 21.04 and the indorsement of claim on the writ does not constitute a statement of claim in accordance with Rule 5.04, a statement of claim.

26 Rules 21.03 and 21.04 govern specific types of default judgments. Rule 21.03 applies to judgment for the recovery of debt, damages or property. It states:

- (1) Where a claim is made for the recovery of a debt, damages or any property, whether or not another claim is also made in the proceeding, and the plaintiff is entitled to judgment on that claim against any defendant in accordance with Rule 21.01 ..., the plaintiff may—
 - (a) for the recovery of a debt, enter final judgment against that defendant for an amount not exceeding the amount claimed in the writ or, if the plaintiff has served a statement of claim, the amount claimed in the statement of claim, together with interest from the commencement of the proceeding to the date of the judgment—
 - (i) on any debt which carries interest, at the rate it carries;
 - (ii) on any other debt, at the rates payable on judgment debts during that time;
 - (b) for the recovery of damages, enter interlocutory judgment against that defendant for the damages to be assessed;
 - (c) for the recovery of land, enter judgment for possession of the land against that defendant;
 - ...
- (2) Upon entering judgment under paragraph (1), the plaintiff may also enter judgment for costs.

²² Rule 2.07(1) of Chapter II provides that, in a proceeding in a commercial list that is managed by a commercial list judge, an order of a commercial list judge is required before judgment in default of appearance can be entered. Thus, it was necessary for the Plaintiffs to also seek an order under this rule.

27 In the context of rule 21.03(1), “debt” means a “debt or liquidated demand”.²³ It refers to a pecuniary demand where the amount due is fixed and specific, or where it can readily be reduced to certainty by a mathematical calculation.²⁴

28 Rule 21.04 accounts for judgment other than for recovery of debt, damages or property. It provides:

- (1) Where a claim is made other than for the recovery of a debt, damages or any property, whether or not a claim for such recovery is also made in the proceeding, and the plaintiff is entitled to judgment on that claim against any defendant in accordance with Rule 21.01..., the Court may give judgment for the plaintiff upon the statement of claim.
- (2) An application for judgment under paragraph (1) may be made without notice to the defendant.

29 More broadly, rule 59.01 provides the court with a discretion in making any judgment or order. It states:

The Court may, at any stage of a proceeding, on the application of any party, give such judgment or make such order as the case requires notwithstanding that the judgment or order had not been sought in the originating process or other document of the party in the proceeding.

30 In relation to the principles to be applied in granting default judgment, the authorities establish that:

- (1) Traditionally, when considering whether to grant default judgment, the courts confined themselves to the facts alleged in the statement of claim.²⁵
- (2) The effect of not filing an appearance is that the allegations in the statement of claim are taken to be admitted.²⁶

²³ *City Mutual Life Assurance Society Ltd v Giannarelli* [1977] VR 463, 468.3 (McInerney J).

²⁴ Ibid.

²⁵ *Phonographic Performance Ltd v Maitra* [1998] 2 All ER 638, 643G (Lord Woolf MR); *Young v Thomas* [1892] 2 Ch 134, 137.7 (Bowen LJ).

²⁶ *Victorian Workcover Authority v White* [2021] VSC 458, [13] (Connock J); *Yang v Finder Earth Pty Ltd* [2019] VSCA 22, [24] (Maxwell P, Tate and Emerton JJA).

- (3) The particulars referred to and served with the statement of claim are part of the statement of claim for this purpose.²⁷
- (4) The statement of claim will be sufficient to ground the requested relief if “each element of the relevant civil wrong is properly and discretely pleaded”.²⁸
- (5) Ordinarily, the court will not look at any affidavit or other material which establishes additional facts that should have been pleaded in the statement of claim.²⁹ However, in appropriate circumstances, a court may permit an applicant for default judgment to rely upon limited further evidence in relation to the relief sought, provided that evidence does not alter the case as pleaded.³⁰

D.2 Available relief

D.2.1 Relief sought beyond the statement of claim

- 31 In *Faithfull v Woodley*,³¹ it was observed that, historically, a plaintiff had been unable to obtain judgment for any relief other than that which was expressly claimed in the statement of claim.³² However, more recently it has been suggested that the court may, in its discretion, award additional or different relief beyond what is sought in a statement of claim.
- 32 In *Australian Competition and Consumer Commission v Dataline.net.au Pty Ltd*,³³ Kiefel J observed that in *Faithfull v Woodley*³⁴ the defendant had not been put on notice of the orders

²⁷ *United Telephone Co v Smith* (1889) 61 LT 617, 618.1 (Chitty J).

²⁸ *Macquarie Bank Ltd v Seagle* (2005) 146 FCR 400, 406–407 [24] (Conti J), quoted with approval in *Geneva Laboratories Ltd v Prestige Premium Deals Pty Ltd (No 4)* (2016) 120 IPR 133, 146 [63] (Bromwich J).

²⁹ *Australian Competition and Consumer Commission v Yellow Page Marketing BV (No 2)* (2011) 195 FCR 1, 21 [63] (Gordon J).

³⁰ *Geneva Laboratories Ltd v Prestige Premium Deals Pty Ltd (No 4)* (2016) 120 IPR 133, 146 [65]; *Australian Competition and Consumer Commission v Yellow Page Marketing BV (No 2)* (2011) 195 FCR 1, 21 [61]–[63]; *Australian Competition and Consumer Commission v Dataline.net.au Pty Ltd* (2006) 236 ALR 665, 678–679 [48]–[51] (Kiefel J).

³¹ (1889) 43 Ch D 287.

³² *Ibid*, 289.6 (North J). See also fn 25 above.

³³ (2006) 236 ALR 665.

³⁴ (1889) 43 Ch D 287.

sought, and that this appeared to be a predominant factor in the court's decision to withhold relief not sought in the statement of claim.³⁵ Her Honour concluded that there is no blanket rule against granting additional or different relief, but rather that such relief may be refused if it would undermine fairness in the conduct of litigation.³⁶ What is fair or unfair "may differ from case to case" and is a matter for the court to determine in its discretion, having regard to the nature of the case, the orders sought, and whether the defendant is or can be taken to be aware of the prospect of such an order being made.³⁷

33 Further, Kiefel J observed that a discretionary approach to granting additional or different relief was consistent with order 35(1) of the *Federal Court Rules 1979* (Cth). At that time,³⁸ order 35(1) empowered the Federal Court to "at any stage ... pronounce such judgment or make such order as the nature of the case requires, notwithstanding that the applicant does not make a claim for relief extending to that order in any originating process". Her Honour therefore concluded that "[n]o general rule prohibiting additional or varied relief should be implied".³⁹

34 Rule 59.01 of the Rules is framed in substantially the same terms as order 35(1) of the *Federal Court Rules* as it stood at the time of Kiefel J's decision.

D.2.2 Declaratory relief

D.2.2.1 Is it necessary to secure a contradictor?

35 Speaking generally, it has been held that a party seeking a declaration should secure a contradictor.⁴⁰ However, as was explained in *Australian Competition and Consumer Commission v MSY Technology Pty Ltd*,⁴¹ the requirement of a contradictor may be met

³⁵ (2006) 236 ALR 665, 678 [46].

³⁶ Ibid.

³⁷ Ibid, 678 [46]-[47].

³⁸ The *Federal Court Rules 1979* (Cth) have been repealed and replaced by the *Federal Court Rules 2011* (Cth).

³⁹ *Australian Competition and Consumer Commission v Dataline.net.au Pty Ltd* (2006) 236 ALR 665, 678 [47].

⁴⁰ *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, 437.9-438.1 (Gibbs J), citing *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438, 448.4 (Lord Dunedin).

⁴¹ (2012) 201 FCR 378.

where there is a party who has a genuine interest in opposing the declaratory relief sought, whether or not that party chooses to oppose the granting of that relief.⁴² Accordingly, the contradictor does not necessarily have to appear at the hearing of the application.⁴³ This has been justified on the basis that “[i]t cannot be that a choice made not to participate puts a respondent in a better position than one who attends and presents arguments against relief being granted”.⁴⁴

- 36 Of course, each case will depend upon its circumstances and the fact that an opposing party does not appear may be relevant to a determination of whether or not a declaration ought to be made. However, the simple fact that the opposing party does not appear will not create an insurmountable obstacle to a plaintiff obtaining declaratory relief.⁴⁵

D.2.2.2 May a declaration be made by way of default judgment?

- 37 The court has a discretion in determining whether or not it ought to make a declaration. Although the discretion is broad, there are limitations upon its exercise consistent with principles pertaining to a court acting judicially.⁴⁶ Speaking generally, a court should not make a declaration unless there is a real legal controversy to be determined that is not hypothetical and the declaration will produce foreseeable consequences for the parties.⁴⁷

- 38 It was observed in *Metzger v Department of Health and Social Security*.⁴⁸

The court does not make declarations just because the parties to litigation have chosen to admit something. The court declares what it has found to be the law after proper argument, not merely after admissions by the parties. There are no declarations without argument; that is quite plain.

- 39 However, the position is not as rigid as this passage might suggest. Any aversion of the courts to granting declarations by way of default judgment should be treated at its highest as a

⁴² Ibid, 382 [14], 387 [30] (Greenwood, Logan and Yates JJ).

⁴³ *Geneva Laboratories Ltd v Prestige Premium Deals Pty Ltd (No 4)* (2016) 120 IPR 133, 148 [79] (Bromwich J).

⁴⁴ Ibid, 148-149 [82].

⁴⁵ See also *Nesor Nominees Pty Ltd v Big Boys BBQ Qld Pty Ltd* (2019) 146 IPR 1, 7 [27] (Anderson J); *Bass Coast Council v Hollole* [2017] VSC 803, [5] (Mukhtar AsJ).

⁴⁶ *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 582.1 (Mason CJ, Dawson, Toohey and Gaudron JJ), 596.3 (Brennan J).

⁴⁷ Ibid.

⁴⁸ [1977] 3 All ER 444, 451.2 (Megarry VC).

rule of practice and not a rule of law.⁴⁹ This is because in some cases declaratory relief may be appropriate where a plaintiff cannot obtain “the fullest justice to which [she or he] is entitled without such a declaration”.⁵⁰

- 40 Although many of the decisions permitting declarations by default judgment have concerned relief sought by regulatory agencies on matters of public interest,⁵¹ it has been suggested the same approach might apply to disputes about private rights given it is less likely that the declaration sought will affect the rights of non-parties.⁵²

D.2.3 Interest

- 41 Because a right to interest from the date of the commencement of the proceeding to the date of judgment arises under the Rules for a plaintiff seeking default judgment, to obtain an order for interest for this period, it is not strictly necessary for the plaintiff to have claimed interest in the writ or statement of claim.⁵³

- 42 Section 2(1) of the *Penalty Interest Rates Act 1983* (Vic) provides that the penalty interest rate is the interest rate expressed as a percentage fixed by the Attorney-General from time to time by notice published in the Government Gazette. At the relevant times, the penalty interest rate on judgment debts as fixed in the Government Gazette was 10 percent.⁵⁴

D.3 Compliance with substituted service orders

- 43 Ordinarily, a writ (being an originating process) must be served personally on a defendant.⁵⁵

⁴⁹ *Patten v Burke Publishing Co Ltd* [1991] 2 All ER 821, 823C (Millet J), applied in *Australian Competition and Consumer Commission v Dataline.net.au Pty Ltd* (2006) 236 ALR 665, 680-681 [58]-[59] (Kiefel J). *Australian Competition and Consumer Commission v Dataline.net.au Pty Ltd* has been followed in subsequent Federal Court decisions: see, for example, *Secretary, Department of Health v Evolution Supplements Australia Pty Ltd* [2021] FCA 74, [40] (Burley J); *Fair Work Ombudsman v Lohr* (2018) 356 ALR 424, 431 [19] (Bromwich J).

⁵⁰ *Patten v Burke Publishing Co Ltd* [1991] 2 All ER 821, 823C, applied in *Australian Competition and Consumer Commission v Dataline.net.au Pty Ltd* (2006) 236 ALR 665, 681 [59].

⁵¹ See, for example, *Bass Coast Council v Hollole* [2017] VSC 803, [23]-[24] (Mukhtar AsJ).

⁵² *Ibid*; *Australian Competition and Consumer Commission v Dataline.net.au Pty Ltd* (2006) 236 ALR 665, 680-681 [58]-[59]; *Patten v Burke Publishing Co Ltd* [1991] 2 All ER 821, 823H.

⁵³ Rule 21.03(1)(a)(ii).

⁵⁴ Victoria, *Victorian Government Gazette*, No G1 (5 January 2017) 9.

⁵⁵ Rule 6.02(1).

Sometimes this is not practicable. Where it is impracticable to serve a document in the manner required by the Rules, the court may order that, instead of service, a party may take specified steps “for the purpose of bringing the document to the notice of the person to be served”.⁵⁶

44 This rule is to be read and applied in the context of the *Civil Procedure Act 2010* (Vic) and its overarching purpose, being the just, efficient, timely and cost-effective resolution of the real issues in dispute.⁵⁷ Achieving the overarching purpose may require a more robust and proactive approach than that historically taken.⁵⁸

45 Further, the provision of documents pursuant to an order for substituted service is not personal service; rather it is a mechanism intended to bring the documents to a party’s attention. The court may be prepared to disregard any failure to comply precisely with the terms of a substituted service order, so long as there is no evidence of prejudice or substantial injustice suffered by the recipient (for example, where it is probable that the document came to the notice of the receiving party within the proper time).⁵⁹

46 If the defendant fails to appear, the plaintiff must file an affidavit showing the order for substituted service was complied with before judgment in default of appearance may be entered.⁶⁰

E. Analysis

47 Broadly speaking, the first plaintiff sought 5 substantive orders.⁶¹ As different issues arise,

⁵⁶ Rule 6.10(1). See also *Sanc (Australia) Pty Ltd v Dixon* [2020] VSC 872, [19(a)] (Connock J).

⁵⁷ *Austin v Dobbs* [2018] VSC 755, [31] (Garde J), applied in *Sanc (Australia) Pty Ltd v Dixon* [2020] VSC 872, [19(f)]; *Civil Procedure Act 2010* (Vic), ss 7(1), 9(1), 11.

⁵⁸ *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303, 323 [56]–[57] (French CJ, Kiefel, Bell, Gageler and Keane JJ). Although the decision in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* concerned s 56(1) of the *Civil Procedure Act 2005* (NSW), the High Court’s reasoning is equally applicable to s 7(1) of the *Civil Procedure Act 2010* (Vic): *Austin v Dobbs* [2018] VSC 755, [32].

⁵⁹ *Re McCormac; Ex parte Taylor* (1985) 10 FCR 162, 164.9–165.2, 166.8–167.1 (Burchett J), followed in *Re Vincent; Ex parte State Bank of New South Wales Ltd* (1996) 71 FCR 58, 65A (Hill J).

⁶⁰ Rule 21.01(3)(b): see par 25 above.

⁶¹ See par 17 above.

each of these will be considered in turn. Before addressing these, there are some preliminary matters.

E.1 Formal requirements

48 Each of the requirements in rule 21.01, which enables a plaintiff to apply for judgment in default of appearance, have been satisfied. The proceeding was commenced by writ; Gangadory has failed to file an appearance; the Plaintiffs have requested the Prothonotary conduct a search for an appearance; the Plaintiffs have provided an affidavit proving service of the writ on Gangadory (in accordance with the Substituted Service Orders); and there is a statement of claim (for the purposes of obtaining relief under rule 21.04).⁶² Accordingly, the court's discretion to give judgment upon the Statement of Claim is enlivened.⁶³

49 Although the court was ultimately satisfied that the Plaintiffs had complied with the Substituted Service Orders, a number of issues arose during the hearing which should be discussed.

50 In accordance with the Substituted Service Orders, the Plaintiffs sent the Court Documents to Gangadory by the 15 March Email to her personal email address. That email advised that "a freezing order" had been made against her, then stated: "Please find below a OneDrive folder containing the following documents by way of service".⁶⁴ The 15 March Email then listed the Court Documents, which list was followed by the OneDrive link. Prior to the hearing of this application, I attempted to click on the link by accessing the electronic version of the 15 March Email (that had been filed by the Plaintiffs) to ensure that the Court Documents had indeed been provided to Gangadory. The link directed me to a page which read: "Sorry, the link has expired. The link was set to expire after a certain amount of time. Please contact the person who shared this link with you."

51 To satisfy the court that the Court Documents had been provided with the 15 March Email,

⁶² Rule 21.01.

⁶³ See rr 21.03, 21.04.

⁶⁴ "Microsoft OneDrive" is 1 example of a shared online drive.

the Plaintiffs provided 2 further affidavits. Amongst other matters, there was further evidence to the effect that the Plaintiffs' solicitors maintained an organisation-wide policy requiring that external OneDrive links automatically expire after 30 days. The evidence confirmed the link remained functional until 14 April 2022.

52 There was also an explanation as to why a link was used to enable access to the Court Documents. The Plaintiffs submitted it was necessary to provide a link because of capacity issues. To elaborate, there is a file size limit of 20 megabytes when sending an email by Microsoft Outlook, and the Court Documents to be provided by way of service to Gangadory exceeded that file size limit (their total size being 26.5 megabytes). This gave rise to the need to send the Court Documents via a shared online drive link.

53 In relation to whether the 15 March Email met the requirements imposed by court order, the relevant part of the Substituted Service Orders simply provided that service could be effected by "sending an email *with* the Court Documents to [email address]". Accordingly, the issue of compliance turned on whether documents contained within a link in an email ought to have been considered to be sent "with" an email.

54 In my view, the ordinary meaning of "with" is sufficient to capture documents contained in a link within an email.⁶⁵ Further, in determining compliance with a substituted service order, regard must be had to the overarching purpose of the *Civil Procedure Act*; namely, facilitating the just, efficient, timely and cost-effective resolution of the real issues in dispute. Sharing documents by an easily accessible online link accords with this purpose. Furthermore, in other contexts, courts have accepted that substituted service may be effected by providing a link to a shared online drive sent via a text message.⁶⁶ Moreover, at the time the Substituted Service Orders were made, there was evidence before the court that this was the very method that had been previously adopted in attempting service.⁶⁷ In the absence of

⁶⁵ See *Macquarie Dictionary* (online at 16 May 2022) "with" (p¹, def 1), which defines it as "accompanied by or accompanying". See also fnn 13-14 above.

⁶⁶ *Fair Work Ombudsman v DTF World Square Pty Ltd* [2020] FCA 1178, [25] (Katzmann J); *Westpac Banking Corporation v Forum Finance Pty Ltd (Contempt Application)* [2021] FCA 1341, [14] (Lee J).

⁶⁷ See pars 10(1), 11 above.

any indication to the contrary, it must have been apparent on 11 March 2022 that this was the intended means of emailing the Court Documents once the Substituted Service Orders had been made.

55 The Plaintiffs provided evidence of the contents and state of the OneDrive platform in question at the point when the link was provided to Gangadory in the 15 March Email. This evidence demonstrated that the OneDrive link did provide access to the Court Documents. Therefore, the link to the drive fulfilled the requirement that an email be sent with the Court Documents. Accordingly, I am satisfied that service as effected complied with the Substituted Service Orders.

56 These reasons concerning service would be incomplete if I did not also express my reservations more generally about the form of substituted service in this case, lest it be thought that in all circumstances an email containing a link to documents will necessarily be an appropriate means of substituted service.

57 It is a common experience in modern litigation for documents to be substantial in number and in length. In a proceeding of any level of complexity, this may be inescapable. As in many other aspects of litigation, practitioners and the court have benefited from the use of digital access to documents. For example, where documents cannot be “attached” to a singular email, a practitioner may opt to provide a link to a shared online drive for the more efficient and orderly presentation of those documents. This allows the sender to avoid splitting the delivery of the documents into multiple emails in order to comply with the file size limits of most email servers. Ordinarily, documents in those shared online drives can, with some ease, be downloaded by a user individually or as a whole. That said, I also accept that not every user will have the technical proficiency to do so. In my view, when initial service is sought to be effected, it is incumbent on practitioners to ensure clear instructions are provided to recipients in relation to using the link, and viewing or downloading the documents.

58 Further, in order to establish service, if a party uses this method to provide documents, it should adduce evidence that the documents were in fact uploaded to and accessible on that online drive in compliance with the orders.

59 Furthermore, caution must be exercised by the court in accepting this form of notification as part of a substituted service order. Regrettably, it has become common knowledge that many scammers use emails for nefarious purposes, including to induce recipients to disclose personal information or to install malware. By such means, many innocent recipients of emails suffer losses each year which total many billions of dollars. Accordingly, many email users who receive an unsolicited email from an unknown sender adopt a practice, justifiably, of not clicking on any link contained in such an email or acting on the email more generally (other than deleting it). Thus, courts need to be alive to these issues when ordering substituted service by the sending of an email with documents, particularly when it is in lieu of personal service.

60 In short, in cases where it appears likely that a defendant does not have knowledge of the existence of the proceeding in question, any order for substituted service by email ought to include information about how the recipient may independently verify that the email is authentic. As the issue did not arise in this case,⁶⁸ it is unnecessary to elaborate further as to how this might be achieved.

E.2 Judgment for purchase price

61 The first plaintiff sought judgment against Gangadory for the sum of \$1,350,000.00.

62 By reason of the nature of this application, the following facts as pleaded in the Statement of Claim are taken to be admitted.

63 The Wrongful Payment was made using the second plaintiff's money. The Service Provider provided a payment service to the second plaintiff by which it would make payments and collect fees on behalf of the second plaintiff. The Service Provider held these fees on trust in a bank account co-mingled with moneys held for the Service Provider's other customers, and would apply those funds to pay refunds where the second plaintiff decided to reverse a transaction. On 15 October 2021, the agreements between the Service Provider and the

⁶⁸ At the time the Substituted Service Orders were made, there was evidence before the court that it was probable that Gangadory already knew of the existence of this proceeding: see par 8 above.

second plaintiff were novated to the first plaintiff.

64 On 12 May 2021, the Wrongful Payment was made to Manivel. Manivel retained those funds, disbursing \$10,100,000.00 to the Joint Account. On 4 February 2022, Manivel withdrew funds from the Joint Account and from the Raveena Funds for the purpose of buying and gifting the Craigieburn Property to Gangadory. That transaction was completed on a date unknown but prior to 21 February 2022. Gangadory is currently the registered proprietor of the Craigieburn Property.

65 Therefore, for the purposes of this application it is established that the Craigieburn Property was acquired with funds traceable to the Wrongful Payment and would never have been in Gangadory's hands if the Wrongful Payment had not been made. Thus, Gangadory was unjustly enriched by receiving the purchase price of the Craigieburn Property out of the Wrongful Payment, and the first plaintiff is entitled to recover an amount representing that price. These facts are sufficient to ground judgment for the first plaintiff against Gangadory in the sum of \$1,350,000.00, being the purchase price of the Craigieburn Property, and more broadly to ground the claims for the relief considered below.

E.3 Declaratory relief

66 The first plaintiff sought a declaration that Gangadory had acquired the Craigieburn Property on trust for the first plaintiff. As noted above,⁶⁹ the court may grant a declaration where it is directed towards a real legal controversy and produces foreseeable consequences for the parties. That is the case here, as the declaration concerns the ownership of the Craigieburn Property and the first plaintiff's interest in that property. This was expressly the subject of a claim in the Statement of Claim.

67 Further, the making of a declaration as part of a default judgment is within the court's discretion and, on the facts of this case, is necessary to do justice in the case. The first plaintiff justifiably wants to be able to sell the Craigieburn Property to recoup its losses.

⁶⁹ See par 37 above.

Although Gangadory did not appear before the court as a contradictor, she was a party to the proceeding who had a real interest in opposing the declaratory relief sought. On the basis that there has been proper service of the Court Documents,⁷⁰ it must be inferred that Gangadory chose not to file an appearance or seek to be heard on the issues in dispute, including the declaratory relief set out in the Statement of Claim.

68 In selling the Craigieburn Property, the Plaintiffs will be required to deal with non-parties. These non-parties will need to be satisfied as to the ability of the first plaintiff to deal with the Craigieburn Property and related matters. Accordingly, it is appropriate for the declaration to be made.

69 For completeness, the Plaintiffs expressly acknowledged in the proposed orders that the moneys received for the sale of the Craigieburn Property pursuant to this order were to be accounted for by the first plaintiff in the recovery of the judgment sum. Although this position would follow in any event, the orders made on 13 May 2022 expressly noted this.

E.4 Facilitating the sale of the Craigieburn Property

70 The relief sought on this application was in a form that was not expressly included in the prayer for relief in the Statement of Claim. The Statement of Claim simply sought orders for the sale of the Craigieburn Property. However, on this application the Plaintiffs sought orders giving the first plaintiff the powers necessary to effect that relief, namely:⁷¹

- (1) The Craigieburn Property be sold by the first plaintiff as soon as practicable.
- (2) The first plaintiff recover possession of the Craigieburn Property.
- (3) The first plaintiff be authorised to engage a qualified real estate agent to advertise the Craigieburn Property for sale by public auction or private treaty and to conduct any auction.

⁷⁰ See pars 49-55 above.

⁷¹ Initially, the Plaintiffs sought orders beyond what is set out above. Some amendments were made after I indicated I was not willing to make orders beyond what could reasonably be said to have been incidental to the relief sought in the Statement of Claim.

- (4) Pending the sale and settlement of the Craigieburn Property, the first plaintiff be entitled to do all things necessary to manage, secure, pay all outgoing rates and taxes, maintain and repair, and acquire insurance in relation to, the Craigieburn Property.
- (5) For the purposes of the sale, the first plaintiff have the power to transfer and execute any documents on behalf of Gangadory that are necessary to transfer the Craigieburn Property and Gangadory's interest in it to a purchaser.
- (6) Upon the sale and settlement of the property, the first plaintiff be entitled to deduct the reasonable commission and other reasonable expenses of the real estate agent and reasonable fees and legal expenses of the sale, and then for the balance of the proceeds remaining to be paid to the first plaintiff.
- (7) The first plaintiff be entitled to appoint an agent to exercise any of the powers or rights given to it under this order, with the reasonable costs of the agent, and any reasonable costs of and incidental to its appointment, to be paid from the sale proceeds of the Craigieburn Property.

71 As set out above,⁷² rule 21.04 allows the court to give judgment other than for the recovery of a debt, damages or property "upon the statement of claim". Rule 59.01 more broadly provides that the court may give any such judgment or order as the case requires, "notwithstanding that the judgment or order had not been sought in the originating process". By reference to a rule substantially in these terms, authority suggests that such a rule permits default judgment to be given regardless of whether the particular claim for relief is made, and that there is otherwise no express denial of the right to relief arising from admissions of matters alleged in the statement of claim.⁷³

72 There is no restrictive language in rule 21.04, and the general power in rule 59.01 is

⁷² See par 28 above.

⁷³ *Australian Competition and Consumer Commission v Dataline.net.au Pty Ltd* (2006) 236 ALR 665, 678 [47] (Kiefel J). See also pars 32-34 above.

expansive. In these circumstances, in the absence of any wording suggesting otherwise, to adopt language previously used, “[n]o general rule prohibiting additional or varied relief should be implied” into the Rules.⁷⁴

73 Thus, the court need not refuse relief unless it is concerned about fairness in the conduct of the litigation, which is to be determined on a case by case basis. Here, the evidence established that it was highly likely that Gangadory was notified of the relief sought in the Statement of Claim for the sale of the Craigieburn Property. Nonetheless, she has chosen not to file an appearance or appear to make submissions against the declaration.

74 As to the content of the proposed orders, each was necessary to give practical effect to the transfer or sale of the Craigieburn Property in an appropriate manner for the benefit of the first plaintiff. In particular, the proposed subparagraphs (1), (2), (3) and (5) were directly necessary to enable the property to be sold for the benefit of the first plaintiff.⁷⁵ Subparagraphs (6) and (7) deal with the consequences of that sale, in that they address costs incurred in the sale process. They are incidental to the relief sought, and should not be viewed as broader or extended relief. As to subparagraph (4), this provided the first plaintiff with the ability to manage the Craigieburn Property prior to sale. While this was not directly sought in the Statement of Claim, the upkeep of the Craigieburn Property prior to sale (among other things, for the purpose of maintaining its value) was plainly appropriate and in the interests of justice, including the interests of Gangadory.

75 Accordingly, I was satisfied that the orders relating to the sale of the Craigieburn Property were appropriate.

E.5 Interest

76 Rule 21.03(1)(a)(ii) is engaged because the first plaintiff is entitled to default judgment for recovery of a debt.⁷⁶ The first plaintiff is therefore able to enter final judgment for the

⁷⁴ Ibid.

⁷⁵ See par 70 above.

⁷⁶ See par 27 above.

amount claimed in the Statement of Claim, together with interest from the commencement of the proceeding against Gangadory to the date of judgment at the rates payable on judgment debts during that time.

- 77 The proceeding as against Gangadory was commenced on 1 March 2022. Applying the statutory interest rate payable on judgment debts, being 10 percent, the sum of \$27,369.64 was awarded to the first plaintiff.

E.6 Costs

- 78 The first plaintiff sought that Gangadory pay the first plaintiff's costs of the proceeding against Gangadory. In accordance with the general power and discretion of the court as to costs,⁷⁷ it was appropriate that costs on a standard basis be awarded to the first plaintiff.

E. Conclusion

- 79 Accordingly, on 13 May 2022 judgment was entered for the first plaintiff against Gangadory in the sum of \$1,350,000.00. The orders further declared that the Craigieburn Property was acquired by Gangadory on trust for the first plaintiff, set out arrangements by which the first plaintiff was to sell the Craigieburn Property, and awarded interest and costs in favour of the first plaintiff.

- 80 Further, orders were made on the summons issued for the purposes of rule 2.07 of Chapter II of the Rules for the first plaintiff to enter default judgment against Gangadory and for Gangadory to pay the first plaintiff's costs of and incidental to the summons.⁷⁸

⁷⁷ Rule 63.02; *Supreme Court Act 1986* (Vic), s 24.

⁷⁸ See par 2 above.