Sportsbet Pty Ltd v Moraitis [2010] NTSC 24

PARTIES:	**SPORTSBET PTY LTD (ACN 088 326 621)** v **MORAITIS, Stephen** (By original proceedings) AND BETWEEN: **MORAITIS, Stephen** v **SPORTSBET PTY LTD (ACN 088 326 621) and MATTHEW TERRENCE TRIPP** (By counterclaim)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	138 of 2007 (20733770)
DELIVERED:	20 May 2010
JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

PRACTICE AND PROCEDURE – application for summary judgment – gambling debt – defence of settlement – was there an oral agreement to forgive the debt – defence of setoff – *dux litis* – costs

Agar v Hyde (2000) 201 CLR 552
Austotel Management Pty Limited v Jamieson (1995) 57 FCR 411
Australian Can Co Pty Ltd v Levin & Co Pty Ltd [1947] VLR 332
Cloverdell Lumber Co Pty Ltd v Abbott (1924) 34 CLR 122
Commonwealth Development Bank of Australia v Karastavrou (VSC, Beach J, No 4558/1995, 12 November 1996, unreported)
Country Estates Pty Ltd v Leighton Contractors Pty Ltd (1975) 49 ALJR 173
El-Mir & 1 Or v Risk [2005] NSWCA 215
Evans v Bartlam [1937] AC 473
Fancourt v Mercantile Credits Ltd (1983) 154 CLR 87
Federal Commissioner of Taxation v Orica Ltd (1998) 194 CLR 500
Forsyth v Gibbs [2009] 1 Qd R 403
Geoffrey W Hill & Associates v King (1992) 27 NSWLR 228
Hausman v Abigroup Contractors Pty Ltd [2009] VSCA 288
Re LJ Young Manufacturing Co [1900] 2 Ch 753
Murphy v Zamonex (1993) 31 NSWLR 439
Needlework Warehouse Pty Limited v Chansonette Pty Limited (2005) 226 ALR 252
Osborn & Bernotti t/as G04 Productions v McDermott t/as RA McDermott & Co & Karmine Pty Ltd [1998] 3 VR 1
Suburban Homes Pty Ltd v Ward [1928] VLR 267
Symon and Co v Palmer's Stores 288 (1903) Ltd [1912] 1 KB 259
Taller man & Co Pty Limited v Nathan's Merchandise (Victoria) Pty Limited (1957) 98 CLR 93
Thompson v Australian Capital Television Pty Ltd and Other (1996) 186 CLR 574
Tomlin v Standard Telephones [1969] 1 WLR 1378

REPRESENTATION:

Counsel:

Plaintiff:	T North SC
Defendant:	P Brereton

Solicitors:

Plaintiff:	Minter Ellison
Defendant:	De Silva Hebron

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Sportsbet Pty Ltd v Moraitis [2010] NTSC 24
No 138 of 2007 (20733770)

BETWEEN:

SPORTSBET PTY LTD
(ACN 088 326 621)
Plaintiff

AND:

MORAITIS, Stephen
Defendant

(by original proceedings)

AND BETWEEN:

MORAITIS, Stephen
Plaintiff

AND:

SPORTSBET PTY LTD
(ACN 088 326 621) and
MATTHEW TERRENCE TRIPP
Defendants

(by counterclaim)

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 20 May 2010)

Introduction

[1] The plaintiff has applied by summons for summary judgment under O 22 of the *Supreme Court Rules*. The plaintiff seeks the following orders:

1. Judgment for the plaintiff in the sum of $3,867,846.

2. Paragraphs 7, 12, 14, 15, 16, 17 and 18 of the further amended defence and counterclaim are struck out.

[2] During the course of the hearing of the application, the plaintiff also argued that par 20 to par 37 inclusive and par 40 to par 56 inclusive of the further amended defence and counterclaim should be struck out and in the circumstances the claim against Mr Matthew Tripp was unsustainable.

[3] Finally, the plaintiff seeks costs of the cross-vesting application.

[4] The plaintiff is a company carrying on business in the Northern Territory as a sports bookmaker, taking bets by telephone and via the internet on horse racing and other sporting events. The plaintiff is licensed to do so under the *Racing and Betting Act (NT)*. The defendant was a customer of the plaintiff. He began placing bets with the plaintiff in 2002. He placed bets with the plaintiff between September 2005 and July 2007 and, as a result of his losses during that period, he became indebted to the plaintiff.

[5] In its Statement of Claim, the plaintiff claims that by an agreement made on or about 30 April 2004 the plaintiff and the defendant agreed the plaintiff would accept bets and wagers placed by the defendant[1]. In performance of the agreement, the plaintiff opened betting account No 1 in the name of the defendant and extended credit as requested by the defendant and, from time to time, the defendant placed bets and wagers with the plaintiff. The results

[1] Hereafter referred to as "the 2004 agreement".

of the betting were debited or credited to betting account No 1 as the case required. As at 4 July 2007, the balance of the debt owed by the defendant to the plaintiff under the 2004 agreement, after taking into account all commissions and conditional adjustments, was $2,242,144. The defendant's debt of $2,242,144 is due and payable to the plaintiff.

[6] The plaintiff further claims that by an agreement made on or about 14 July 2006 the plaintiff and the defendant agreed the plaintiff would accept bets and wagers placed by the defendant[2]. In performance of the agreement, the plaintiff opened betting account No 2 in the name of the defendant and extended credit as requested by the defendant and, from time to time, the defendant placed bets and wagers with the plaintiff. The results of the betting were debited or credited to betting account No 2 as the case required. As at 17 June 2007, the balance of the debt owed by the defendant to the plaintiff under the 2006 agreement, after taking into account all commissions and conditional adjustments, was $1,625,702. The defendant's debt of $1, 625,702 is due and payable to the plaintiff.

[7] On 4 July 2007, the plaintiff and the defendant agreed the balance of $2,242,144 outstanding in betting account No 1 would be transferred to betting account No 2 making the total sum owing of $3,867,846. In breach of the 2004 agreement and in breach of the 2006 agreement the defendant has wrongfully failed to pay the amount $3,867,846 to the plaintiff.

[2] Hereafter referred to as "the 2006 agreement".

[8] In its further amended defence and counterclaim, the defendant has confessed that as at 4 July 2007 he was indebted to the plaintiff in the sum of $3,867,846. However, the defendant seeks to avoid his liability to pay the debt on three grounds. First, in par 15 of the further amended defence and counterclaim, the defendant pleads that on or about 3 August 2007 the plaintiff forgave the debt of $3,867,846, the debt was discharged and the defendant was released from paying the debt. It is said the debt was forgiven for valuable consideration, the defendant promised to bet exclusively with the plaintiff if he resumed betting. Secondly, in the alternative, in par 16 and par 17 of the further amended defence and counterclaim the defendant pleads that on 21 April 2008 the plaintiff and the defendant settled their disputes. In par 18 of the further amended defence and counterclaim the defendant pleads that as a result of either the forgiveness of the debt or the settlement of the parties' disputes the plaintiff is barred from maintaining the proceeding against the defendant. Thirdly, in the alternative, the plaintiff claims a setoff or, in the alternative, relief under r 13.14 of the *Supreme Court Rules*. The setoff is based on pleadings in the counterclaim that the plaintiff engaged in unconscionable conduct and was negligent in its dealing with the defendant.

[9] The plaintiff's application for summary judgment proceeds upon the defendant's admissions that as at 4 July 2007 he was indebted to the plaintiff in the sum of $3,867,846. The plaintiff says that the defences relied on by the defendant fundamentally contradict each other and are so

weak as to constitute an abuse of process. Further, the plaintiff says the defendant's counterclaims do not amount to a setoff. Therefore, while the defendant's claims may be pursued in a counterclaim, the claims of unconscionable conduct and negligence are not a defence. The plaintiff says it should have judgment for its claim for $3,867,846; the defendant should then be *dux litis* and his counterclaims alone should proceed to trial.

The principles applicable to an application for summary judgment

[10] The principles that govern an application by a plaintiff for summary judgment are well known. Rule 22.06 of the *Supreme Court Rules* states that on the hearing of an application for summary judgment the Court may give such judgment for the plaintiff against the defendant as appropriate unless the defendant satisfies the Court that, in respect of the plaintiff's claim, a question ought to be tried or there ought, for some other reason, be a trial of the claim. The substance of the criterion to be applied is that, after the matter involved has been explained to the Judge, there must be a real uncertainty as to the plaintiff's right to judgment[3]. The power to order summary or final judgment is one that should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried[4]. In *Agar v Hyde*[5] the High Court observed that:

> It is of course, well accepted that a Court whose jurisdiction is regularly invoked … should not decide the issues raised in those proceedings in the summary way except in the clearest of cases.

[3] *Australian Can Co Pty Ltd v Levin & Co Pty Ltd* [1947] VLR 332 at 334 – 5.
[4] *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87 at 99.
[5] (2000) 201 CLR 552 at par [57].

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

[11] A burden is cast on the defendant of satisfying the Court that there ought to be a trial and, if not, judgment. The provisions of O 22 of the Supreme Court Rules apply to cases where there can be no reasonable doubt that a plaintiff is entitled to judgment.

[12] The following principles[6] are also of relevance to this particular application:

(1) Unless the plaintiff makes a proper affidavit the defendant is not required to answer the application for judgment[7].

(2) The court will give the plaintiff judgment unless the defendant shows cause against the application to the satisfaction of the Court[8]. Cause may be shown by affidavit or otherwise.

(3) The Court will normally require an affidavit by or on behalf of a defendant before a defendant will be granted leave to defend. The defendant is required to use such diligence as is reasonable in the circumstances to put before the Court in a summary form

[6] For a fuller discussion of the principles see N Williams *Civil Procedure Victoria* at pp 3359 to 3386.
[7] *Suburban Homes Pty Ltd v Ward* [1928] VLR 267; *Symon and Co v Palmer's Stores* (1903) Ltd [1912] 1 KB 259 at 263 - 4.
[8] r 22.04 *Supreme Court Rules*.

all of the evidence relied on by the defendant in defence of the plaintiff's claim[9].

(4) The affidavit material relied upon by a defendant may contain statements of fact based on information and belief provided the source of the evidence is identified and the grounds of belief are set out[10]. A defendant may also obtain leave to defend if the defendant tenders evidence which, though not evidence of the facts, shows such evidence exists and will be available at the trial[11].

(5) A defendant should condescend into particulars[12]. The evidence of the defendant must deal specifically with the facts relied upon by the plaintiff in support of its application. The affidavit of the defendant should state clearly and concisely what facts are relied on as supporting the defence[13].

(6) The defendant must point to some material, legal or factual, that provides an arguable response to the claim and not leave it to the judicial officer hearing the application to trawl through the material to find an answer to the plaintiff's claim[14].

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[9] *Hausman v Abigroup Contractors Pty Ltd* [2009] VSCA 288 par [55].
[10] R 22.04(2) *Supreme Court Rules*; *Re LJ Young Manufacturing Co* [1900] 2 Ch 753.
[11] *Geoffrey W Hill & Associates v King* (1992) 27 NSWLR 228.
[12] *Cloverdell Lumber Co Pty Ltd v Abbott* (1924) 34 CLR 122 at 128 – 9.
[13] *Country Estates Pty Ltd v Leighton Contractors Pty Ltd* (1975) 49 ALJR 173.
[14] N Williams *Civil Procedure Victoria* par I 22.04.15.

(7) The evidence of the defendant should show that there is a real case to be investigated either on the facts or in law.

(8) A defendant will be granted leave to defend if there are facts which, if true, would constitute a defence to the plaintiff's claim. The Court is reluctant to try a case on affidavit where there are facts in dispute[15].

(9) An important issue is whether the defendant's account of the facts has sufficient prima facie plausibility to merit further investigation[16].

The pleading of the defence of forgiveness and release on 3 August 2007

[13] In par 15 of the further amended defence and counterclaim, the defendant pleads:

> Further, or in the alternative, and in answer to the whole of the statement of claim, the defendant says that on or about 3 August 2007, the plaintiff forgave the defendant the debt alleged to be owing as pleaded in paragraph 14 of the statement of claim and the alleged debt was accordingly discharged or released.
>
> Particulars
>
> (ii) An offer to forgive the alleged debt was made orally during the course of a telephone conversation between Matthew Tripp (on behalf of the plaintiff) and the defendant on or about 3 August 2007.

[15] *Evans v Bartlam* [1937] AC 473.
[16] *Commonwealth Development Bank of Australia v Karastavrou* (VSC, Beach J, No 4558/1995, 12 November 1996, unreported).

(iii) The defendant accepted the plaintiff's offer orally during the course of the same telephone conversation.

(iv) The valuable consideration moving from the defendant was an assurance that if the defendant resumed betting he would bet exclusively with the plaintiff.

[14] In par 18 of the further amended defence and counterclaim, the defendant pleads that by reason of the matters pleaded in par 15 of the further amended defence and counterclaim the plaintiff cannot bring or prosecute the proceeding which is the subject of the statement of claim.

[15] In par 15 of its reply to the further amended defence and counterclaim, the plaintiff pleads:

> As to paragraph 15 of the defence, without prejudice to the matters pleaded in [sub-paragraph 3 below] the plaintiff denies each allegation in paragraph 15 of the defence as if it had been set out seriatim and denied, and says:
>
> 1. There is no allegation of any agreement between the plaintiff and the defendant in paragraph 15 and the plea is contradicted and unsupported by the particulars subjoined thereto.
>
> 2. Further, the consideration alleged to have been given by the defendant is illusory.
>
> 3. In any event paragraph 15 of the defence should be struck out as embarrassing, as: there is insufficient particularity of the matters alleged; and, the plea is in such conflict with paragraph 16 of the defence that it cannot be pleaded in the alternative thereto.

The evidence about the defence of forgiveness of the debt of $3,867,847

[16] In support of the defence of forgiveness, the defendant relies on three affidavits of Jane Margaret Francis Owen sworn respectively on 29 May 2008, 23 June 2008 and 19 March 2009. The defendant did not make an affidavit about his discussions with Mr Tripp on 3 August 2007 or at all.

[17] In par 7 of her affidavit sworn on 19 March 2009 Ms Owen states as follows. From about February 2006, the defendant started dealing with Mr Matthew Tripp about his betting with the plaintiff and his requests for credit. From February 2006, the defendant was obtaining $50,000 to $80,000 credit on a weekly basis from the plaintiff with Mr Tripp's authority. In May or June 2006, the plaintiff granted the defendant a $300,000 credit limit. Between May 2006 and July 2007, the defendant was regularly incurring significant amounts of debt with the plaintiff. During this period the defendant and Mr Tripp had a number of discussions in which Mr Tripp agreed to write off some of the debt owed by the defendant to the plaintiff. One such occasion was on 1 December 2006. At that time the defendant owed the plaintiff in excess of $1,000,000. They had the following conversation:

> Defendant: Matt can we do a deal where I pay some funds into Sportsbet's account today or tomorrow to pay off some of my debt, you hold some of the debt over into a number 2 account and wipe part of the debt?
>
> Mr Tripp: Okay, but only on the basis that you promise you will not bet anywhere else.

Defendant: Okay!

After this conversation, some of the defendant's then current debt was written off by the plaintiff. This pattern of the plaintiff writing off parts of the debts incurred by the defendant and the defendant being permitted to continue betting lasted throughout the period between 1 October 2005 and July 2007. In the course of discussions between the defendant and Mr Tripp about such matters, Mr Tripp stated on a number of occasions that a debt was forgiven only on the basis that the defendant kept betting with the plaintiff.

[18] The amount of the defendant's debt written off by the plaintiff on 1 December 2006 was in excess of $1 million.

[19] In par 11 of her affidavit sworn on 23 June 2008, Ms Owen states she is informed by the defendant and she believes that: between July 2007 and 3 August 2007 the defendant had four or five telephone conversations with Mr Tripp about his outstanding debt to Sportsbet; during some of these telephone discussions, the defendant requested the plaintiff to release him from any indebtedness because he had no money to pay his debts; on 3 August 2007, the defendant received a message on his mobile telephone to call Mr Tripp senior; after receiving the message, the defendant telephoned Mr Matthew Tripp and Mr Matthew Tripp told the defendant the message he received was from Mr Tripp's father who wanted the defendant to explain his financial circumstances to him personally.

[20] In par 12 of her affidavit sworn on 23 June 2008, Ms Owen states she is informed by the defendant and she believes that on 3 August 2007 he telephoned Mr Matthew Tripp's father and they had the following conversation:

> Defendant: This is Stephen Moraitis returning your call.
>
> Tripp Snr: Can you explain why you want Sportsbet to write off your debt?
>
> Defendant: I have no money. I have an overdraft of about two and half million. I am not sleeping at night and I have rashes on my chest. If my wife finds out I could end up divorced. I ask you that you leave me be as you have had enough out of me.
>
> Tripp Snr: It is hard because we have accountants and solicitors who are shareholders and they don't understand wiping a debt like this.
>
> Defendant: I have always paid my debt to you before. I have lost all my money to you.
>
> Tripp Snr: We have bigger punters than you.
>
> Defendant: I don't want to be your biggest punter. It is no good trying to promise you payment as I have nothing. It is no good keeping on pushing me into a corner as it will do you no good.
>
> Tripp Snr: No one threatens me.
>
> Defendant: I am not threatening you. I am just saying you have taken everything from me and I have nothing left. I could understand you chasing me if I had won money from you but I have lost all my money to you.
>
> Tripp Snr: All right leave it with me.

[21] In par 13 of her affidavit sworn on 23 June 2008, Ms Owen states she is informed by the defendant and she believes that shortly after the telephone conversation recounted in par [20] above, the defendant telephoned Mr Matthew Tripp and they had a discussion to the following effect:

> Tripp: Thanks for speaking to my father. Now the pressure is off me to fight for this and I can now agree to wipe your debt.
>
> Defendant: I would like closure, like a letter or something, so that I know I don't owe you guys any more money.
>
> Tripp: Yes, I will get it sorted out in the next two weeks. I will send you a letter or something confirming closure of your account and the wiping of the debt. However, if you start up betting again, make sure you come back to us and no one else.
>
> Defendant: Trust me, if I start up betting again it will be with you guys, but I don't intend to bet again.

[22] Ms Owen then states the following in par 14 to par 17 of her affidavit sworn on 23 June 2008. She is informed by the defendant and she believes, a couple of weeks after the telephone conversation with Mr Tripp on 3 August 2007, the defendant received a telephone call from Mr Tripp who asked him if they could meet in Sydney and go for lunch. Mr Tripp said he wanted the defendant to look at a document which stated Sportsbet has released the defendant from his debt to the company so no one would come back at him for the debt if they sold the company. The defendant agreed to such a meeting. However, on the day they had arranged to meet, Mr Tripp telephoned the defendant and cancelled the lunch. On 28 September 2007, the defendant sent a facsimile to the plaintiff requesting copies of his

betting records. Two weeks later the defendant spoke to Mr Tripp by telephone and they made arrangements to meet at the Qantas Club at Sydney airport. In October 2007, Mr Tripp and the defendant met at the Qantas Club. At the meeting Mr Tripp gave the defendant a copy of his betting records and a draft deed of settlement and release. Mr Tripp told the defendant the settlement deed was to cover both of them because the plaintiff's business was in the process of being sold. Mr Tripp said he did not want the release of the debt to come back and "bite the defendant in the bum" if the business was sold. The defendant told Mr Tripp he would show the settlement deed to his lawyer and come back to him.

[23] The draft deed of settlement and release was dated 15 October 2007. The operative part of the document stated:

> Sportsbet agrees to forgo the Debt [of $3.867.846.18]. Each party hereby releases and forever discharges the other against any claim, action, suit, demand, costs, interest and any cause of action which it/he may have had against the other but for the execution of this deed arising out of or in any way connected with the Betting and the Debt.

[24] In her par 7(a) of her affidavit sworn on 19 March 2009, Ms Owen states she is informed by the defendant and she believes that when the defendant told Mr Tripp, if he started betting again "it will be with you guys" this was a promise which was made in exchange for being released from his indebtedness to the plaintiff.

[25] In her affidavit sworn on 29 May 2008, Ms Owen annexes an open letter from Mr Finlay to Mr Tripp dated 10 December 2007. In par 23 of the letter, Mr Finlay stated:

> My client advises that following a series of telephone conversations with you and your father in August and September 2007, Sportsbet agreed to wave and forgive the current balance in Betting Account No. 124536 of $3,867,846.18. Subsequently you have sent to my client a draft deed which not only provides for the forgiveness of the current balance in Betting Account No. 124536 of $3,867,846.18 but also seeks mutual releases. The issue of mutual releases was never discussed with, nor agreed by, my client as part of the oral agreement reached with Sportsbet for the forgiveness of the debt of $3,867,846.18.

[26] The effect of Ms Owen's evidence is that the defendant will be available to give evidence at the trial and she believes his evidence will be consistent with what is set out in par [17] to par [24] above.

[27] Annexures A, B and C to the affidavit of Ms Owen sworn on 19 March 2009 are records of various betting and other transactions involving the defendant's betting accounts with the plaintiff. They reveal that before 3 August 2007 the plaintiff had forgiven the defendant debts totalling in excess of $1 million.

[28] In support of its argument that the defence pleaded in par 15 and par 18 of the further amended defence and counterclaim, is embarrassing and unarguable, the plaintiff read: two affidavits of Mr Matthew Terence Tripp dated respectively 12 June 2008 and 23 March 2009 and an affidavit of Heather Joy Ross sworn on 13 June 2008.

[29] In his affidavit sworn on 12 June 2008, Mr Tripp stated as follows. He is a director of the plaintiff company and he is authorised to make the affidavit on behalf of the plaintiff. He believes the defendant has no defence to the plaintiff's claim for recovery of the debt of $3,867.846. In October 2007, he did not forgive the debt owed by the defendant to the plaintiff. Between June 2007 and October 2007, the plaintiff demanded the defendant pay the debt of $3,867,846 and there were without prejudice negotiations between him and the defendant which did not result in a resolution of the plaintiff's claim. At no time between June 2007 and October 2007 did he, on behalf of the plaintiff, reach any agreement with the defendant about the forgiveness or discharge of the debt of $3,867,846. At no time from June 2007 to date has the defendant accepted any offer as alleged to resolve the issues outstanding between him and the plaintiff. The defendant did not make any promise or give any assurance to the plaintiff that if he resumed betting he would bet exclusively with the plaintiff. There is no truth in the defence pleaded in par 15 of the further amended defence and counterclaim.

[30] Mr Tripp also stated that on 28 September 2007, he received a facsimile signed by the defendant which stated:

> Please provide a summary or print out of all wagers and other bets transacted through my account with Sportsbet Pty Ltd (including all debits and credits) for the period 1 September 2005 to 28 September 2007 and please mail it by express post to the address below.

[31] The purpose of the reference to the facsimile dated 28 September 2007 is to show that after 3 August 2007, the defendant behaved inconsistently with

the existence of the alleged agreement to forgive the defendant's debt of $3,867,846. The defendant's conduct arguably supports the plaintiff's argument that the plaintiff did not agree to forgive the defendant's debt of $3,867,846 and, in any event, the consideration offered by the defendant was illusory. As the defendant did not write to Mr Tripp and ask for written confirmation that his debt of $3,867,846 had been forgiven by the plaintiff, it is a reasonable inference that the information was sought by the defendant to either verify how much he owed the plaintiff or so he could prepare the counterclaims he has made against the plaintiff. The preparation of the counterclaims against the plaintiff shortly after 3 August 2007, would be inconsistent with a promise to bet exclusively with the plaintiff in the future. Such conduct would evince an intention not to bet with the plaintiff again.

[32] On the other hand, the request for the information made by the defendant on 28 September 2007 is not necessarily inconsistent with the defendant's debt being forgiven by the plaintiff. It is not inconceivable that the defendant may have become concerned about his position because he had not received written confirmation from the plaintiff that his debt was forgiven and Mr Tripp had cancelled a meeting at which the defendant was to be provided with written confirmation of the forgiveness of his debt. However, no explanation, as to why the information was sought, is given in any affidavit filed on behalf of the defendant.

[33] In his affidavit sworn on 23 March 2009, Mr Tripp states as follows. In the course of a telephone conversation in August 2007, between the defendant and him, the plaintiff never forgave the defendant's debt. The defendant never revealed to Mr Tripp he was betting with other bookmakers nor was Mr Tripp aware of any gambling activities the defendant engaged in with other bookmakers. There is no suggestion in correspondence between the defendant and the plaintiff or between Mr Ron Finlay and the plaintiff that the debt of $3,867,846 was forgiven, discharged or released. At no time has Mr Tripp received any deed of release executed by the defendant.

[34] In her affidavit sworn on 13 June 2008, Ms Ross states that on 6 February 2008 and 28 April 2008 there were directions hearings held in the Court in this proceeding and at neither directions hearing did the solicitor appearing for the defendant tell the Court the plaintiff was barred from pursuing the proceeding because the plaintiff had either forgiven the debt or the parties had settled their disputes. The plaintiff relies on the conduct of the defendant's solicitor as evidence which shows the defendant's debt had not been forgiven and the parties had not settled their disputes. If the defendant's instructions were that the proceeding was barred then the solicitor for the defendant was bound to bring such matters to the attention of the Court. If the solicitor did not have those instructions then it was unlikely that the matter had been resolved.

[35] In my opinion, not a lot of weight can be given to the conduct of the defendant's Darwin solicitor. On 10 December 2007 Mr Finlay, who was

then the defendant's solicitor, wrote to Mr Tripp and stated, among other things, that in August or September 2007 the plaintiff had released the defendant from the debt; and the mention of the proceeding in Court on 6 February 2008 was during an agreed moratorium when the parties explored settlement of their disputes. The mention on 28 April 2008 occurred before the defendant had filed his defence and, on 9 May 2008, the solicitors for the defendant wrote to the solicitors for the plaintiff stating the defendant would be asserting the parties' had settled their dispute.

[36] In my opinion, Mr Finlay's sending of the letter of 10 December 2007 to Mr Tripp is potentially of greater significance than the conduct of the defendant's solicitor at the directions hearing on 6 February 2008. The letter foreshadows that the defendant will be making a claim in the Federal Court of Australia to recover his losses and damages. It annexed a draft statement of claim in which the defendant claimed in excess of $17.8 million. The amount claimed by the defendant in that document was an amount which included the debt alleged to have been forgiven by the plaintiff. The sending of the letter is inconsistent with a promise to bet with the plaintiff in the future. It evinces an intention not to bet with the plaintiff at all in the future particularly as the annexed draft claim in the Federal Court asserts the plaintiff, in effect, lacks the capacity to place valid bets with the plaintiff.

[37] Alternatively, Mr Finlay's two letters dated 10 December 2007 amount to an acceptance of a repudiation of the alleged agreement whereby the plaintiff is

said to have forgiven the defendant's debt constituted by Mr Tripp's delivery of the draft deed of settlement and release in October 2007. Mr Finlay's letters assert a right to bring a claim for an amount of $17.8 million, which includes the sum of $3.8 million or thereabouts claimed by the plaintiff, and an offer to negotiate the resolution of the plaintiff's claim for that amount.

[38] The affidavit of Mr David John Fitzpatrick sworn on 12 June 2008 also arguably provides some support for the plaintiff's argument. The affidavit annexes a copy of a letter dated 28 February 2008 from the defendant to the Secretary of Licensing and Regulation in the Department of Justice of the Northern Territory. In the letter the defendant requests to be made the subject of a self-exclusion agreement which extends to all sports bookmakers in the Northern Territory. The letter is some evidence that after 3 August 2007 the defendant may have continued to bet with other sports bookmakers in the Northern Territory. If the defendant was betting with other bookmakers, then he was either in breach of the agreement to forgive his debt or no such agreement was made and he did not make any promise or give any assurance to the plaintiff that he would bet exclusively with the plaintiff.

[39] Further, Mr Ron Finlay made various admissions to Mr Griffiths that the defendant was gambling with other sports bookmakers in the latter part of 2007. In a meeting on 29 January 2008 Mr Finlay told Mr Griffiths that he was aware of a number of instances in the latter part of 2007 but none

recently. In a written Submission that was emailed to Mr Griffiths on 26 February 2008, it was stated that since August 2007 the defendant has incurred a debt from wagering with a Queensland bookmaker. These admissions are again some evidence that either the defendant breached the terms of the alleged agreement to forgive his debt or, alternatively, he never promised to bet solely with the plaintiff, should he resume betting in the future.

[40] Mr Tripp is incorrect when he says Mr Finlay never stated, in any correspondence with the plaintiff, the admitted debt was forgiven, discharged or released. In fact, in paragraph 23 of Mr Finlay's letter to Mr Tripp, dated 10 December 2007, he stated he was instructed the plaintiff had forgiven the defendant's debt of $3,867,846.

[41] Further, par 6 of the written Submission, which was prepared by the defendant's lawyers and emailed to Mr Griffiths by Mr Finlay on 26 February 2008, stated that the defendant's defence will include a pleading that an oral agreement had been reached between the defendant and Mr Matthew Tripp and Mr Tripp senior to forgive the defendant's debt of $3.867m and such forgiveness was not subject to any conditions including a release.

[42] Another difficulty with Mr Tripp's evidence is that it is largely assertion. He does not provide a detailed historical account of the contents of the conversations he had with the defendant in August and September 2007.

Nor does he provide any details of the demands the plaintiff made for payment of the debt of $3,867,846.

The defendant's argument about the defendant's defence that the debt was forgiven.

[43] The defendant argues that the evidence which will be available at the trial of the proceeding will establish the plaintiff forgave the defendant's debt of $3,867,846. The plaintiff had an established practice of forgiving the defendant's debts. It had forgiven debts in a similar way on a number of occasions before 2 August 2007. The defendant's promise to bet exclusively with the plaintiff in the future if he resumed betting amounted to valuable consideration. The consideration is not past consideration as the previous promises the defendant made to bet exclusively with the plaintiff, including the promise made on 1 December 2006, would not be construed to last for an indefinite period of time. They would be construed as a promise not to bet anywhere else for a reasonable period of time. There is no reason why, come August 2007, the defendant was not able to provide, by way of valuable consideration, an assurance that if he resumed betting it would be with the plaintiff. The issue of whether there was valuable consideration can only be determined properly at a trial. Only at trial will the parties have had the benefit of the usual interlocutory processes and only then will the Court have all of the relevant evidence before it; and at that time the evidence can be tested by cross examination.

Consideration of the defence that the debt was forgiven by the plaintiff

[44] Given that the defendant is required to use such diligence as is reasonable to put before the Court in a summary form all of the evidence relied on by the defendant in support of the defence, in my opinion, the defendant's account of the facts that his debt of $3,867,846 was forgiven lacks sufficient prima facie plausibility to merit further investigation. The defence that the defendant's debt to the plaintiff was forgiven which is pleaded in par 15 and par 18 of the further amended defence and counterclaim should be struck out. It is manifestly hopeless.

[45] The defendant did not make an affidavit in which he deposed to the facts which are said to establish the defence of forgiveness of his debt of $3,867,846. No explanation was given as to why the defendant did not make an affidavit. The defendant did not write to Mr Tripp asking for written confirmation that his debt was forgiven. Instead, on 28 September 2007, he wrote to Mr Tripp asking for a summary of all bets transacted through his account with the plaintiff between 1 September 2005 and 28 September 2007. No explanation was given as to why the defendant wrote this letter. The defendant bet with at least one other bookmaker after 3 August 2007. Before 10 December 2007, the defendant instructed his solicitor, Mr Finlay, to commence proceedings in the Federal Court of Australia to recover the bets that he had lost to the plaintiff. On 10 December 2007, his instructing solicitor wrote to Mr Tripp outlining the claims the defendant proposed to make against the plaintiff. This was only slightly more than four months

after 3 August 2007. The letter and the proposed causes of action evince an intention not to bet with the plaintiff in the future. The basis of the causes of action relied on by the defendant is the defendant's alleged incapacity to place valid bets with the plaintiff due to the special disability he suffered as a result of being a problem gambler. In February 2008, which is about six months after 3 August 2007, the defendant wrote to the relevant Government Department in the Northern Territory asking to be self excluded from all sports bookmakers who conducted business in the Northern Territory. The overall course of the defendant's conduct is irreconcilably inconsistent with the defendant's allegation that he promised to bet with the plaintiff in the future.

[46] There is also force in the plaintiff's submission that, even if the defendant promised to bet exclusively with the plaintiff in the future, the consideration said to flow from the promise was illusory. The promise was significantly qualified. Ms Owen's evidence was the defendant said he did not intend to bet in the future. The consideration was past consideration as on the defendant's case the plaintiff had already forgiven the defendant somewhere between $1 million and $4 million in debt on the basis that the defendant would continue to bet exclusively with the plaintiff. There was no evidence that a reasonable time had passed and the plaintiff had already received the full benefit of the defendant's earlier promises.

[47] Even if the agreement pleaded in par 15 of the further amended defence and counterclaim had been made by the parties, it is apparent the defendant had

formed the view that the plaintiff had repudiated the agreement by failing to provide written confirmation of the forgiveness of the debt and by giving the defendant a deed of release which contained mutual releases, and the defendant accepted the plaintiff's repudiation of the agreement and had decided not to bet with the plaintiff in the future. Instead, the defendant sought to recover the money he had lost on losing bets.

The pleadings about the defence of settlement of the parties claims

[48] In par 16 of his defence the defendant pleads:

> Further, or in the alternative, and in answer to the whole of the statement of claim, on or about 21 April 2008, the plaintiff and the defendant entered into a legally binding agreement to settle the matters that are the subject of these proceedings (Settlement Agreement).
>
> Particulars
>
> (i) In or about October 2007, the defendant offered to discharge the alleged debt by Mr Tripp giving the defendant a copy of an unexecuted Deed of Settlement and Release, which constituted an offer to release the defendant from the alleged debt on the basis of the parties giving mutual releases.
>
> (ii) On 26 February 2008 Mr Finlay, on behalf of the defendant, provided to Mr Griffiths, on behalf of the plaintiff, a document entitled "Submission", on a without prejudice basis, prepared for the purpose of the settlement discussions. The Submission contained a statement inter alia that "any settlement which is reached would involve the execution of a deed of release with mutual releases and indemnities as well as covenants relating to confidentiality".
>
> (iii) On 27 February, during the course of a without prejudice meeting between Mr Griffiths and Mr Finlay held at the

office of Storm Sustainability at South Yarra, Mr Griffiths advised Mr Finlay that he had authority from the plaintiff (and he did have such authority) to make an offer to the defendant to settle the matters then in dispute between the parties (which are the subject of these proceedings). Mr Griffiths made an offer to release the defendant from the alleged debt.

(iv) On 16 April 2008, in the course of a telephone discussion between Mr Finlay on behalf of the defendant, and Mr Griffiths, Mr Griffiths advised Mr Finlay that the offer put to the defendant on 27 February has not been withdrawn or lapsed and it was still capable of acceptance.

(v) Alternatively to (iv), in the course of the telephone discussion on 16 April 2008 between Mr Finlay, on behalf of the defendant, and Mr Griffiths, on behalf of the plaintiff, Mr Griffiths offered to release the defendant from the alleged debt if the defendant released the plaintiff from his claim (the subject of the cross claim).

(vi) The offer put or confirmed during the conversation between Mr Finlay and Mr Griffiths was accepted orally by Mr Finlay on behalf of the defendant during the course of a telephone conversation with Mr Griffiths on 21 April 2007 (sic).

[49] In par 17 of the further amended defence, the defendant pleads that it was an express term of the Settlement Agreement that the plaintiff would not pursue the debt which is the subject of the statement of claim. In par 18 of the further amended defence the defendant pleads that by reason of the matters pleaded in par 16 and of the further amended defence the plaintiff cannot bring or prosecute the matters that are the subject of the statement of claim.

[50] In par 16 of the reply and defence to counter claim the plaintiff pleads:

As to paragraph 16 of the defence, without prejudice to the matters pleaded in paragraph 16.3 herein, the plaintiff denies each allegation in paragraph 16 of the defence as if each were set out seriatim and denied, and says:

1. If (which is denied) there was an offer as alleged in paragraph 16(i) of the defence, that offer was not accepted before it lapsed by the effluxion of time;

2. If (which is denied) there was a contract concluded that the debt be forgiven, on the consideration that the defendant bet exclusively with the plaintiff, that contract was breached by the defendant betting on and from that time with Sportingbet Australia Pty Ltd and other wagering operators (and the defendant continues to bet with Sportingbet Australia Pty Ltd under another name or names including the name "Brett Grant") whereof the forgiveness of the debt is rescinded, and the amount claimed remains owing;

3. In any event paragraph 16 of the defence should be struck out as embarrassing, as:

    3.1 Sub-paragraphs 16(iii) to (vi) plead matters subject to without prejudice privilege, over which the plaintiff has not waived privilege, and which do not constitute communications said to amount to an operative offer or acceptance, and in any event such plea is irrelevant to any defence;

    3.2 The particulars subjoined are embarrassing and do not support the claim in paragraph 16 of the defence;

    3.3 The particulars are otherwise embarrassing in that they rely upon an unexecuted Deed of Settlement and Release which was neither executed nor exchanged;

    3.4 The plea is in such conflict with the plea in paragraph 15 of the defence, that it cannot be pleaded in the alternative thereto;

    3.5 At no time did either the defendant or Mr Finlay send any correspondence asserting that the admitted debt had been forgiven, discharged or released as alleged in paragraphs 15 and 16 of the defence, and the plea is an abuse of process, by reason of the fact that it is

foredoomed to fail, and should be struck out accordingly;

3.6 The particulars in sub-paragraph 16(vi) are embarrassing as no conversation or alleged acceptance could have taken place on 21 April 2007.

[51] In par 17 of the reply to the further amended defence and defence to counterclaim, the plaintiff pleads that the plaintiff denies each of the allegations and the paragraph should be struck out as not being severable from par 16 of the defence. As to par 18 of the defence, the plaintiff pleads in its reply to further amended defence and counterclaim that it denies each of the allegations and says that at no time has the defendant sought any relief or sought any stay of the proceeding based upon the allegations pleaded in par 15 to par 18 of the further amended defence and counterclaim.

The evidence about settlement of the parties' claims

[52] In support of the defence of settlement the defendant relied on the affidavit of Mr Ronald Arthur Finlay sworn on 19 March 2009.

[53] In his affidavit sworn on 19 March 2009 Mr Finlay gave the following evidence. He is a solicitor practising in New South Wales. From March 2005 to date, he has provided legal advice to the defendant in relationship to his relationship with and indebtedness to the plaintiff. In October 2007 the plaintiff gave the defendant a deed of settlement and release. In December 2007 the defendant instructed him to attempt to negotiate a resolution of the

parties' disputes. On 10 December 2007 he wrote an open letter to Mr Matthew Tripp setting out the basis of the defendant's claims against the plaintiff. On the same day he also wrote to the Mr Tripp inviting the plaintiff to enter into discussions about settlement of the defendant's claims. On 14 December 2007, he received a telephone call from Mr Grant Griffiths and they agreed to enter into settlement discussions. To preserve the parties' positions, while settlement was discussed, a written moratorium agreement dated 20 December 2007 was executed by the parties and Mr Finlay and Mr Griffiths made arrangements to have their first meeting on 29 January 2008.

[54] On 29 January, Mr Finlay had a meeting with Mr Griffiths at the office of Storm Sustainability in South Yarra in Melbourne. The meeting lasted for an hour and a half. At the meeting Mr Griffiths told Mr Finlay he was a major shareholder of the plaintiff. He had been so since the establishment of the plaintiff. The plaintiff was willing to discuss the $3,867,846 claimed by the plaintiff but the plaintiff would not be paying any money to the defendant.

[55] On 26 February 2007, Mr Finlay emailed Mr Griffiths a document entitled "Submissions" which was prepared for the purposes of their discussions. The document set out the defendant's position and the basis of his claims. Paragraph 102 of the Submission stated, "Clearly any settlement that is reached would involve the execution of a deed of release with mutual releases and indemnities as well as covenants relating to confidentiality".

[56] On 27 February 2007, Mr Finlay and Mr Griffiths had another meeting at the office of Storm Sustainability. During the meeting Mr Griffiths said to Mr Finlay, "I have authority to say that the $3.8 million was off the table, but no way will we give back $1.00." Mr Finlay told Mr Griffiths, "We [are] not going to settle unless [the plaintiff was] prepared to pay some money." Later in the meeting Mr Griffiths said, "The $3.8 million is on the table. The best you can do is nil." However, nothing was resolved at this meeting other than it was agreed the parties would give further consideration to a formal mediation.

[57] On 4 April 2008, Mr Finlay and Mr Griffiths had a telephone conversation. During the course of the conversation, Mr Griffiths told Mr Finlay the plaintiff "had decided not to proceed with mediation and [was] determined to press on with the claim". The decision of the plaintiff followed a two and a half hour briefing with the plaintiff's lawyers. Mr Griffiths said his lawyers were now 100 per cent certain that the plaintiff would win the case.

[58] I interpose here that annexure "G" to the affidavit of Ms Owen sworn on 19 June 2008 is a file note that Mr Finlay made on 10 April 2008. The file note reveals that on 10 April 2008, Mr Griffiths telephoned Mr Finlay while Mr Finlay was absent from his office. Mr Finlay returned Mr Griffiths' telephone call when he returned to his office. During the telephone call Mr Griffiths said he had called as a courtesy to close out the last issue they had discussed which was where the litigation between the parties should be conducted. Mr Griffiths also told Mr Finlay his legal team had advised the

plaintiff they should conduct the litigation in the Northern Territory. The advice was strongly supported by Mr Matthew Tripp and Mr Nick Tyshing who wanted to run the proceeding in the Northern Territory.

[59] On 16 April 2008, Mr Finlay and Mr Griffiths had a further telephone conversation. During the course of the telephone conversation Mr Finlay said he told the Moraitis family that so far as he was concerned there is no choice but to proceed because settlement was no longer an option. However, he had been asked by the Moraitis family to ask Mr Griffiths if settlement was still an option. Mr Griffiths replied that so far as he was concerned, settlement is always an option. Mr Griffiths said, "My door is always open and the offer to walk away is an offer that has never been taken off the table". Mr Finlay states he told Mr Griffiths he would pass this information onto the defendant and get back to him with the defendant's final decision.

[60] In respect of an important aspect of the telephone conversation on 16 April 2008, there is potentially a significant inconsistency between Mr Finlay's typed notes of the telephone discussion between him and Mr Griffiths and his hand written notes of the telephone discussion. In the relevant part of his typed notes of the telephone conversation, Mr Finlay records the following:

> [Mr Griffiths] again warned me that his lawyers are going to play it very hard. They will play the man!

> He then said the reason that they [the plaintiff] are being so aggressive is they believed "they had done the right thing" and it was Finlay and Moraitis who "first bounced the ball".
>
> I asked him to explain what he meant by doing "the right thing" and he said Matthew Tripp had spoken with Stephen, he had already agreed to write off $4 million and agreed to write off a further $3.8 million provided you "don't come chasing me".
>
> He affirmed that they were still prepared to settle on the basis that "we keep the $11 million and write off the $7.8 million".

[61] In the relevant part of his handwritten notes of the 16 April 2008 telephone conversation, Mr Finlay records the following:

> Will play the man!
>
> Bigger issue – always said we were going to settle.
>
> Right thing – write off $3.8m
>
> Don't come chasing me.
>
> Tried to do the right thing – "Finlay/M bounced the ball".
>
> We keep $11.0m. Write off $7.8m.
>
> Will very messy
>
> Opp'ty to settle – each walk away/pay own costs
>
> Option never off table
>
> Speak on behalf of the company – yes.

[62] Mr Finlay gives yet another version of this part of the conversation in paragraph 25 of his affidavit sworn 19 March 2009. He states as follows:

> As I have recorded in both my handwritten notes and my typed written file note of the 16 April 2008 discussion, Mr Griffiths made

> an offer to settle the dispute the subject of these proceedings. Specifically, Mr Griffiths made the following statements to me in the course of the 16 April 2008 discussion:
>
> > We always said we are going to settle
> >
> > We will do the right thing and write off the $3.8 million
> >
> > We keep the $11 million and write off $7.8 million
> >
> > This is an opportunity to settle on the basis that each party walk away and pay their own costs. This option has never been off the table.

[63] In par 24 of his affidavit, Mr Finlay stated that during the 16 April 2008 telephone discussion he specifically asked Mr Griffiths if he spoke on behalf of the company and Mr Griffiths answered yes. Mr Finlay's typed notes of the discussion on 16 April 2008 make no mention of him asking Mr Griffiths such a question or Mr Griffiths giving such an answer. No attempt was made to explain the difference in the two lots of notes about the telephone discussion.

[64] On 20 April 2008, Mr Finlay obtained the defendant's instructions to settle on the basis that each party walk away and pay their own costs. He was instructed that the settlement was to be by way of deed of mutual releases including mutual confidentiality obligations. On 21 April 2007, there was a further telephone conversation between Mr Finlay and Mr Griffiths. During the telephone conversation Mr Finlay told Mr Griffiths the defendant had agreed to accept the plaintiff's offer and settle on the basis that each party walks away and pays their own costs and the parties enter into a deed of

mutual release including confidentiality provisions. Mr Griffiths replied that he would "have to take it back" as he said he would and he would get back to Mr Finlay in 48 hours. He agreed to talk to Mr Matthew Tripp. Mr Finlay then said, "You told me you had authority to settle and the offer was still on the table". Mr Griffiths said he expected to be able to get confirmation within 48 hours.

[65] On 28 April 2008, there was a telephone conversation between Mr Griffiths and Mr Finlay. Mr Griffiths apologized for the delay in getting back to Mr Finlay and he said, "A decision has been made to run it and not to settle". Mr Griffiths said the decision was made because Mr Matthew Tripp and Mr North QC want to run a test case on unconscionability. The decision had been taken out of his hands. Mr Finlay told Mr Griffiths that, "I thought you had authority to settle it and the offer was still open."

[66] After the telephone conversation on 28 April 2008, Mr Finlay sent an email to Mr Griffiths which stated:

> Further, to our telephone conversation yesterday afternoon, based on my detailed file notes, may I remind you of some recent history of our telephone conversations:
>
> 1. On 16 April we spoke by phone and amongst other things I said to you: "Is settlement still an option?"
>
> 2. You replied with words to the effect: "So far as I am concerned, settlement is always an option, my door is always open and the offer to walk away is an offer that has never been taken off the table".

3. I then asked you if you had authority to make that decision and you said, “I am speaking for 80 percent of the shareholders and I have the authority”.

4. I then said that I would pass this information on and get back to you with the Moraitis final decision.

5. On 21 April we again spoke by telephone and I said, “Stephen has agreed to settle on the basis that each party walks away and pays their own costs and that we enter into a deed of mutual release including confidentiality provisions”.

6. You then said that you would have to speak to Matt.

7. In our 28 April telephone conversation you said a decision had been made not to settle and to run it as a test case.

8. I responded by saying that I thought you had authority to settle on the basis we previously discussed.

Taken with your unconditional agreement to proceed to mediation, the agreed appointment of a mediator and then your lawyers’ decision to unilaterally terminate the mediation, I cannot now be sure of who should be talking about misleading and deceptive conduct.

[67] Contrary to par 3 of his email dated 29 April 2008, nowhere in any of Mr Finlay’s file notes of the telephone conversation is it recorded that Mr Griffiths said “he was speaking for 80 percent of the shareholders and have the authority [to settle the dispute]”.

[68] On 29 April 2008, Mr Griffiths responded by email saying that, as a result of all of the work the plaintiff’s lawyers had done, the plaintiff was of the opinion the case was the best possible test case to run in order to deal with large professional gamblers and their associates who want to win big, but when they lose big they want to blame the bookmaker for their losses and say that the bookmaker acted unconscionably or dishonestly. Mr Griffiths

also stated he never has, and he never will, engage in any form of deceptive or misleading conduct and he resented the implication that he had done so.

[69] On 30 April 2008, Mr Finlay sent a further email to Mr Griffiths in which he stated:

> I noticed that in your email you have not addressed the very issue I raised in my email. You stated to me unequivocally that you had the authority to make the decision to settle, that the offer was on the table and had never been taken off the table yet you could not deliver. It was on the basis of your representations (that you had authority and that the offer was still open) that I took those statements to my meeting with the Moraitis family and their advisors. The conversation we had was less than two weeks ago. If you say to me directly that you had authority to settle and the offer is still on the table and you renege, I do not know how to describe that conduct. I trusted you.

[70] On 9 May 2008, the solicitors for the defendant wrote to the solicitors for the plaintiff advising that the defendant would be pleading in his defence a defence that on 21 April 2008 the plaintiff had compromised its claim against the defendant.

[71] In support of its application that the defence of settlement was manifestly hopeless the plaintiff relied on two affidavits of Mr Grant Alfred Griffiths sworn on 3 June 2008 and 23 March 2009 respectively.

[72] In his affidavit sworn on 3 June 2008, Mr Griffiths states as follows. No agreement of the type pleaded in par 16 of the further amended defence or any other settlement agreement at all was ever made by Mr Griffiths with Mr Finlay. At no time did he ever receive any correspondence that such an

agreement was made on 21 April 2008 nor did he receive any 'release documents'. He first met Mr Finlay on 29 February 2008 in his office at South Yarra. On 10 April 2008, he advised Mr Finlay by telephone that negotiations had been completed and the plaintiff wished to proceed to Court. There were further negotiations and discussions between him and Mr Finlay on 16 April 2008. However, he totally refutes the suggestion that he ever accepted or said any words whatsoever that could lead Mr Finlay to assume he had agreed to accept any offer to settle the proceeding. On 21 April 2008, Mr Finlay telephoned Mr Griffiths and he offered to settle on the basis that each party walks away and pays their own costs and the parties enter into a deed of mutual release including confidentiality provisions. He did not accept Mr Finlay's offer. On 28 April 2007, he telephoned Mr Finlay and formally told him the plaintiff was not interested in further discussions or negotiations.

[73] In his affidavit sworn on 23 March 2009, Mr Griffiths stated as follows. The conversations between him and Mr Finlay were held on a without prejudice basis. Accordingly, save as stated in his affidavit, he was not prepared to comment on what was discussed between him and Mr Finlay. Mr Griffiths and Mr Finlay proceeded on the basis that any settlement reached would involve the execution of a deed of release. At no time was any deed of release executed by either party as no settlement was reached arising out of their negotiations. Moreover, at no time had Mr Griffiths

received any draft settlement agreement from Mr Finlay whether containing terms of confidentiality or releases or at all.

[74] Mr Griffiths appears to be operating under a misapprehension that a "without prejudice" agreement is neither complete nor binding until confirmed by an "open" agreement. This is not so. Once a "without prejudice" offer is accepted, a complete contract is established which is binding on both parties[17]. Further, the principle that without prejudice communications cannot be put into evidence without the consent of both parties does not exclude communications in the event of an agreement. It is also well established that without prejudice material will be admissible if the issue is whether or not negotiations resulted in a settlement[18].

The plaintiff's argument about the defence of settlement

[75] The plaintiff developed three primary arguments in support of the contention that the defence of settlement was manifestly hopeless. First, it was said that the evidence of Mr Griffiths established that there was no settlement and Mr Finlay's evidence was intrinsically unreliable. Secondly, the defendant does not allege that Mr Griffiths made any offer to Mr Finlay which included a term dealing with confidentiality. Mr Finlay's acceptance of the offer alleged to have been made by Mr Griffiths, that each party walk away and bear their own costs, amounted to a counter offer because

[17] *Taller man & Co Pty Limited v Nathan's Merchandise (Victoria) Pty Limited* (1957) 98 CLR 93 per Dixon CJ and Fullagar J at 110; *Tomlin v Standard Telephones* [1969] 1 WLR 1378.
[18] *Tomlin v Standard Telephones* [1969] 1 WLR 1378; *Austotel Management Pty Limited v Jamieson* (1995) 57 FCR 411 at 416; *Needlework Warehouse Pty Limited v Chansonette Pty Limited* (2005) 226 ALR 252 at [84].

Mr Finlay introduced a term about confidentiality. The counter offer was not accepted by Mr Griffiths. Mr Griffiths said he had to take the matter back to the plaintiff company. After Mr Griffiths obtained instructions he rejected Mr Finlay's offer. The correspondence between Mr Finlay and Mr Griffiths after 21 April 2008 shows the parties were still negotiating and in a position of disputation. Thirdly, the plaintiff argues the pursuit of the counterclaim by the defendant has the effect that the settlement is rescinded and is of no effect.

Consideration of the plaintiff's arguments about the defence of settlement

[76] None of the arguments pressed on behalf of the plaintiff demonstrated that the defence of settlement pleaded in par 16, par 17 and par 18 of the further amended defence and counterclaim was manifestly hopeless. The plaintiff's first argument gives rise to a factual dispute which can only be resolved at trial.

[77] The plaintiff's second argument, gives rise to an issue as to whether the parties had reached agreement about all of the terms of the alleged agreement. This involves an inquiry about whether, prior to the final acceptance of the alleged substantive offer by Mr Finlay, it had already been accepted by the parties that settlement would be by way of a deed of release and would include a term about confidentiality and Mr Griffiths' offer was made on this basis. This issue will involve an inquiry into the content of all communications between Mr Finlay and Mr Griffiths before 21 April 2007.

The Court will not be in a position to consider those communications in full until the hearing of the case at trial.

[78] It is reasonably arguable that the defendant's contention that Mr Finlay's reference to confidentiality obligations did not have the consequence that his communication with Mr Griffiths constituted a counter offer because the condition of confidentiality is in the nature of a formality to be dealt with in the context of a written document and did not detract from the finality of the substance of the bargain. The defendant's contention can only be fully considered at a trial.

[79] The plaintiff's third argument is arguably misconceived. The settlement pleaded is relied on as an accord and satisfaction. The essence of an accord and satisfaction is the acceptance by a party of something in place of the party's original cause of action[19]. There is the acceptance of something in place of the full remedy to which the recipient is entitled[20]. Where there is an agreement to accept a promise in satisfaction of a cause of action the original cause of action is discharged from the date when the promise is made and only the settlement agreement may be enforced because *ex hypothesi* the previous cause of action has gone[21]. If the promisor fails to perform the promise there cannot be a return to the original obligation or

[19] *Federal Commissioner of Taxation v Orica Ltd* (1998) 194 CLR 500 per Gummow J at [116].
[20] *Thompson v Australian Capital Television Pty Ltd and Other* (1996) 186 CLR 574 per Gummow J at 610.
[21] *Osborn & Bernotti t/as G04 Productions v McDermott t/as RA McDermott & Co & Karmine Pty Ltd* [1998] 3 VR 1 at 8.

claim[22]. It follows that arguably the bringing of any claim by the defendant in breach of any settlement agreement does not rescind the settlement agreement. In any event, the defendant has made it clear that the counterclaim is brought in the alternative.

The defensive operation of the counterclaim

[80] In par 7, par 12 and par 14 of the further amended defence and counterclaim the defendant pleads the following:

> In answer to paragraph [7, 12 or 14 as the case maybe] of the statement of claim, the defendant admits that as at … he owed a debt to the plaintiff in the sum of [$2,242,144, $1,627,702 or $3,867,846 as the case maybe] but says:
>
> (a) that he is entitled to setoff against the plaintiff's claim so much of the sums claimed in the counterclaim as is sufficient to extinguish it; and
>
> (b) that by reason of the matters alleged in the counterclaim, he is entitled to relief that would have the effect of extinguishing the debt.

The plaintiff's argument against the defendant relying on the causes of action pleaded in the counterclaim in a defensive manner

[81] In support of the argument that par 7, par 12 and par 14 should be struck out and the plaintiff should have judgment in the sum of $3,867,846 the plaintiff argued as follows. The only possible basis of a plea of setoff which is available to the defendant would be a setoff in equity. However, it is a fundamental requirement that for there to be an equitable setoff there must be such a connection between the claim and the counterclaim that the

[22] *El-Mir & 1 Or v Risk* [2005] NSWCA 215 at [52].

counterclaim could be said to impeach the plaintiff's claim[23]. There is no such connection in this proceeding because what the counterclaim attacks as unconscionable is the plaintiff's acceptance of any of the defendants bets or it is asserted the plaintiff owed and breached a duty of care in accepting the defendant's debts. Whereas the plaintiff's cause of action is based on a series of transactions whereby the plaintiff advanced the defendant credit and the defendant failed to repay the money advanced to him by the plaintiff. Therefore, no equitable setoff arises in this proceeding. The defendant's counterclaim does not allege that the plaintiff's conduct in advancing the defendant credit was unconscionable or a breach of a duty of care. It is the acceptance of the defendant's debts which is said to be unconscionable or a breach of duty of care. The transactions of repetitively lending money on the one hand and placing bets on the other are not dependent transactions in the requisite sense.

Consideration of the plaintiff's argument about setoff

[82] In my opinion, the plaintiff's argument that no setoff is available to the defendant cannot be sustained. In my opinion, for the reasons submitted by the defendant, the transactions of repeatedly advancing credit on the one hand and accepting bets on the other are dependent transactions. The distinction between wagering transactions and credit transactions is artificial and ultimately of no consequence. The defendant is sued on the balance of a running account which is the result of both the extension of credit and the

[23] *Forsyth v Gibbs* [2009] 1 Qd R 403.

placing of bets. The credit transactions were part and parcel of the wagering transactions. The defendant seeks an order that all betting transactions of the defendant with the plaintiff after 1 October 2005 be declared void. If the betting transactions are declared void there will be no enforceable debt. Both the causes of action pleaded in the defendant's counterclaim are so directly connected with the plaintiff's claim that it would be unjust to allow the plaintiff to recover without taking into account the defendant's claims[24]. The circumstances are such as to attract the intervention of a court of equity.

The deficiencies in the counterclaim

[83] The plaintiff argued that par 20 to par 37 inclusive and par 40 to par 56 inclusive of the further amended defence and counterclaim were defective on a number of grounds. The defendant met the plaintiff's argument on many occasions by foreshadowing an application to amend the further amended defence and counterclaim. In the circumstances, save for one particular matter addressed below, I consider that it is inappropriate to rule in respect of this part of the plaintiff's application until, and subject to, the defendant filing an application to amend the further amended defence and counterclaim.

[84] The plaintiff pressed an argument that the counterclaim was no counterclaim at all because the claims pleaded by the defendant were hypothetical. The plaintiff's argument cannot be sustained. The solicitor for the defendant

[24] *Murphy v Zamonex* (1993) 31 NSWLR 439 at 465.

wrote to the plaintiff on 10 December 2007 foreshadowing he intended to commence proceedings to recover his betting losses. The defendant maintained that he had a cause of action for unconscionable conduct and a cause of action in negligence. After the plaintiff received the letter dated 10 December 2007, the plaintiff commenced the proceeding in this Court. There was then a moratorium during which the parties engaged in settlement negotiations. The defendant says the settlement negotiations were successful. The plaintiff says the settlement negotiations were unsuccessful. If the defendant is ultimately found to be correct any causes of action of the defendant are is extinguished. If the plaintiff is correct the defendant's causes of action are not extinguished. In the circumstances the plaintiff is entitled to plead the counterclaim in the alternative. It has done so. The situation is analogous to a claim for contribution or indemnity which is made by a defendant.

Dux litis

[85] As the defendant bears the burden of proof both in relation to defence of settlement and the causes of action pleaded in its counterclaim the defendant should be dux litis.

Costs of the cross-vesting application

[86] The plaintiff seeks costs of the cross-vesting application and an order that the costs be immediately enforceable and taxable. The defendant accepts that costs should follow the event in the cross-vesting application but

opposes and order that costs be immediately enforceable and taxable. The defendant submits that costs should not be taxed immediately because the plaintiff ought to have reasonably anticipated the cross-vesting application and the full burden of the costs order will fall on a natural person.

[87] The plaintiff argues that the cost orders it seeks should be made because the application was a discrete application which was made at an early stage of the proceeding, the plaintiff is otherwise likely to be without its costs for sometime as the counterclaim is a complex claim which will require extensive investigation. Further, there is no evidence to suggest that such costs orders would disadvantage the defendant or hinder the defendant in the preparation and presentation of his case.

[88] I accept the plaintiff's submissions. In my opinion an order should be made that the defendant is to pay the plaintiff's costs of the cross-vesting application and such costs are to be immediately enforceable and taxable.

Orders

[89] I make the following orders:

1. Paragraph 15 and the related pleading in par 18 of the further amended defence and counterclaim are struck out.

2. The defendant is to be *dux litis* at the trial of this proceeding.

3. The defendant is to pay the plaintiff's costs of the cross-vesting application and such costs are to be immediately enforceable and taxable.

[90] I will hear the parties further as to the costs of the application for summary judgment.
