KING'S BENCH FOR SASKATCHEWAN

Citation: **2025 SKKB 110**

Date: **2025 07 24**
File No.: KBG-RG-02874-2024
Judicial Centre: Regina

BETWEEN:

ABOVE FOOD INGREDIENTS INC.

APPLICANT

- and -

ANMOHO LLC

RESPONDENT

AND

Date: **2025 07 24**
File No.: KBG-RG-02873-2024
Judicial Centre: Regina

BETWEEN:

ABOVE FOOD INGREDIENTS INC.

APPLICANT

- and -

CAP MINDS ADVISORY GROUP LLC.

RESPONDENT

Counsel:

Eric Marcotte	for the applicant
Jason Clayards	for the respondents

FIAT — KLATT J.
July 24, 2025

OVERVIEW

[1] Cap Minds Advisory Group LLC [Cap Minds] and ANMOHO LLC [ANMOHO] brought applications for judgment against Above Food Ingredients Inc. [Above Food]. The applications were properly served on Above Food but when the applications were heard in chambers, Above Food had not responded and no one appeared on its behalf.

[2] On March 6, 2025, after a few adjournments, Krogan J. granted the orders for judgment in favour of ANMOHO in the amount of $184,166.67 USD and Cap Minds in the amount of $3,487,084 USD. Both Cap Minds and ANMOHO took out judgments against Above Food in accordance with those orders.

[3] The judgments were emailed to the Chief Executive Officer (CEO) of Above Food who almost immediately contacted their counsel. That was the first time anyone in Above Food's management learned of the judgments.

[4] Above Food now applies to set aside the two orders of Krogan J. For the reasons that follow, I grant Above Food's application with respect to the Cap Minds order but dismissed the application respecting ANMOHO's order.

DISCUSSION

[5] Above Food is a publicly traded company that is in the business of the wholesale purchase and sale of food products and ingredients. Lionel Kambeitz [Kambeitz] is board chairman and one of the founders of Above Food; Jason Zhao [Zhao] is the Chief Financial Officer of Above Food. Both Kambeitz and Zhao were authorized to enter into negotiations and agreements on behalf of Above Food.

[6] Cap Minds provides business consultation services focussing on business

development and growth. The sole owner and operator of the respondent Cap Minds is Sean Dollinger [Dollinger].

[7] ANMOHO, a corporation registered in Saskatchewan, provides business consultation services. Alexandra Hoffman [Hoffman] is the sole owner and operator of ANMOHO.

[8] Veg House Holdings GP Inc. [Veg House] is a holding corporation registered in Delaware, United States. Dollinger is one of the founders of Veg House and one of its directors. Hoffman was acting Chief Executive Officer of Veg House and one of its directors. There does not appear to be any dispute that they were authorized to enter into negotiations and agreements on behalf of Veg House.

[9] In June 2024, Above Food approached Veg House with a view to acquiring it and some of its other interests. Negotiations to acquire Veg House began between Zhao and Kambeitz on behalf of Above Food and Dollinger on behalf of Veg House.

[10] On July 24, 2024, Cap Minds and Above Food proceeded to execute a business consultation agreement [Cap Minds Agreement] with an effective date of July 1, 2024. The Cap Minds Agreement set out the various consulting services that Cap Minds would provide Above Food such as finding potential business development opportunities, capital-raising advice and strategies for acquisitions.

[11] The Cap Minds Agreement stipulated that compensation to Cap Minds would include a monthly fee of $12,916 commencing on July 15, 2024, discretionary bonuses and bonuses for capital-raising if certain conditions were met.

[12] Under the heading of “Commission on Sales”, the Cap Minds Agreement provided that Cap Minds would “aggregately receive a maximum of $3,500,000.00 USD during the term of the consulting contract”.

[13] The Cap Minds Agreement provided that the term of the consultancy would end on the later of December 31, 2025, or at such time as Cap Minds received consideration of at least $3,500,000 USD in the aggregate as stipulated.

[14] ANMOHO and Above Food entered into another consulting agreement [ANMOHO Agreement] to take effect on July 1, 2024. The ANMOHO Agreement provided that ANMOHO would perform business consultation services for Above Food, including operational development, capital raising advice. The ANMOHO Agreement also stipulated that ANMOHO would handle the day-to-day operations of Veg House.

[15] Under the terms of the ANMOHO Agreement, ANMOHO was to be paid a monthly fee of $10,833.33 commencing on July 15, 2024, in addition to any discretionary bonuses as determined by Above Food.

[16] The ANMOHO Agreement provided that the term of the consultancy would end on December 31, 2025. The parties agreed, however, that the ANMOHO Agreement could be terminated either by mutual agreement or unilaterally by Above Food provided that Above Food continue to pay the monthly fee until the end of the agreement term.

[17] On July 26, 2024, Above Food sent a Letter of Intent [LOI] to Veg House that contained proposed parameters for the acquisition of Veg House. In about September 2024, Above Food decided not to proceed with the acquisition of Veg House. The relationship between Above Food on one side and Cap Minds and ANMOHO on the other side soured and the litigation outside Saskatchewan began.

[18] In this Court, on December 17, 2024, Cap Minds filed an Originating Application for judgment against Above Food in the amount of $3,500,000 USD. According to the Originating Application filed, the basis for Cap Minds' claim was that

Above Food terminated the Cap Minds Agreement before either the end of its term or before Cap Minds had received the aggregate of $3,500,000 USD, as stipulated in the Cap Minds Agreement.

[19] ANMOHO also filed an Originating Application against Above Food, claiming it was paid only one monthly fee under the ANMOHO Agreement. ANMOHO sought judgment in the amount of $184,166.67 USD, representing the monthly $10,833.33 USD fee that it claims it was owed to term end of December 31, 2025.

[20] According to the Saskatchewan Corporate Registry, Above Food's registered office is Gowlings LLP in Calgary, Alberta but it has a mailing address in Regina, Saskatchewan [Saskatchewan mailing address]. Kambeitz is listed as the power of attorney for Above Food and he has the same Saskatchewan mailing address as Above Food.

[21] On December 19, 2024, counsel for Cap Minds and ANMOHO served Above Food with notice of the applications and supporting material by courier on Above Food at the Saskatchewan mailing address. The material filed discloses that the application was delivered to the reception at the Saskatchewan mailing address.

[22] When the applications were in chambers for the first time on February 6, 2025, Above Food had not filed anything in response to them and nor did anyone appear on its behalf. Because no affidavit of service on Above Food was filed, the applications were adjourned to February 13, 2025.

[23] On February 13, 2025, again no one appeared for Above Food. Wildeman J. directed that Above Food file its response materials by February 27, 2025 and that counsel for Cap Minds and ANMOHO serve Above Food with a copy of her fiat. A copy of the fiat was served on Above Food by leaving it with Colleen Grad, an administrative associate at Above Food's Saskatchewan mailing address.

[24] On the chambers return date of March 6, 2025, Above Food had still not responded and no one appeared on its behalf. Krogan J. granted the orders sought by Cap Minds and ANMOHO.

[25] On April 14, 2025, Zhao learned of the judgments that Cap Minds and ANMOHO took out against Above Food. It appears the judgment was emailed to him by counsel for Cap Minds and ANMOHO. Zhao deposed that he immediately contacted his lawyer the next day. On April 17, 2025, counsel for Above Food contacted counsel for Cap Minds and ANMOHO seeking their consent to set aside Krogan J.'s orders and the judgments issued in accordance with those orders. When Cap Minds and ANMOHO refused, Above Food began to prepare their materials and applications to set aside the orders. Above Food's applications to set aside the orders and judgments were served on counsel for Cap Minds and ANMOHO on June 9, 2025.

[26] In oral argument, counsel for Above Food does not dispute that there was, technically, valid service of the Originating Applications. Both counsel agree that the Court has inherent jurisdiction to set aside Krogan J.'s orders (and judgments) and they agree on the legal principles that apply in exercising the discretion to do so.

[27] Rule 10-13 of *The King's Bench Rules* provides:

> 10-13 Subject to rule 9-13, in the case of any judgment by default, whether by reason of non-delivery of defence or non-compliance with any of these rules or with any order of the Court, the Court may set aside or vary the judgment on those terms as to costs or otherwise that the Court considers fit.

[28] Rule 10-13 does not apply to where judgment has been entered after hearing an application on the merits. In *Montgomery v Jahnke*, 2017 SKQB 374 [*Montgomery*], Tholl J. (as he then was) stated:

> [19] The court is not persuaded Rule 10-13 applies or that the test applicable to setting aside a default judgment is the exact same test to be applied to setting aside an order granted on the

> merits on notice in Chambers. The court determines it has inherent jurisdiction to set aside the order and, in considering whether it should do so, must apply the same principles as it would to setting aside a default judgment with the additional requirement that such an order can only be set aside in exceptional circumstances when required by the principles of equity and fairness.
>
> [20] An order obtained in Chambers on proper notice and upon the filing of evidence is not a default judgment issued following a noting for default occasioned by a failure to file a statement of defence. While there are similarities between these situations, there are fundamental differences. An order resulting from an application on notice in Chambers is a decision on the merits of the application based on the evidence provided. A default judgment arises from a noting for default upon uncontested allegations.

[29] Here, there was proper service of both applications on Above Food. In support of their applications, Cap Minds and ANMOHO filed material that was considered by Krogan J. when she granted the orders. Although Rule 10-13 has no direct application to the matters at hand, the principles that underly Rule 10-13 do. Importantly, and in addition, the inherent jurisdiction to set aside a judgment must only be exercised in exceptional circumstances, when equity and fairness dictate: *Shell Canada Products Ltd. v L & D Truck Ltd.*, 2005 SKQB 336 at para 10, 276 Sask R 315 [*Shell Canada*], *Montgomery* at para 32.

[30] In *Desbiens v Warken*, 2020 SKQB 145, 61 CPC (8th) 187 [*Desbiens*], Tochor J. (as he then was), discussed the relevant principles that must be considered when the court is asked to set aside a judgment. Starting at para. 19 of *Desbiens*, Tochor J. stated:

> [19] These principles were summarized by Popescul J. (as he then was) in *Browne Building Services Ltd. v North Country Homes Ltd.*, 2010 SKQB 20 at paras 14-15, 349 Sask R 72 [*Browne*]:

[14] The general principles respecting the interpretation of Rules 114(3) and 346 of *The Queen's Bench Rules* that have emerged from the jurisprudence in this province are as follows:

> 1. The order is discretionary.
>
> 2. The discretion is available to be exercised where an action has been noted for default and/or a "default judgment" has been entered.
>
> 3. The application to set aside the noting and/or the default judgment should be done as soon as possible after the noting or the judgment sought to be set aside comes to the attention of the defendant. In the event of any delay, that delay must be satisfactorily explained.
>
> 4. Mere delay will not, in and of itself, defeat an application unless the plaintiff will suffer irreparable harm.
>
> 5.(a) Where no defence was filed within the time prescribed by *The Queen's Bench Rules*, the defendant must provide a satisfactory explanation for his or her failure to respond to the claim; or
>
> (b) Where the defence has been struck by court order, the defendant must provide a satisfactory explanation of the events leading up to the defence being struck and must also remedy the problem that caused the defence to be struck or undertake to remedy the misconduct.
>
> 6. The defendant must disclose an arguable defence or that there is a *bona fide* question to be decided. Generally, the affidavit pertaining to a meritorious defence must show the nature of the defence and set forth sufficient facts to enable the Court to decide if there is a defence. It is generally insufficient to merely swear that there is a defence on the merits. It is customary for the party seeking to file a statement of defence, where one has not yet been filed, to attach a copy

> of the "proposed" statement of defence to the supporting application.
>
> 7. The defendant must satisfy the Court that an order setting aside the noting and/or the default judgment will not seriously prejudice the plaintiff.
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> 8. The principles applicable to opening up a noting for default pursuant to Rule 114(3) and setting aside a default judgment pursuant to Rule 346 are substantially the same.
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> 9. Should the Court decide to exercise its discretion in favour of opening up a noting for default or setting aside a default judgment, the Court will normally impose conditions upon the defendant that, for example, specify when the deficiencies giving rise to the default must be remedied.
>
> 10. Normally, the defendant will be ordered to pay the plaintiff's costs on a "costs thrown away" basis.

> [15] The above principles are shaped by the notion that the defendant, who has failed or neglected to do something, comes before the Court seeking its indulgence to set aside a process, apparently valid on its face, because of equitable considerations.

[20] Another important observation in this regard is made by Caldwell J.A. in *Ballentyne v Benard,* 2012 SKCA 23 at para 14, 385 Sask R 280 [*Ballentyne*]:

> [14] ... Despite the cautionary wording on the face of a statement of claim, it is not uncommon that an individual will fail to appreciate that not responding in a legal way to a statement of claim will result in a legally enforceable judgment against him or her by default. There may be many reasons for this. For example, an individual may fail to read the document out of fear, or he or she may read it but not understand it or what it requires, or may fail to read it carefully enough, or may simply ignore it as yet another tactic in an on-going dispute with the party opposite. Such conduct may well be negligent; but, if it

> falls short of a deliberate decision to allow a default judgment to issue, such conduct, in and of itself, does not justify denial of an application to set aside a default judgment brought in a timely way where the applicant has shown an arguable defence and no irreparable prejudice to the plaintiff if the default judgment is set aside. In short, in my opinion, a "wilful" default (*i.e.*, one which could in and of itself justify dismissal of an application to set aside the default judgment) occurs where the defendant understands the import of a statement of claim and deliberately decides to let the matter go to default judgment, whether to vex the plaintiff with the cost, delay and inconvenience of defending an application to set it aside or otherwise. And, that is not the case here.
>
> [21] In *Ballentyne*, the court draws a careful distinction between negligent conduct and a deliberate decision to allow a default judgment to issue. The former will ordinarily, absent other factors, result in the opening of a default judgment, while the latter ordinarily will not.
>
> [22] On the basis of the above, a court must look very carefully at the circumstances to determine whether there was a willful default.

[31] The principles underlying Rule 10-13 must be examined against the backdrop of equity and fairness: *Desbiens* at para 23. To put a finer point on it, equity and fairness informs the analysis as to whether exceptional circumstances exist.

[32] In *Desbiens*, Tochor J. cited *Sparrow v Schnurr*, 2017 SKQB 358 , which offers the following on what it means to act fairly:

> [16] The task of the court when considering an application to set aside a default judgment involves determining if the rigid application of the Rules should yield to the justification set forth by the defendant as to why a default judgment was obtained. Each situation is unique and must be assessed by carefully examining the specific circumstances. In the end result, the court, in exercising its discretion must simply do what is fair. When the court acts fairly, by implication, it is ensuring that the principles of fundamental justice and equity are respected.

[33] The Court of Appeal in *Ballentyne v Benard*, 2012 SKCA 23 at para 13, 385 Sask R 280 [*Ballentyne*], also spoke of the notion of fairness and equity:

> [13] While one might imagine circumstances in which a "wilful" failure to defend an action might constitute sufficient reason to deny an application to set aside a default judgment, as noted, the fundamental principle relevant to the exercise of judicial discretion in these cases is that it is necessary to ensure that the application of the Court's rules and principles does not violate the principles of fundamental justice and equity. As Cameron J.A. pointed out in *Rimmer v. Adshead* [2002 SKCA 12, [2002] 4 WWR 119], the applicable principle requires consideration of all the circumstances and a strong reason to deny a defendant his or her day in court when he or she can demonstrate an arguable defence to the claim and the delay has not caused the plaintiff irreparable harm.

[34] Exceptional circumstances have been found to exist where there is fraud, lack of jurisdiction, irregularity, perjury, new evidence and lack of notice: *Shell Canada* at para 10.

[35] The case law is well-settled that whether to exercise the inherent jurisdiction to set aside requires consideration of the following issues:

(a) the application is to be made as soon as possible after the judgment sought to be set aside comes to the attention of the applicant. In the event of any delay, the applicant must justify and satisfactorily explain the reasons for the delay;

(b) the applicant must provide a satisfactory explanation for his failure in responding to the claim;

(c) the applicant must disclose the defence that raises arguable issues;

(d) the applicant must satisfy the Court that an order setting aside the judgment will not seriously prejudice the party who has obtained

the judgment.

1. Was the application made as soon as possible after the judgment sought to be set aside came to the attention of the applicant?

[36] The orders were granted by Krogan J. on March 6, 2025. In his brief, counsel for Cap Minds stated that he emailed copies of the registered judgments along with demands for payment to Zhao on April 14, 2025. Zhao deposed that was the date he first learned of the judgments against Above Food.

[37] Zhao deposed that he immediately contacted Above Food's counsel. It was within a few days, April 17, 2025, that counsel for Above Food contacted counsel for Cap Minds and ANMOHO asking if they would consent to setting aside Krogan J.'s orders. On April 23, 2025, counsel for Cap Minds and ANMOHO responded that they would not consent.

[38] Zhao's affidavit was prepared and sworn on June 6, 2025. The affidavit and supporting material were filed and served on counsel for Cap Minds and ANMOHO a few days after that. I find that in all the circumstances, Above Food moved expeditiously to make the application to set aside the judgments. I have found that as soon as Zhao became aware of the judgments, he set the wheels in motion to have the orders set aside. It was a little more than six weeks later that the materials were filed and served on the respondents' counsel.

2. Is there a satisfactory explanation for Above Food's failure in responding to the Originating Applications?

[39] While Above Food acknowledges that technical service was complied with, Zhao deposed that none of their senior management or leadership had any notice of either Cap Minds' or ANMOHO's court actions until judgment had already been obtained.

[40] Mike Jiang, an accounting assistant at Above Food, stated that he

accepted service of legal documents pertaining to ANMOHO and Cap Minds on December 19, 2024. He deposed that his English communication skills are limited, and he did not understand the nature or significance of the legal documents he received. He explained that he understood there was an internal procedure for routing incoming mail and deliveries but had never been involved in the process as it usually goes through reception. He said he did not know that the documents were time sensitive and did not recognize the importance of forwarding them to the legal team.

[41] Despite the urging of counsel for ANMOHO and Cap Minds, I decline to draw an adverse inference from the fact that there is no evidence as to what Mike Jiang did with the documents he received or what the administrative assistant, Colleen Grad, did with Wildeman J.'s fiat that was served on Above Food. Whatever happened to the documents, I am satisfied that they did not come to the attention of Kambeitz or Zhao.

[42] Counsel for Cap Minds and ANMOHO makes the point that this was not an instance of a singular document going awry. There were several documents in addition to the Originating Applications that were all properly served including a brief of law, Chambers Appearance Memos, and the Wildeman J. fiat. There is no evidence as to what became of all these documents.

[43] The ignorance of the applications for judgment was not wilful. Either there were no policies in place at the Saskatchewan mailing address at Above Food for the routing of mail and legal documents or, if there were, there was a complete abandonment of attention to them. Whatever the case, the inattention to them represents negligence on the part of Above Food to ensure staff understood the importance of what it means to be the mailing address for a corporation.

3. Does Above Food's proposed response raise arguable issues?

[44] Upon an application to set aside a default judgment, an applicant typically

files a proposed statement of defence. However, Cap Minds' application for judgment was brought by originating notice, with affidavit evidence. Thus, it is permissible for Above Food to file an affidavit that sets out the proposed "defence" to the application: *Ballentyne* at para 17.

[45] The arguable issue criterion involves a consideration of whether there is "an arguable defence or there is a *bona fide* issue to be decided": *Desbiens* at para 51. A defendant does not need to prove that the defence will be successful but must demonstrate that "they have a reasonable defence on the merits, worthy of investigation": *Desbiens* at para 52, quoting from *McAdam v Grimard*, 2017 SKQB 39 at para 31, 7 CPC (8th) 123.

[46] The question to be asked here is whether, based on all the information I have before me, there is a triable issue?

[47] With respect to the Cap Minds action, Cap Minds applied for judgment on the basis that, in its view, the Cap Minds Agreement stipulated that it was entitled to compensation of $3,500,000 USD regardless of the duration of the Cap Minds Agreement. Cap Minds took the position that it was entitled to that amount as long as it was providing services in good faith. Further, Cap Minds argued that the Cap Minds Agreement was never formally terminated and, therefore, the *pro rata* payment provision was not triggered thereby relieving Above Food of its obligation to pay the full $3,500,000 USD.

[48] Above Food disputes that Cap Minds provided the services Dollinger claims were provided. Zhao deposed that after the Veg House deal fell through, Cap Minds provided no services and Dollinger became litigious, commencing the actions against defendants including Kambeitz and Above Food, in other jurisdictions. Above Food argues that they took the Cap Minds Agreement to have ended in the fall of 2024 when Cap Minds no longer responded to correspondence and no longer, in their view,

were providing consultancy services to it. Above Food argues that the Cap Minds Agreement did not provide for a guarantee of $3,500,000 USD. Rather, the Cap Minds Agreement provided that the term of the agreement would end December 31, 2025 or at such time that Cap Minds received an aggregate amount of $3,500,000 USD, whichever happened first. In other words, the most that Cap Minds would be entitled to, including bonuses and commissions, was $3,500,000 USD.

[49] Both parties cite the Cap Minds Agreement in support of their respective positions. Under clause 4 "Compensation", there are two distinct sections: "Monthly Fee", whereby Cap Minds was entitled to receive a monthly fee of $12,916; and "Earned Bonuses", which sets out various forms of remuneration. One of those forms of remuneration is "Commission on Sales" which provides that Cap Minds will receive aggregately a "**maximum** of $3,500,000.00 USD during the term of the consulting contract" [emphasis added].

[50] Above Food also questions the use of the summary judgment procedure to decide the issues that appear to be at play. If Above Food's applications are granted, Above Food intends to argue that the dispute cannot be resolved on the basis of summary judgment.

[51] Having reviewed the material, including the Cap Minds Agreement itself, Above Food has satisfied me that there is a triable issue as to whether Cap Minds was entitled to a guaranteed payment of $3,500,000 USD.

[52] With respect to the ANMOHO Agreement, Zhao simply stated in his affidavit sworn June 6, 2025 at para. 18 that Above Food "viewed Dollinger and Hoffman as one and the same, operating through their respective companies". The ANMOHO Agreement and the Cap Minds Agreement were executed with the Veg House acquisition in mind but Above Food expected that they would be involved in other business acquisitions and ventures. Zhao acknowledged that despite the obvious

connections between Dollinger and Hoffman and their respective companies, the agreements were separate.

[53] The ANMOHO Agreement was indeed different from the Cap Minds Agreement, most notably in the area of compensation. The basis for ANMOHO's claim was that despite sending Above Food monthly invoices, and repeat requests for payment of those invoices, Above Food consistently sought more time within which to pay but paid nothing apart from the first invoice. The emails appended to Hoffman's affidavit bear this out.

[54] From the correspondence between Hoffman and Zhao, it appears that ANMOHO was lining up business prospects for Above Food and Hoffman wanted to discuss those opportunities with Zhao. There is no evidence that Hoffman had decided to walk away from the ANMOHO Agreement. There is no evidence that ANMOHO was not attempting to fulfill its obligations to provide consulting services. There is also no evidence that Hoffman considered the agreement to be at an end when the Veg House deal fell through.

[55] In my view, Zhao's affidavit does not offer any defence or response to ANMOHO's application for judgment. Despite the relationship between all the parties, and their companies, the claims of ANMOHO and Cap Minds are different, based on different terms of their respective agreements. On an application to set aside a judgment, the applicant must tender evidence that demonstrates there is a reasonable defence on the merits. Above Food does not offer any evidence as to a defence with respect to ANMOHO's claim.

4. If the orders are set aside, will Cap Minds and/or ANMOHO be seriously prejudiced?

[56] Cap Minds and ANMOHO argue that they will be prejudiced if the orders are set aside because they have already incurred significant costs in service attempts

and court appearances. Additionally, they argue that they have already commenced judgment enforcement proceedings.

[57] Cap Minds and ANMOHO also argue that there is a bankruptcy proceeding in Saskatoon, Saskatchewan with respect to "a number of Above Food's subsidiary companies". Neither Cap Minds nor ANMOHO have provided any specifics on the bankruptcy proceeding other than to say it "suggests that these subsidiaries are indebted to the Royal Bank of Canada in amounts exceeding $35,000,000" [Brief of Law of ANMOHO dated June 20, 2025 para. 76].

[58] Above Food counters that the bankruptcy proceeding in Saskatoon relates to a subsidiary of Above Food, not the parent company of Above Food. Any costs incurred by either Cap Minds or ANMOHO to date can be compensated for in costs.

[59] I am not persuaded that ANMOHO or Cap Minds would suffer any serious prejudice if the orders were set aside. Given the issues surrounding the Cap Minds Agreement, I can foresee that the first issue would relate to whether summary judgment is even an appropriate mechanism for this type of dispute. If Above Food had responded to the applications for judgment of Cap Minds and ANMOHO, it is highly likely that a special hearing date would have been scheduled to hear the applications, rather than having them dealt with in regular chambers. It is very possible, if not probable, that the hearing would not have been heard earlier than in the fall of 2025. Setting aside the judgment will not have resulted in a lengthy delay that would cause serious prejudice to Cap Minds or ANMOHO.

[60] As to the argument relating to the financial state of Above Food's subsidiaries, I have no specific information on the extent to which this would impact Above Food's ability to satisfy a judgment. If Above Food itself was in financial peril when the applications were filed, Cap Minds and ANMOHO would be in no worse position if the applications for judgment were to be heard on their merits with evidence

and submissions from both sides.

[61] The next question to be addressed is whether there are exceptional circumstances that would mitigate in favour of setting aside the orders.

[62] One of the factors that stands out in this case is that while service requirements were technically complied with, Above Food's counsel was not notified of the applications sought by Cap Minds or ANMOHO. Given how quickly Zhao responded when he received the email enclosing the judgments, I cannot help but wonder why Cap Minds and ANMOHO did not advise counsel of the impending applications. I would have expected, as a courtesy, that Cap Minds and ANMOHO would have done so.

[63] Both ANMOHO and Cap Minds appear to base their applications on a claim for liquidated damages. I agree that on the evidence before me, and in the absence of evidence to the contrary from Above Food, ANMOHO's claim is just that.

[64] However, in my view, there appears to be a question as to whether the summary judgment procedure is properly invoked to decide Cap Minds' claim. If what Zhao asserts is true, the dispute requires a determination of whether the Cap Minds Agreement provides for a guaranteed payment as Cap Minds alleges and whether there was a breach of that contract. Given the matters that are obviously in dispute, and that were in dispute before the applications were brought, I would have expected the claims to be commenced by way of Statement of Claim rather than summary judgment.

[65] In considering all the circumstances, and the relevant factors, I find it is just and equitable to set aside Krogan J.'s order and the ensuing judgment with respect to Cap Minds' claim to allow Above Food to present its defence on the merits.

[66] With respect to ANMOHO's claim, there is nothing in the material filed on behalf of Above Food that speaks to an arguable defence or a triable issue. As I said,

the application to set aside requires that Above Food provide some indication of what the defence might be. It has not done so. The application to set aside the judgment and Krogan J.'s order with respect to the claim is dismissed.

[67] Above Food has 45 days from the date of this fiat to file material in response to Cap Minds' application for judgment.

[68] Cap Minds' costs thrown away shall be costs in the cause to be determined ultimately at trial or the conclusion of the summary judgment hearing.

[69] ANMOHO will be entitled to the costs of this application which I fix at $500.

J.
B.L. KLATT