Nanyang Law LLC *v* Alphomega Research Group Ltd
[2010] SGHC 133

Case Number	: Suit No 540 of 2009 (Registrar's Appeal No 67 of 2010)
Decision Date	: 30 April 2010
Tribunal/Court	: High Court
Coram	: Andrew Ang J
Counsel Name(s)	: Philip Jeyaretnam SC and Ng Hui Min (Rodyk & Davidson LLP) for the plaintiff/respondent; Adrian Tan and Robert Raj Joseph (Drew & Napier LLC) for the defendant/appellant.
Parties	: Nanyang Law LLC — Alphomega Research Group Ltd

Civil Procedure

Companies

Statutory Interpretation

30 April 2010

Andrew Ang J:

Introduction

1 This is an appeal by Alphomega Research Group ("Alphomega") against the decision of the learned assistant registrar ("AR") who declined to set aside a default judgment dated 7 July 2009 ("the Default Judgment"), which was granted in favour of Nanyang Law LLC ("Nanyang"), as well as two orders of court with respect to execution ("the Orders") and a writ of seizure and sale ("the WSS"). After much consideration, I decided to allow Alphomega's appeal. I now give my reasons for doing so.

Background

2 The facts in the present matter are clearly set out at [3] to [8] of the AR's judgment in *Alphomega Research Group Ltd v Nanyang Law LLC* [2010] SGHC 45 ("the Judgment"). Essentially, Nanyang, a firm of advocates and solicitors, had represented Alphomega in two suits involving Alphomega's directors/shareholders and Alphomega, *viz*, Suit No 49 of 2008 ("Suit 49") and Suit No 856 of 2008. Both suits were consolidated, together with a third suit, *viz*, Suit No 855 of 2008 and heard before Tan Lee Meng J ("Tan J"). [note: 1] Midway through the trial before Tan J on 9 February 2009, Alphomega terminated the services of Nanyang and replaced Nanyang with Sterling Law Corporation ("Sterling") as its counsel. Subsequent to its discharge, Nanyang sought to recover from Alphomega payment for work done up to the termination. Several invoices were rendered to Alphomega. However, payment was not made. Nanyang then proceeded to tax the solicitor-client costs with the result that registrar's certificates were issued for sums totalling $332,229.40 payable by Alphomega to Nanyang. Nanyang then sought payment of this sum from Alphomega. Once again, this was to no avail. Nanyang hence commenced the present action against Alphomega to recover the total outstanding amount in respect of the registrar's certificates.

3 The writ of summons for the present suit ("the Writ") was filed on 23 June 2009. It was purportedly served by a court clerk of Nanyang ("the Court Clerk") on Alphomega on 24 June 2009 at 6 Sungei Kadut Way, Singapore 728786, the address of Alphomega's principal place of business. As Alphomega did not enter appearance in respect of the Writ, Nanyang obtained judgment in default against Alphomega (*ie*, the Default Judgment) for the sum of $332,229.40 on 3 July 2009. Thereafter, Nanyang proceeded with execution proceedings against Alphomega. It obtained the Orders and the WSS and lodged a caveat in the Registry of Land Titles in connection with the WSS.

4 On 26 November 2009, Alphomega filed an application to set aside the Default Judgment ("the Application"). Two other summonses, *viz*, Summons No 6297 of 2009 and Summons No 6440 of 2009, were filed to amend the Application. One of the amendments to the Application was to include an additional ground for setting aside the Default Judgment, namely, the merits of its defence against Nanyang's claim. After hearing the arguments of both parties, the AR dismissed the Application and upheld the Default Judgment. Alphomega's appeal against the AR's decision then came before me.

5 After careful consideration of the respective submissions of the parties, I allowed Alphomega's appeal on the basis that even though the Default Judgment was regularly obtained, as the learned AR had rightly found, Alphomega had a *prima facie* defence and ought therefore to be allowed to defend itself against Nanyang's claim.

The law on the setting aside of default judgments

6 Under O 13 r 8 of the Rules of Court (Cap 322, R5, 2006 Rev Ed) ("Rules of Court"), the court may, on such terms as it thinks just, set aside a judgment entered in default of appearance. The law on the setting aside of default judgments may be found in the seminal case of *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR(R) 907 ("*Mercurine*"), where the Court of Appeal restated the principles governing this area of the law. The Court of Appeal drew the usual distinction between default judgments which have been obtained regularly and those obtained irregularly.

7 Where the default judgment sought to be set aside is regular, the Court of Appeal said at [60] (and again at [95]) that "the question for the court is whether the defendant can establish a *prima facie* defence in the sense of showing that there are triable or arguable issues". However, the Court of Appeal stressed at [65] that "the merits of the defence do not constitute the sole consideration that a court takes into account in deciding whether to set aside a regular default judgment", indicating that it will also take other considerations into account. At the end of the day, whether there is a defence on the merits is to be balanced against other considerations, such as the applicant's explanation for the default and any delay, as well as against prejudice to the other party.

8 Where the default judgment sought to be set aside is irregular, the Court of Appeal's guidance at [96] is instructive:

> Where the default judgment sought to be set aside is an *irregular* one, setting aside as of right (*viz*, the *ex debito justitiae* rule) remains the starting point, especially in cases where the irregularity consists of the premature entry of a default judgment or a failure to give proper notice of the proceedings to the defendant – *ie*, in cases where there has been egregious procedural injustice to the defendant. This starting point may, however, be departed from where there are proper grounds for doing so. The court has an unfettered discretion whether the *ex debito justitiae* rule should be followed, and, in exercising this discretion, it may take into account, among other factors (see also [76] above):
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> (a) the blameworthiness of the respective parties (*eg*, whether there has been undue

delay on the defendant's part in making its setting-aside application);

(b) whether the defendant has admitted liability under the default judgment; and

(c) whether the defendant would be unduly prejudiced if the irregular default judgment is allowed to stand.

In those instances where the court is of the view that there has been no procedural injustice of such an egregious nature as to warrant setting aside the irregular default judgment as of right, the court has to go on to consider whether to nonetheless set aside the irregular default judgment on some other basis apart from the *ex debito justitiae* rule. To this end, it is crucial for the court to take into account the merits of the defence. Should the court find that the defendant is 'bound to lose' (*per* Sir Staughton in *Faircharm* ([77] *supra*)) if the default judgment is set aside and the matter re-litigated, the court should ordinarily uphold the default judgment, subject to any variation which the court deems fit to make and/or any terms which it deems fit to impose.

In other words, the plaintiff has first to persuade the court that the *ex debito justitiae* rule should not be applied. Having done so, it then has to counter the defendant's setting aside application by showing that the defendant is "bound to lose".

Whether the Default Judgment was regularly obtained

9 Based on the guidance provided in *Mercurine* ([6] *supra*), I had first to decide whether the Default Judgment was regularly or irregularly obtained. In this regard, I agreed with the AR that the Default Judgment was regularly obtained. First, I was of the view that service of the Writ had indeed been effected. The Court Clerk had described in detail how service was effected on 24 June 2009 in a statutory declaration. Alphomega's argument (that Nanyang's assertion that service of the Writ had been acknowledged by one "Chris" ought not to be believed because none of its employees bore the name of "Chris") was weak. I was also not convinced by Alphomega's argument that Nanyang's chairman, Mr Ng Kim Tean ("Mr Ng") who was also Alphomega's company secretary, had possession of Alphomega's stamp and could have belatedly and improperly affixed the same to the Writ. This was because I noted that Mr Ng had ceased to be Alphomega's company secretary in February 2009.

10 Second, not only had service of Writ been effected, I was also of the view that there was proper service of the same. To my mind, service of the Writ at Alphomega's principal place of business was good service. In this regard, I disagreed with the learned authors of *Walter Woon on Company Law* (Sweet & Maxwell, 3rd Ed, 2005) at para 10.2 and *Halsbury's Laws of Singapore* vol 6 (LexisNexis, 2006 Reissue) at para 70.298, who take the view that s 387 of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act"), which provides for service at a company's registered office, is prescriptive and not only permissive. I based my decision, in part, on the AR's comprehensive discussion of service on companies at [19] to [39] of his Judgment. In addition to his analysis of the law in Singapore, the United Kingdom and Australia, I have two points to add. First, s 387 of the Companies Act which provides that "a document *may* be served on a company by leaving it at or sending it by registered post to the registered office of the company" is in substance very similar to s 1139(1) of the UK Companies Act 2006 which also provides that "a document *may* be served on a company registered under [the Companies Act 2006] by leaving it at, or sending it by post to, the company's registered office". I noted, in particular, that the word "may" is used in both ss 387 and 1139(1).

11 Apart from the other authorities considered by the learned AR, the Court of Appeal in England in *Singh v Atombrook* [1989] 1 WLR 810 suggests (at 818–819) that there is no reason why "may" as

used in s 725(1) of the Companies Act 1985 (UK) (c 6) (the predecessor of s 1139(1) of the Companies Act 2006) (UK) (c 46)) should be read as "must". The earlier decision of *Vignes v Stephen Smith & Co* (1909) 53 SJ 716 ("*Vignes*"), which stated that "the only way in which a writ can be served on a company is by leaving it at or sending it by post to the registered office", as well as the decisions of *Wood v Anderson Foundry Co* (1888) 36 WR 918 ("*Wood*") and *Pearks, Gunston & Tee Limited v Richardson* [1902] 1 KB 91 ("*Pearks, Gunston & Tee*"), which Eve J relied upon in *Vignes*, all did not explain why "may" in s 62 of the Companies Act 1862 (c 89) (UK) (which is equivalent to s 387 of our Companies Act) ought to be read as "must". *Wood* and *Pearks, Gunston & Tee* merely stated that service had to be effected in the manner provided by s 62 of the UK Companies Act 1862 and then concluded that because service was not effected at the respective registered offices, s 62 was not complied with. However, no cogent reason was offered as to why service under s 62 had to be limited to service at the registered office despite the word "may" in s 62. My view that s 387 of the Companies Act is merely permissive also finds support in the Australian case of *Peters v Oscar Mayer Pty Ltd* [1963] VR 390. In that case, the Supreme Court of Victoria opined (at 395) that s 252 of the Victorian Companies Act 1958, which states that "a document *may* be served on a company by leaving it at or sending it by post to the registered office", does not purport to "provide an exclusive mode of effecting service on a company. It [merely] provides what will be sufficient leaving other methods open of proving effective service".

12 The second point I would like to make concerns s 48A of the Interpretation Act (Cap 1, 2002 Rev Ed) ("Interpretation Act") which provides:

> 48A.—(1) *Where a written law authorises or requires* a document to be served on a person, whether the expression 'serve', 'give' or 'send' or any other expression is used, then, *unless the contrary intention appears*, the document may be served —
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> (*a*) …
>
> (*b*) …
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> (*c*) in the case of a body corporate —
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> (i) by delivering it to the secretary or other like officer of the body corporate; or
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> (ii) by leaving it at, or by sending it by pre-paid post to, the registered office or a principal office of the body corporate in Singapore.
>
> [emphasis added]

Since s 387 merely provides that service "may" be effected at the company's registered office, I was of the view that service on the company may be effected in accordance with any of the methods stipulated in s 48A(*c*) of the Interpretation Act. In my view, the clause "Where a written law authorises or requires a document to be served on a person", which appears at the beginning of s 48A(1) of the Interpretation Act, refers principally to written law which authorises or requires service of a document but which is silent on the manner of service of the same. Section 48A therefore supplements such written law by providing the methods whereby service may be effected.

13 Admittedly, on a plain reading of the prefatory words in s 48A, s 387 of the Companies Act could also qualify as a written law which "authorises … a document to be served". But does s 387 "require" service in the manner provided in s 387? On the view that I have already expressed, it does not. On a plain reading, s 387 of the Companies Act is clearly permissive and not prescriptive.

Therefore, it cannot be said that any "contrary intention appears" in s 387. Such a construction permits s 48A(1)(*c*) of the Interpretation Act to have effect. In contrast, a reading that s 387 of the Companies Act is prescriptive (so that a contrary intention appears) would render s 48A(1)(*c*) otiose in so far as service on a company is concerned. It would then be capable of applying only to bodies corporate other than companies, *ie*, to foreign corporations. I cannot imagine any principled argument in favour of such construction. That this could not have been the legislature's intent is demonstrated by the provision in s 48A(1)(*c*) for service on "the secretary ... of the body corporate". Typically, a foreign company would not have a secretary in Singapore. Moreover, if truly the legislative intent was that s 48A(1)(*c*) was to apply only to foreign corporations, it could easily have been drafted to make this clear.

Whether the defendant has a *prima facie* defence

14 Second, having established that the Default Judgment was regularly obtained, I then considered whether Alphomega had established a *prima facie* defence and ought to be allowed to defend Nanyang's claim.

15 Of the various defences Alphomega pleaded, I was of the view that, *prima facie*, Alphomega had a defence of set-off based on money had and received by Nanyang. On that basis, I allowed the appeal.

16 Order 18 r 17 of the Rules of Court provides for the defence of set-off. Since a set-off is a defence, the claims must, as a general rule, be between the same parties and made in the same capacity. In addition, not all claims can be the subject of a set-off. The law only recognises three forms of set-off, *viz*, legal set-off, abatement and equitable set-off (*Hua Khian Ceramics Tiles Supplies Pte Ltd v Torie Construction Pte Ltd* [1991] 2 SLR 901 ("*Hua Khian Ceramics Tiles Supplies*") at 887.

17 In the present matter, Alphomega argued that in a separate suit (see *Tan Choon Yong v Goh Jon Keat* [2009] 3 SLR(R) 840, moneys had been found, as a matter of fact, to have been inappropriately paid out of its funds to Nanyang for services Nanyang rendered to Alphomega's directors in their personal capacities. As a result, it was submitted that it was entitled to repayment of that sum of money by way of set-off against moneys owing to Nanyang. I was of the view that, *prima facie*, Alphomega did have an arguable claim for money had and received against Nanyang and ought to be given an opportunity to establish its claim. I stressed, however, that it was not for me to adjudicate on the merits of that claim. It sufficed to say that if Alphomega's claim was made out, Nanyang would owe Alphomega a liquidated debt and that this debt would satisfy the requirements of a set-off.

18 A claim for money had and received seeks to return both parties to their respective positions which they would have been in had the disputed moneys not been paid out. In this respect, the sum which Alphomega sought on a claim for money had and received would be fixed at the amount Nanyang received. It was hence a liquidated sum. It would appear that Alphomega's claim against Nanyang was unrelated to Nanyang's claim in the present suit. However, that is no barrier to a defence of legal set-off, since it is irrelevant that a defendant's claim against the plaintiff is unrelated to the plaintiff's claim against the defendant, so long as the defendant's claim is for a liquidated sum (*Axel Johnson Petroleum AB v MG Mineral Group AG* [1992] 1 WLR 270 at 272, 274 and 276; *Aectra Refining and Manufacturing Inc v Exmar NV (The New Vanguard and The Pacifica)* [1994] 1 WLR 1634 ("*Aectra Refining*") at 1643 and 1647; *Hua Khian Ceramics Tiles Supplies* ([16] *supra*) at 887; and *OCWS Logistics Pte Ltd v Soon Meng Construction Pte Ltd* [1998] 3 SLR(R) 888 ("*OCWS Logistics*") at [6] and [8]).

19 In the alternative, Alphomega could arguably have a defence of equitable set-off. In my view, there was *prima facie* a triable issue as to whether Alphomega's claim (based once again on money had and received) is so closely connected with Nanyang's claim that it would be manifestly unjust to allow Nanyang to enforce payment without taking into account Alphomega's claim (*Hua Khian Ceramics Tiles Supplies* at 889; *OCWS Logistics* at [9]; *Pacific Rim Investments Pte Ltd v Lam Seng Tiong* [1995] 2 SLR(R) 643 at [35]; *Abdul Salam Asanaru Pillai v Nomanbhoy & Sons Pte Ltd* [2007] 2 SLR(R) 856 at [28]. Once again, it was not for me to adjudicate on the merits of such defence. I noted, however, that there were arguable or triable issues in that respect.

20 Other than Alphomega's defence of set-off based on a claim for moneys inappropriately paid out of Alphomega's funds to Nanyang for services Nanyang rendered to Alphomega's directors in their personal capacities, I was not convinced that Alphomega had a *prima facie* defence based on its other submissions. Alphomega alleged that it had a defence against Nanyang's claim as Nanyang did not have the authority or mandate to act on behalf of Alphomega. It also alleged that Nanyang was not entitled to claim for work done as it had not acted in Alphomega's best interest. In essence, both defences concerned non-entitlement to payment for work done. I rejected both arguments for two reasons. First, Nanyang's claim against Alphomega was for money payable by Alphomega to Nanyang as a result of the taxation of various invoices Nanyang had issued to Alphomega for work done. It was akin to an enforcement action whereby the rights of one party against the other (such rights arising from the former's liability to the other at law) was given effect to, rather than an action determining whether one party was liable to another to begin with. By agreeing to taxation of solicitor and client costs (the learned AR found at [4] and [41] of the Judgment that Alphomega had in fact agreed to such taxation), Alphomega had acknowledged Nanyang to be its solicitors in Suits 49, 855 and 856. If it disputed Nanyang's authority or mandate to act on its behalf, Alphomega ought to have raised such objection at the taxation hearing. However, this was not done. Hence, it was not open to Alphomega to argue before me that Nanyang was not entitled to claim for work done in the first place. Arguments to this effect appeared to be an afterthought on Alphomega's part.

21 Second, pursuant to O 59 r 33 of the Rules of Court, the registrar's certificates, unless set aside on review, ought to be taken as conclusive both as to Alphomega's liability towards Nanyang as well as to the quantum of that liability (*Shook Lin & Bok v Yeo Kian Teck* [1991] 2 SLR(R) 944, quoted in *Commercial Bank of Kuwait SAK v Nair (Chase Manhattan Bank NA, garnishee)* [1993] 3 SLR(R) 281 at [26]).

22 As for Alphomega's claims that it has a right to claim against Nanyang for damages it allegedly suffered as a result of first, Nanyang's wrongful actions; and second, Nanyang's negligence, both claims are in effect counterclaims against Alphomega for damages rather than defences against Nanyang's claim. However, a counterclaim is not synonymous with a defence. Since the Default Judgment may only be set aside if Alphomega had a *prima facie* defence against Nanyang, rather than a counterclaim, Alphomega's arguments in this respect are untenable.

Effect of defence of set-off

23 The effect of Alphomega having, *prima facie*, a right of set-off is that it is entitled to have the Default Judgment set aside. This is based on the law's approach to set-offs and counterclaims raised in opposition to summary judgment applications. It has been said in *Mercurine* ([6] *supra*) at [60] that "it is … rather illogical to hold that the test for setting aside a regular default judgment should be any stricter than that for obtaining leave to defend in an O 14 application. In both instances, there has been no hearing on the merits".

24 The court's approach to set-offs and counterclaims raised in opposition to summary judgment

applications can be found in *United Overseas Limited v Peter Robinson Limited* (Civil Division, 26 March 1991, unreported) where Bingham LJ identified four classes of cases which the court would encounter when deciding whether summary judgment ought to be granted:

> The first class of case is that in which the defendant can show an arguable set-off, whether equitable or otherwise. To the extent of such set-off the defendant is entitled to unconditional leave to defend. It is for the judge to decide whether such an arguable set-off is shown or not. If he decides that it is, he has no further discretion as to the order he makes. …
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> The second class of case is where the defendant sets up a bona fide counterclaim arising out of the same subject-matter as the action and connected with the grounds of defence. In this class of case … the order should not be for judgment on the claim, subject to a stay of execution pending the trial of the counterclaim, but should be for unconditional leave to defend even if the defendant admits the whole or part of the claim. …
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> The third class of case … is where the defendant has no defence to the plaintiff's claim so that the plaintiff should not be put to the trouble and expense of proving it, but the defendant sets up a plausible counterclaim for an amount not less than the plaintiff's claim. In such a case the order should not be for leave to defend, but should be for judgment for the plaintiff on the claim and costs until the trial of the counterclaim. That passage in the White Book is based on, and is indeed an almost literal quotation from, the judgment of Lord Esher in *Sheppards & Co v Wilkinson and Jarvis* (1889) 6 TLR 13, where judgment was entered for the plaintiff on the claim, but with a stay of execution pending trial of the counterclaim.
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> The fourth class of case is where the counterclaim arises out of quite a separate and distinct transaction or is wholly foreign to the claim or there is no connection between the claim and the counterclaim. The proper order should then be for judgment for the plaintiff with costs without a stay pending the trial of the counterclaim. ...

These were adopted by Lai Siu Chiu J in *Hawley & Hazel Chemical Co (S) Pte Ltd v Szu Ming Trading Pte Ltd* [2008] SGHC 13 at [33].

25 Based on Bingham LJ's classification, since I found that Alphomega has an arguable defence of set-off, its claim against Nanyang falls within the first class of Bingham LJ's classification (which represents the classic set-off situation), entitling it to have the Default Judgment set aside. Alternatively, it could be said that Alphomega has a *bona fide* counterclaim which acts as a set-off against Nanyang's claim and which can be placed in the second class (also resulting in the Default Judgment being set aside).

Conclusion

26 In the result, I allowed Alphomega's appeal and ordered, albeit with some reluctance, that the Default Judgment be set aside. This was because Alphomega should have realised from the hearing before the AR that several of its assertions were not borne out by the facts. It suffices to mention three such instances. First, Alphomega claimed that it had no notice of the proceedings in this action until 17 November 2009 when it was served the Orders and WSS by the court bailiff. However, Alphomega's filing of a Notice of Appointment of Solicitor on 13 November 2009, giving notice that Sterling had been appointed as solicitors for Alphomega, suggested that Alphomega would have had notice of the proceedings in this suit by that day.

27 Second, Alphomega would have been aware of demands made by Nanyang for payment in

letters sent in June 2009 by Nanyang to Sterling demanding payment and seeking confirmation that Sterling had instructions to accept service. In response to those letters, Sterling wrote to Nanyang (with copy to Alphomega) to state that it had "no instructions to act".

28 Finally, Alphomega asserted that Nanyang's chairman, Mr Ng, was its company secretary until 21 September 2009 but never notified Alphomega of any action being commenced by Nanyang. In addition, it was contended that as Alphomega's company secretary, he could have easily affixed Alphomega's stamp to the Writ, thereby misrepresenting that service had been properly effected. However, the assertion relating to Mr Ng's position as Alphomega's company secretary until 21 September 2009 was not true, since Alphomega had sent a letter to Mr Ng earlier in February 2009, informing him that he had been removed from the company secretary position, and Mr Ng had in return sent Alphomega a letter of resignation from the position.

29 Accordingly, while the justice of the case required that Alphomega be allowed an opportunity to be heard on its defence and it was in that spirit which I allowed its appeal (though I would also mention at this point that that on which Alphomega succeeded was covered in but four short paragraphs, out of 114 paragraphs, of Alphomega's written submissions), I was disinclined to allow Alphomega its costs in the appeal. Under O 59 r 7 of the Rules of Court, the court may refuse to allow a party to recover its costs if it appears to it "that any thing has been done, or that any omission has been made, unreasonably or improperly by or on behalf of any party" in the action. Accordingly, I ordered that the costs order below was to remain and made no order as to costs in the appeal.

[note: 1] Suits 855 and 856 were eventually withdrawn during the course of the trial before Tan J. Tan J's decision in Suit 49 can be found at *Tan Choon Yong v Goh Jon Keat* [2009] 3 SLR(R) 840.