Canberra Development Pte Ltd v Mercurine Pte Ltd
[2007] SGHC 185

Case Number : Suit 861/2005, RA 168/2007

Decision Date : 26 October 2007

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Harpreet Singh Nehal SC and Lin Yan Yan (Drew & Napier LLC) for the plaintiff; Christopher Chong and Kelvin Teo (Legal Solutions LLC) for the defendant

Parties : Canberra Development Pte Ltd — Mercurine Pte Ltd

Civil Procedure – Judgments and orders – Setting aside of judgment in default of appearance – Test for setting aside irregular default judgment – Power to amend irregular default judgment – Whether unreasonable delay in making application to set aside prejudicing right to set aside default judgment

26 October 2007 Judgment reserved.

Judith Prakash J:

1 This is an appeal by the plaintiff, Canberra Development Pte Ltd, against the decision of Assistant Registrar Lim Jian Yi to set aside the default judgment that the plaintiff had obtained against the defendant, Mercurine Pte Ltd, on 9 January 2006.

Background

2 The plaintiff is the owner of the commercial building known as Sun Plaza in Sembawang Drive. In February 2000, the plaintiff leased units #04-01 and #05-01 of the building ("the premises") to the defendant who operated the same as a 6-screen cinema complex. The plaintiff and the defendant are loosely related companies in that one of the defendant's two equal shareholders is, ultimately, owned by the same companies that own the plaintiff. The defendant took possession of the premises on 25 February 2000 and commenced paying rent on 25 May 2000.

3 Disputes subsequently arose between the parties. First, they had agreed that the plaintiff would bear the air-conditioning charges for the premises for a maximum of 12 hours each day. These air-conditioning charges were billed directly to the defendant's account by the utility supplier and the defendant therefore sought reimbursement from the plaintiff. The plaintiff, however, was often late in making such reimbursement. Second, the parties disagreed over the plaintiff's commitment to buy movie gift passes ("MGVs") from the defendant for the purpose of promoting the cinema. The defendant alleged that the plaintiff had not met this commitment. From April 2003, the defendant stopped paying rent pending the resolution of the issues in relation to the air-conditioning charges and the MGVs.

4 On 30 November 2005, the plaintiff commenced the present action against the defendant. In its statement of claim, the plaintiff claimed unpaid rent from April 2003 to November 2005 amounting to the sum of $1,005,916.81. It averred that by reason of the non-payment of the rent, the defendant had evinced an intention no longer to be bound by the lease agreement and had repudiated the same and that the plaintiff had accepted such repudiation on 7 November 2005. Further, by reason of the defendant's non-payment of rent and its repudiation of the lease, the plaintiff was entitled to exercise

its right of re-entry. The plaintiff therefore claimed, *inter alia*, possession of the premises, the sum of $1,005,916.81 and damages to be assessed.

5 The writ was duly served. The defendant did not enter an appearance. On 9 January 2006, the plaintiff entered default judgment against the defendant for:

(a) possession of the premises;

(b) the sum of $864,388.31 as outstanding rent from April 2003 to November 2005;

(c) damages to be assessed; and

(d) interest and costs.

The amount of rent for which judgment was issued was reduced from the sum of $1,005,916.81 claimed in the statement of claim as that amount had not taken into account a payment of $141,528.50 which the defendant had made towards rent on 11 November 2005.

6 The defendant found out about the default judgment on 16 January 2006. It recognised that it had two options at that stage: the first was to apply to set aside the default judgment and contest the plaintiff's claims, and the second was to negotiate with the plaintiff to try and resolve the disputes between the parties and thereby avoid a trial. The defendant said that it preferred to resolve the disputes amicably and decided to take the latter route since the parties had some shareholders in common.

7 Thereafter, there were negotiations between the parties and there is now a dispute about the results of those negotiations. The defendant takes the position that all disputes in the action were compromised with the plaintiff and that the plaintiff agreed to "withdraw" the default judgment (including the order in the default judgment that the defendant was to deliver possession of the premises to the plaintiff) in return for payment of the sum of $519,155.62. The plaintiff's position is that whilst the "money" part of the default judgment was compromised pursuant to a settlement agreement by which it agreed to accept $519,155.62 in full settlement of its claims for rental arrears, it did not agree to withdraw the default judgment or to compromise its right to repossess the premises.

8 The defendant paid the plaintiff the sum of $519,155.62 on 6 June 2006. The plaintiff did not thereafter take any steps to have the default judgment set aside or to otherwise "withdraw" it. The defendant itself also took no further action at that stage although, in July 2006, the plaintiff's solicitors wrote to the defendant's solicitors stating that the plaintiff intended to enforce the order for possession contained in the default judgment.

9 The next development was in December 2006 when the defendant filed an originating summons (OS 2374 of 2006) seeking, *inter alia*, a declaration that it and the plaintiff had entered into full and final settlement of the disputes which were the subject matter of the present case. OS 2374 of 2006 was heard on 2 February 2007 and the defendant was granted the declaration it prayed for. The plaintiff then appealed. This appeal was allowed on 29 March 2007 by Belinda Ang J and the order in favour of the defendant was set aside. Her Honour also ordered that OS 2374 of 2006 be converted into a writ action (it is now known as S 244 of 2007) and gave directions for pleadings to be filed. That action is on-going.

10 Summons-in-chambers No 1843 of 2007 was filed by the defendant in the present action on

26 April 2007. By it, the defendant prayed for, *inter alia*, the following orders:

(a) that the judgment in default of appearance entered in this suit by the plaintiff on 9 January 2006 be set aside; and

(b) that the plaintiff's claim in this suit be stayed pending final determination of Suit 244 of 2007.

The grounds of the application were stated to be as follows:

(a) that the default judgment was irregular as: (i) the plaintiff had failed to comply with the requirements of O 13 r 4(1) of the Rules of Court (2006 Rev Ed) ("the Rules") and (ii) the plaintiff had entered judgment for an excessive sum; and

(b) the defendant had a defence on the merits which had a real prospect of success and carried some degree of conviction.

11 The defendant's summons was heard before the Assistant Registrar on 19 June 2007. On that same morning, the plaintiff filed a summons in chambers asking for the amount of $864,388.31 stated in para 2 of the default judgment be amended to $725,116.81. The difference of $139,271.50 comprised credit for various cross claims the defendant had for the air-conditioning charges, the MGVs and another item. It was not in dispute in the court below therefore that the plaintiff had in fact entered judgment for an excessive sum.

The decision below

12 In the setting aside application, the defendant argued as follows:

(a) the default judgment was irregular in three aspects:

(i) judgment was entered for claims which fell beyond the scope of O 13 rr 1-4;

(ii) in entering judgment for possession of the premises, the plaintiff failed to produce a certificate under O 13 r 4(1); and

(iii) judgment was entered for an excessive sum;

(b) it being an irregular judgment, the defendant was entitled to have the default judgment set aside *ex debito justitiae;* and

(c) in any event, the defendant had a meritorious defence. First, there was an agreement between the plaintiff and the defendant to set off the rental arrears against outstanding sums owed by the plaintiff to the defendant. Second, the plaintiff had agreed that the balance rental arrears due to the plaintiff after the set-off would not be due until additional fund contributions were made by the defendant's shareholders ("the pay later agreement")

13 As stated, the Assistant Registrar decided that the whole of the default judgment should be set aside. He gave written grounds for his decision and, in the course of those grounds, dealt in some detail with the legal position. His conclusions can be summarised as follows. First, the Assistant Registrar held that the default judgment was irregular. On the issue as to whether the default judgment was entered for claims beyond the scope of O 13 rr 1-4, the Assistant Registrar dismissed the defendant's contention. He accepted the plaintiff's argument that the default judgment was

entered for claims falling under O 13 r 5, *i.e.* that the default judgment was for a mixed claim. The Assistant Registrar was of the view that all the three claims in the default judgment fell within the ambit of O 13 rr 1-4.

14 As for the plaintiff's failure to produce a certificate under O 13 r 4(1), the Assistant Registrar also dismissed the defendant's arguments. He held that the failure to produce the certificate under O 13 r 4(1) was not an error "*so fundamental or serious that the court ought not to exercise its discretion under r 1 to remedy it*". Neither was the requirement contained in O 13 r 4(1) a mandatory rule which required strict compliance. On the facts of the case, the Assistant Registrar was of the view that the omission to produce the certificate was not an incurable irregularity and that it had caused the defendant no prejudice whatsoever.

15 On the issue of the default judgment being for an excessive sum, after reviewing the defendant's claims for air-conditioning charges and purchase cost of the MGVs, the Assistant Registrar held that the judgment sum was excessive. He declined to amend the default judgment on the basis that, as a matter of law, an amendment of an excessive judgment sum only occurs in cases of accidental errors. In this case, he considered that the judgment sum entered was not a product of any mere accident or clerical error but was plainly intended and consciously entered by the plaintiff. As the amount was excessive, the Assistant Registrar held that the default judgment was irregular.

16 Second, the Assistant Registrar held that the court has the discretion to review the merits of the case when a defendant seeks to set aside an irregular judgment. Accepting *Faircharm Investments Ltd v Citibank International plc* (1998), The Times, February 20 ("*Faircharm*") and *Standard Chartered Bank v Chip Hong Machinery (S) Pte Ltd and Another* [1990] SLR 1230 ("*SCB v Chip Hong Machinery*") as being sound in policy and principle, the Assistant Registrar endorsed the principle that where setting aside the default judgment would be an exercise in futility because of the weakness of the defence, the court ought not to act in vain. As such, a defendant does not have a right to set aside an irregular default judgment *ex debito justitiae* and it is up to the court to consider the merits of the defence.

17 Third, the Assistant Registrar considered the merits of the defence and held that the defendant had an arguable defence which would have satisfied the requirements for resisting a summary judgment application. The Assistant Registrar was of the view that if he had applied the test to evaluate the merits of a regular default judgment set out in *Alpine Bulk Transport v Saudi Eagle Shipping* [1986] 2 LLR 221 ("the *Saudi Eagle*") to the present case, the defendant would not have succeeded in setting aside the default judgment. In particular, the Assistant Registrar was not persuaded that the defendant's assertions based on the pay later agreement had a realistic prospect of success which carried a degree of conviction. However, because he had concluded that the default judgment was irregular, the Assistant Registrar declined to apply the *Saudi Eagle* test and instead applied the test of an arguable defence applicable for a summary judgment application. On this basis, the Assistant Registrar concluded that there was a sufficient defence and that the default judgment should be set aside.

The appeal

18 The plaintiff's contention that the decision below should be reversed was based, in summary, on the following arguments:

(a) the Assistant Registrar had failed to distinguish between that part of the default judgment which was regularly entered (*i.e.* the order for possession) from the other part which was irregular (*i.e.* the judgment for the liquidated sum). Accordingly, he had erred in setting aside the

whole judgment and instead, at most, should have set aside the default judgment in respect of the liquidated sum but affirmed the default judgment in respect of the order for possession;

(b) in respect of the judgment for the liquidated sum, the Assistant Registrar ought to have amended the default judgment to reflect the undisputed sum of $725,116.81 due from the defendant instead of treating the whole default judgment as irregular and setting it aside; and

(c) the court also failed to take adequate account of the defendant's lengthy delay in applying to set aside the default judgment. While the defendant was aware as early as 16 January 2006 of the entry of the judgment, it did not apply to set it aside until 26 April 2007, a delay of over 15 months. During that period, the defendant had commenced OS 2374 of 2006 seeking a declaration that the default judgment had been compromised on account of a settlement agreement reached between the parties and the fundamental premise of this further proceeding was that the default judgment constituted a valid and binding judgment which had since been compromised.

19 The issues that I have to address in this judgment are as follows:

(a) whether the regular part of the judgment should be hived off from the irregular portion;

(b) what the test is when the court is asked to set aside an irregular judgment;

(c) whether the court should allow the amendment of the amount of an irregularly entered judgment even though the excessive amount for which the judgement was obtained was not careless or accidental;

(d) whether the defence put forward by the defendant met the test required for setting aside a judgment; and

(e) the effect that the defendant's delay in making the application to set aside should have on the outcome of the application.

Splitting the regular portion of the judgment from the irregular portion

20 The plaintiff submitted that the Assistant Registrar had erred in failing to distinguish that part of the default judgment which granted possession of the premises to the plaintiff from the other part which provided for the payment of the liquidated sum. It pointed out that O 13 r 8 of the Rules expressly provides that the court "may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this order" and that this language had been interpreted to entitle the court to set aside the default judgment in whole or in part by the UK Court of Appeal in *National Westminster Bank Ltd v Humphrey* 128 SJ 81 ("the *National Westminster Bank* case"). There, the plaintiff had sued for and entered judgment in default in respect of two separate debts referred to in the judgment as "the alleged guarantee debt" and "the alleged overdraft debt". At first instance, the default judgment was set aside as to the alleged guarantee debt but not as to the alleged overdraft debt because there was a defence in respect of the former but not the latter. That decision was upheld by the Court of Appeal. Arguing by analogy, the plaintiff submitted that it stood to reason that the part of the default judgment that was not affected by any irregularity should not be prejudiced by a separate part of the same default judgment which may be affected by an irregularity. In such a case, the court, in the proper exercise of its discretion, ought not to set aside the whole of the default judgment, but only that part which is affected by the irregularity.

21 Before the Assistant Registrar, the defendant had submitted that the default judgment as to possession was irregular as the plaintiff's former solicitors had failed to produce a certificate under O 13 r 4(1) stating that the plaintiff was not claiming any relief in the nature specified in O 83 r 1. The Assistant Registrar, at [62] of his grounds, rejected that argument on the following basis:

> An omission of this nature properly falls under the ambit of O 2 r 1. [The defendant] has pointed to no harm to it arising from this omission. The certification is no doubt of procedural value – it highlights to all parties concerned that O 83 r 1 actions have no place in O 13 applications. However, it was not argued or shown that the breach of O 13 r 4(1) by not producing the certificate was an error "so fundamental or serious that the court ought not to exercise its discretion under r 1 to remedy it" : see *Kuah Kok Kim v Chong Lee Leong Seng* [1991] 2 MLJ 129. Nor was the requirement contained in O 13 r 4(1) shown to be a mandatory rule which required strict compliance. In such circumstances, the omission to produce the certificate was not an incurable irregularity.

I respectfully agree with the Assistant Registrar's reasoning and conclusion. In my judgment too, the omission by the plaintiff to produce the certificate specified was not incapable of remedy and the Assistant Registrar was quite right to treat it as he did. Accordingly, I agree that this defect did not make the judgment for possession irregular.

22 I do not, however, accept the plaintiff's argument that the Assistant Registrar should have, while setting aside the order for payment of rental arrears, allowed the order for possession to remain in place. Whilst under O 13 r 4 the court does have a discretion to set aside a part rather than the whole of a judgment, whether it does so must depend on the circumstances of the case. In the *National Westminster Bank* case, the two amounts for which judgment were given were in respect of wholly different claims and, as importantly, although there was a defence put forward to the alleged guarantee claim, the defendant there admitted liability in respect of the alleged overdraft claim. In the present case, whilst, as the Assistant Registrar pointed out, the two claims were entirely severable from each other in that the rental arrears did not need to be claimed (though they had to be shown to be due) in order for the plaintiff to make the claim for possession, the defence that was put forward to both claims was the same. This defence was that the arrears were not due because of the existence of the pay later agreement. If this defence were to be established, then the plaintiff would not have been able to obtain judgment either for possession or for the arrears themselves.

23 The way that the court assesses the merits of a setting aside application depends on whether the judgment sought to be set aside is a regular or irregular one. Different requirements have to be met by the defendant depending on the nature of the judgment challenged. In this case, what the plaintiff is actually asking me to do is to assess the merits of the defence concerning the pay later agreement on the basis of a different standard when that defence is considered in relation to the judgment for possession from the standard that would be applied when that defence is considered in relation to the judgment for the liquidated amount. I cannot do that. I think that doing so would be an irrational exercise. I think that the Assistant Registrar took the correct course when he applied the standards applicable to irregularly obtained judgments to the whole of the default judgment. It would not have been right for him to have done otherwise. Once he considered that the defendant had met the standard required for the setting aside of the judgment for the arrears, and, further, concluded that there was no other reason not to set aside the judgment for the arrears, he had no option but to set aside the judgment for possession as well.

Tests for setting aside judgments

24 As I mentioned above, different standards are applied in the decision making process on an

application to set aside a default judgment, depending on whether the judgment concerned has been regularly obtained or not. In the case of a regular judgment, the position is not in doubt. In *Abdul Gaffer v Chua Kwang Yong* [1995] 1 SLR 484 ("*Abdul Gaffer*"), our Court of Appeal adopted the test articulated in the *Saudi Eagle i.e.* that the discretion to set aside judgment in default is exercised when the applicant has a defence with a real prospect of success and which carries some degree of conviction. To persuade a judge to set aside a regular judgment it is insufficient for the defendant to put forward an arguable defence that would justify leave to defend under O 14.

25 When an irregularly obtained judgment is under consideration, however, the situation is different. It has often been said that a defendant has the right to set aside an irregular judgment *ex debito justitiae*. In the local context, as Tay Yong Kwang J explained in *TR Networks Ltd v Elixir Health Holdings Pte Ltd* [2005] SGHC 106, this means that under the Rules of Court, if a default judgment is found to be irregular and incapable of being corrected by varying it, then the defendant may have it set aside as a matter of right. This "right" however, is not an absolute one even though the judgment may be irregular. First, it is subject to the power of the court to correct an irregularity and second, it is subject to the duty of the defendant to make his application for setting aside within a reasonable time. Further, as the *Singapore Civil Procedure 2007* (Singapore Sweet & Maxwell Asia, 2007) notes at para 13/8/4:

> … in the light of *Faircharm Investments Ltd v Citibank International Plc* … it appears (in England at least) that setting aside an irregular judgment is no longer a matter of right on the part of the defendant; the courts have a wide discretion to consider whether to set aside and are entitled to look at all circumstances including circumstances under which default judgment was allowed to be entered, the explanation for any delay in making the application and any other relevant matters, including whether there is a defence on the merits.
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> This approach was adopted … in *Tan Ewe Chong & Ors v Pribudi Sdn Bhd & Ors* [1998] 5 MLJ 108, where the court declined to set aside a wholly irregular judgment as the defendant had, amongst other things, failed to show any sort of defence on the merits.

26 Until the ruling below, *Faircharm* had not been followed by any decision in Singapore as far as I am aware. The plaintiff here, however, cited the case to the Assistant Registrar who found the following passage from the judgment of Sir Christopher Staughton to be sound in principle and policy:

> However that may be, I am impressed by what both the deputy master and the judge said, that if [the defendants] are bound to lose on a subsequent application for summary judgment, it would be pointless to set aside the existing the existing judgment, *Lex non cogit ad inutilia*. I would not go so far as to say that no irregularity could be so fundamental that the judgment in such a case would have to be set aside, whatever the other circumstances. But if indeed [the defendants] would be bound to lose I do not, in the circumstances of this case, consider that there is such a degree of fundamental error to require that judgment be set aside. After all the tortured misunderstanding on both sides in this case and the regrettable imprecision in the pleading and court documents, it is time that justice is done once and for all in relation to this sum of £7.788.99. As was said over 100 years ago:
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> > "We are not here to punish people for their mistakes in procedure but to do justice."

It is significant that in *Faircharm*, the irregularity was not a matter of overstating the amount of the defendant's liability but that the plaintiff had entered judgment in default of defence before the time for service of the defence had even begun to run. Yet, even in these circumstances where the plaintiff's right to take the procedural step had not accrued, the judgment was not set aside. The

decision shows that modern courts, though not condoning procedural improprieties, are alive to the realities of litigation and are concerned both with the efficient use of court facilities and the cost to the parties of allowing a hopeless defence to proceed further. The Assistant Registrar considered and I agree that if the defendants were "bound to lose", then it would be pointless to set aside the irregular judgment. This determination is also supported by *SCB v Chip Hong Machinery* where Punch Coomaraswamy J expressed the view that courts ought not to act in vain and therefore where it was clear that setting aside an irregularly obtained writ of possession would be an exercise in futility, such writ should not be set aside.

27 The defendant submitted that *Faircharm* should not be followed in Singapore. It noted that the courts of Hong Kong had declined to follow *Faircharm* and cited the Hong Kong Civil Court Practice Volume 1, paras 2756 and 2756.1 where it was observed that the traditional rule that an irregular judgment in default would be set aside without consideration of the merits of the proposed defence had been affirmed by the Court of Appeal. Further, there are distinguishing facts between *Faircharm* and the present case. First, in *Faircharm*, before the application to set aside the irregular default judgment was made, Faircharm had made and succeeded upon a summary judgment application against Citibank and, secondly, the amount involved in the case was a relatively small sum which made it not worthwhile to continue the litigation.

28 In my view, whilst there are no doubt differences of fact between this case and *Faircharm*, those differences do not diminish the sound reasons for adopting the principles enunciated in *Faircharm*. I have adverted to those reasons in [26] above. Whilst parties who have viable claims or defences will not be shut out of the system, and, indeed, resources have to be made available for such cases, the Singapore approach is to keep a tight rein on litigation so that to the extent practicable, these resources (that are not infinite) are not wasted by catering to cases that are "bound to fail".

29 I therefore agree that the position in Singapore now is that when a defendant seeks to set aside a default judgment that has been irregularly obtained, in order to succeed on his application, he must show that he has some merits in a defence that is not bound to fail. *Abdul Gaffer* distinguished between the test for obtaining leave to defend under O 14 and that for setting aside a regularly obtained default judgment. The O 14 test sets the lower standard and I agree with the Assistant Registrar that this is the appropriate test to apply when deciding whether a particular defence is "bound to fail".

Amendment of the amount of the judgment

30 Below, the plaintiff submitted that instead of setting aside the judgment on the ground of irregularity, the court should amend it to reflect the correct amount of the claim and then consider the setting aside application from the stand point of a regularly entered judgment. The Assistant Registrar declined to take this course. He agreed with the defendant's argument that the amendment of an excessive judgment sum only occurs in cases of accidental errors. In this case, the judgment sum entered was not the product of any error. At [69] of his judgment, the Assistant Registrar stated:

> [The plaintiff] plainly intended that amount to be claimed at the time the judgment was entered. Up till the hearing it was still asserting the correctness of that sum despite [the defendant's] arguments that this sum was excessive. It has pinned its colours to the mast. As it turns out, [the plaintiff] has now reversed its position, but this *volte-face* is too late and entirely disingenuous. When the court exercises its discretion to amend a flawed default judgment, it does so on the basis of justice and equity. It would be neither just nor equitable to allow [the

plaintiff] any benefit of switching its position now. In my view, the judgment is irregular on this ground and, rather than being amended, ought to be set aside.

31 The plaintiff reiterated this argument when it appeared before me. It submitted that the court's power to amend the monetary default judgment to reflect the correct sum due is not limited to cases involving an inadvertent error. Whilst it was true that in cases where the party had inadvertently entered the wrong sum in the default judgment, the courts had readily amended the judgment to reflect the correct sum (see *Philip Securities v Yong Tet Miaw* [1988] SLR 594; *Bayersiche Landesbank Girozentrale v Dato Azlan bin Hashim* [2002] 4 SLR 838), it did not follow that the court had no power at all to amend the judgment to reflect the correct sum where the plaintiff, who mistakenly believed that a larger sum was due, mistakenly entered judgment for that larger sum. This would be so particularly where the evidence disclosed that there was an undisputed sum due. The plaintiff relied on several passages from the judgment of Staughton LJ in the UK Court of Appeal in *Ban Hin Lee Bank Berhad v Sonali Bank* (unreported, heard on 9 November 1988). To paraphrase these, His Lordship stated that although an irregular judgment could be set aside *ex debito justitiae*, such setting aside was always subject to the power of the court to amend in appropriate cases. It would not be appropriate to allow an amendment in all cases for example, if the judgment was entered before the time for service of notice of intention to defend had expired, but in other cases amendment may be appropriate. Further, the power to amend a default judgment was wider than the power given by the slip rule which provided for the correction of clerical mistakes in judgments or orders arising from accidental slips. In this connection, Staughton LJ observed:

> The power to amend was originally thought to be derived from the slip rule, now Order 20, rule 11. That provides for the correction of clerical mistakes in judgment or orders, or errors arising thereunder from any accidental slip or omission. But the parties to this appeal are agreed that when it comes to amendment of a default judgment the power is wider; it is based on Order 13, rule 9 itself, which provides that the court may set aside or vary any judgment entered in pursuance of that Order. That this concession was rightly made appears from a decision which Mrs Blackburn has referred us to in *Re Mosenthal,* Ex parte Marx 54 SJ 75, where the Master of the Rolls treated the then equivalent of Order 13, rule 9 as permitting amendment.

And he went on to conclude quite categorically that the power to grant leave to amend on a summons was not confined to a case of slip or mistake. In view of these observations, the plaintiff submitted that since the sum of $725,116.81 was undisputed, it would be futile to put the parties through the expense of a trial to prove it and the court should in the exercise of its discretion, amend the default judgment to reflect the undisputed sum instead of setting aside the whole of the default judgment.

32 I agree with the plaintiff's submission that the court's power to amend even an irregularly obtained judgment is not circumscribed in any way. Accordingly, the court can amend the amount of the judgment even where the error in obtaining a judgment for that sum instead of the smaller one actually due does not arise from a slip or accident, but instead arises from the plaintiff's mistaken view of the case so that it can be said that the judgment was entered deliberately for an excessive amount. In this respect, the case of *CSR South East Asia Pte Ltd v Sunrise Insulation Pte Ltd* [2002] 3 SLR 281 does not stand for the proposition that where a party enters a default judgment for an excessive sum through a deliberate act, the court is not empowered to amend the judgment to reflect the correct sum.

33 In that case, the plaintiffs and the defendants arrived at a negotiated settlement in relation to their claim and counterclaim in a district court case. A consent order recorded by the court provided that the defendants were to pay the plaintiffs the negotiated amount in four equal instalments and in

the event of default in any payment, the plaintiffs could enter judgment for the sum originally claimed less the payments received. The defendants paid and the plaintiffs received the first three instalment payments on time. The last payment was due on 1 October but the plaintiffs only received the defendants' cheque for the amount (dated 29 September) on 3 October. The plaintiffs deemed the late arrival of the cheque to be in breach of the consent order and on 11 October entered judgment against the defendants for the sum claimed originally by them in the suit less the three instalments paid. The defendants applied to set aside the default judgment. It was subsequently discovered that the plaintiffs, after having received the defendants' cheque, retained possession of it and banked it in and received payment thereunder at a time when the defendants were disputing the validity as well as the regularity of the default judgment. The defendants' application to set aside was denied by the district judge who was not aware of what had been done with the fourth cheque and it was only when the defendants appealed to the High Court against this decision that these facts emerged. MHP Rubin J considered that the plaintiffs' holding on to the defendants' cheque was not an accident but a conscious act and that they had misjudged the legal implications of retaining and encashing it. He set aside the judgment, holding that the plaintiffs' proceedings to enter judgment, as they did, for a sum which did not take into account the amounts stated in the fourth instalment cheque, was irregular and the judgment therefore ought to be set aside *ex debito justitiae*.

34 That case, as the plaintiff submitted, shows that whether the court exercises its discretion to set aside a judgment or not, depends on the circumstances before the court and the judge's evaluation of those circumstances. There is nothing in the case that indicates that an irregular judgment cannot be amended. It is pertinent to note that in that case, there was no issue of amending the judgment because the issue was whether the terms of the consent order had been satisfied by the receipt of the cheque or whether the plaintiff was entitled to enter judgment under the consent order for a larger amount than had been paid. Amending the judgment to reflect amount of the fourth instalment would not have been correct as, first, this amount had been paid by the time the matter came before the judge and, second, there was no undisputed sum for which judgment could be entered since the defendant's position was that no further payment was due at all after settlement of the fourth instalment and the plaintiff's position was that it was entitled to a much larger amount.

35 Whilst as a matter of law the Assistant Registrar had the power to amend the default judgment in this case, whether he did so or not was a matter of discretion. The passage from his judgment that I have cited at [30] gave his reasons for not exercising that discretion in favour of the plaintiff. I cannot fault those reasons. The plaintiff's application to amend the judgment was made at a very late stage, some time after the defendant's application to set it aside. If the judgment had been amended, then the Assistant Registrar would have had to consider the setting aside application differently. The plaintiff could not expect to change the standard to be applied to the setting aside application by making such a sudden change in its position. If the plaintiff had applied very early on to amend the judgment, that would have been a different matter altogether. Of course if the Assistant Registrar had found that the defence was, nevertheless, bound to fail, he should then have amended the amount of the default judgment before dismissing the setting aside application.

Did the defendant raise a triable issue?

36 As the judgment was irregularly obtained, the Assistant Registrar correctly applied the O 14 test to the defence put forward. His judgment contains a detailed analysis of the arguments and the evidence. I see no need to repeat the same here. He came to the conclusion that an arguable defence up to the standard required by O 14 had been established. I agree that whilst the defence does not appear to be a strong one, it does meet that lower standard.

Other reasons for maintaining the default judgment

37 The plaintiff has, however, one further powerful string to its bow. It is a fundamental principle of civil procedure that a party must act promptly in order to protect or prosecute his rights and, therefore, if he is dilatory he may prejudice those rights. This principle is enshrined in O 2 r 2 of the Rules which provides that an application to set aside for irregularity shall not be allowed unless it is made within a reasonable time. As *Singapore Court Practice 2006* (LexisNexis, Singapore 2006) by Jeffrey Pinsler notes at para 13/8/4, "inordinate delay in making the application may lead the court to believe that it is not bona fide or that the defendant is not serious or that he is irresponsible about the relief he seeks".

38 One good example of the adverse consequences of delay is the case of *Ang Kim Soon v Sunray Marine* [1997] 3 SLR 619. The plaintiff there was a workman who was injured during an explosion on board a vessel. He commenced an action against his employer for damages. His employer was, at the same time, involved in another action against the vessel owner for indemnity for the explosion and indicated that it wished to have the action by the plaintiff heard together with the admiralty action. The employer failed to file a defence in the action by the plaintiff despite repeated requests to do so and the plaintiff eventually entered interlocutory judgment against his employer. At the trial of the admiralty action, the employer was found not to be liable for the explosion. It then applied to set aside the interlocutory judgment, on the basis of the findings in the admiralty action but Choo Han Teck JC disallowed the application. He took into account the conduct of the parties, especially the defendant's delay in applying to set aside the interlocutory judgment and explicitly rejected the argument that once the defendant has satisfied the court that there is a real prospect of success, such conduct becomes of secondary importance. In the course of his judgment, Choo JC stated (at [16]):

> [H]aving considered the chronology of this case and the conduct of the parties, I find that it is too late now for the employer to set aside the default judgment. Once liability is disputed, the employer was bound to set aside the interlocutory judgment at the earliest opportunity. It should not place a cat-and-mouse game with the shipowner using the plaintiff as cheese.

39 In the present case, the material facts were that the defendant had applied only in April 2007 to set aside the judgment entered in January 2006, a delay of over one year and three months. That delay did not arise from ignorance of the situation. The defendant was fully aware of the existence of the judgment a week after the plaintiff obtained it.

40 The defendant submitted that this delay should not be held against it. It had, it said, a good and reasonable explanation for the delay in taking out the application and this explanation had been accepted by the Assistant Registrar. The defendant had chosen to settle the disputes in the action via negotiation rather than to enter into litigation. In fact, these negotiations had been somewhat successful initially and the defendant had made payment of the compromised amount to the plaintiff in accordance with the negotiations. As the Assistant Registrar had held, the existence of the alleged compromised agreement would have rendered any attempt to set aside the default judgment quite unnecessary and therefore the filing of OS 2374 of 2006 was not a step that was inconsistent with the assertion of the defendant's right to have the default judgment set aside. The defendant submitted that the ruling below, that neither the delay in the defendant's application to set aside nor the defendant's conduct subsequent to the entry of the default judgment constituted grounds for denying the defendant the right to have the judgment set aside, was correct and should be affirmed.

41 After careful consideration of the circumstances of the case, I have come to a different conclusion. I think that for the first few months it was permissible for the defendant to delay its

application to set aside the default judgment in order to try and compromise the claim out of court. Although, if it disputed the plaintiff's rights under the default judgment in good faith, it was incumbent upon it to apply to set aside the same at the earliest opportunity, I think that a reasonable period for negotiation would not prejudice the defendant in this respect, as long as such negotiations were carried on actively and there appeared to be reasonable prospects of a successful outcome. As things went, some sort of agreement appears to have been arrived at in fact and it was on the basis of the defendant's understanding of that agreement that it paid the plaintiff $519,155.62 on 6 June 2006. Shortly thereafter, however, it became clear that the plaintiff took a very different view of the agreement reached and did not accept that there had been a settlement which had compromised all of the plaintiff's rights under the default judgment.

42 On 10 July 2006, the plaintiff's solicitors wrote to the defendant and informed it that pursuant to order 1 of the default judgment, the defendant was required to deliver possession of the premises to the plaintiff. The letter went on to say that, strictly without prejudice to its rights under the judgment, the plaintiff was prepared to grant the defendant an extension of time until 28 February 2007 to deliver possession of the premises to the plaintiff subject to certain terms and conditions. From this letter, it should have been clear to the defendant that the plaintiff intended to enforce its right under the default judgment. The defendant from that time could no longer have believed that the plaintiff accepted that its rights under the default judgment had been compromised and therefore that there was no need for the defendant to take steps to have the default judgment set aside. Yet, the defendant did nothing for a further five months or so.

43 When the defendant finally invoked the assistance of the court in its dispute, it did not make an application to set aside the default judgment. Instead, it filed a completely new proceeding and asked for the declaration that the plaintiff's rights under the default judgment had been compromised. It was not until the initial decision in favour of the defendant in OS 2374 of 2006 had been set aside on the plaintiff's appeal, that the defendant made its application herein for the setting aside of the default judgment. In my view, this sequence of events is fatal to the defendant. It ignored the requirement under O 2 r 2 to make its application promptly and within a reasonable time. Instead, as the plaintiff submitted, it chose to make its application as and when that course appeared to suit the defendant's litigation strategy. The defendant took its time to make the application without regard to the plaintiff's rights under the default judgment.

44 In my judgment, if the defendant had, in good faith, considered that it had grounds on which to have the default judgment set aside, it would have made the application herein in July or August 2006 at the latest. The fact that it chose to file OS 2374 of 2006 instead indicates that it thought that whatever the position was when the judgment was entered, that position had been altered by a compromise agreement and that it was the parties' respective obligations under the compromise agreement that were now binding on them and should be enforced by the courts. By taking this step, the defendant indicated that it no longer placed any reliance on any rights that it might originally have had in regard to the default judgment. I agree with the plaintiff's submission that the conduct of the defendant in failing to apply to set aside the default judgment promptly and then applying for a declaration that that judgment had been compromised by an alleged settlement reached must weigh heavily against it in any consideration of whether the default judgment should be set aside.

Conclusion

45 I have therefore concluded that in this case, the court's discretion should have been exercised so as to refuse the defendant the relief that it sought. The default judgment should not have been set aside. I therefore allow the plaintiff's appeal. The default judgment shall be reinstated but shall be varied so that the amount payable thereunder shall be altered to $725,116.81. Of course this is an

academic variation since the money part of the default judgment has, both parties agree, been settled. However, for good order, it should be effected.

46 I will hear the parties on costs.