Canberra Development Pte Ltd v Mercurine Pte Ltd
[2007] SGHC 107

Case Number : Suit 861/2005, SUM 1843/2007

Decision Date : 28 June 2007

Tribunal/Court : High Court

Coram : Lim Jian Yi AR

Counsel Name(s) : Harpreet Singh 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

28 June 2007 Judgment reserved.

Lim Jian Yi AR:

1 This summons raises a number of significant issues in relation to the setting aside of an irregular judgment in default of appearance under Order 13 of the Rules of Court (2006 Rev Ed). Should the merits of a defence matter when the judgment sought to be set aside is irregular? If so, does the defence have to show a "real prospect of success" and "some degree of conviction"? Where a judgment is irregular because it was entered for an excessive sum, should the judgment be set aside or should the plaintiff be allowed to amend the judgment? Finally, is the defendant's delay in applying to set aside the judgment a relevant consideration when a court decides whether an irregular default judgment should be set aside?

The facts

2 The defendant, Mercurine Pte Ltd ("Mercurine"), is the operator of a cineplex on the fourth and fifth floors of a shopping mall in Sembawang named Sun Plaza ("the Premises"). The plaintiff, Canberra Development Pte Ltd ("Canberra"), is the owner of Sun Plaza as well as the landlords of Mercurine. The ultimate ownership of Canberra lies in the hands of Koh Brothers Group Limited ("Koh Brothers") and Heeton Holdings Ltd ("Heeton"). Mercurine, on the other hand, is a joint venture company which is ultimately owned by Eng Wah Organization Ltd ("Eng Wah Organization"), Koh Brothers and Heeton. The latter two companies held their stake in Mercurine via a company called Clareville Investments Pte Ltd ("Clareville"), whose shareholders were wholly owned subsidiaries of Koh Brothers and Heeton. In broad terms, Eng Wah Organization can be said to be on Mercurine's side in this dispute, while Koh Brothers' interests are aligned with Canberra's.

3 On or about February 2000, Canberra and Mercurine entered into an agreement whereby the Premises would be leased to Mercurine ("the Lease"). No written lease agreement was signed, although various drafts were exchanged. There is some dispute as to the duration of the Lease, which is the subject of Suit No 354 of 2007 ("S 354/2007").

4 Mercurine stopped paying rent for the Premises in April 2003. On 30 November 2005, Canberra commenced the present suit. It sought the payment of rental arrears for the period of April 2003 to November 2005 totalling $1,005,916.81 and also possession of the Premises, on the basis that Mercurine had repudiated the Lease. Canberra also sought damages, interests and costs.

5 As Mercurine did not enter an appearance, on 9 January 2006 judgment in default of appearance was entered in favour of Canberra ("the Default Judgment"). The Default Judgment

ordered that Mercurine:

(a) Deliver possession of the Premises to Canberra;

(b) Pay Canberra the sum of $864,388.31 for rental arrears;

(c) Pay Canberra damages to be assessed; and

(d) Pay Canberra interests and costs of $4,524.00.

6 Subsequently, a dispute arose as to whether the parties had entered into a sort of settlement agreement to "compromise" the Default Judgment, which had not been set aside ("the alleged Compromise Agreement"). I understand this to mean that Canberra would not enforce the judgment. On 21 December 2006, Mercurine filed Originating Summons No 2374 of 2006 ("OS 2374/2006") seeking, *inter alia*, a declaration that the parties had entered into a full and final settlement of the disputes in this suit. The Senior Assistant Registrar granted Mercurine's application at first instance on 2 February 2007 but this decision was reversed by Belinda Ang Saw Ean J on 29 March 2007. The learned judge also ordered that OS 2374/2006 be converted into a writ action, which is now proceeding as Suit No 244 of 2007 ("S 244/2007").

7 On 26 April 2007, about one year and three months after the Default Judgment had been entered, Mercurine applied to have set it aside.

The application

8 Mercurine is seeking to set aside the Default Judgment on two grounds: First, on the basis that it is an irregular judgment and thus should be set aside as of right; and second, that even if the Default Judgment was regular, Mercurine had a defence on the merits.

9 The first proposition warrants closer scrutiny. I understand Mercurine to be arguing that an irregular default judgment ought to be set aside without regard to whether there is a good defence or not. This proposition is based on the case of *Anlaby v Praetorius* (1888) 20 QBD 764, in which Fry J said that "… the order to set aside the judgment is made *ex debito justitiae*."

10 Black's Law Dictionary (8th ed. 2004) defines the term "*ex debito justitiae*" as:

> From or as a debt of justice; in accordance with the requirement of justice; of right; as a matter of right.

Two related questions arise: First, does this "right" exist quite apart from the procedures for setting aside an irregular judgment in the Rules of Court? There is some suggestion of that in *Isaacs v Robertson* [1985] AC 97 where Lord Diplock said, in reference to what his Lordship felt was the correct interpretation of *Marsh v Marsh* [1945] AC 271 and *MacFoy v United Africa Co Ltd* [1962] AC 152:

> … what they do support is the quite different proposition that there is a category of orders of such a court which a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make.

11 In Singapore, we have one general provision dealing with setting aside for irregularity under O

2 r 2, and other specific provisions for various particular circumstances such as O 13 r 8, O 19 r 9 and O 42 r 11. With the greatest respect, I do not think that Lord Diplock's principle is what the local courts have in mind when they speak of setting aside an irregular judgment *ex debito justitiae*. It appears to me that the "right" to set aside the irregular judgment is seen by the local courts as being exercised *through* the existing Rules rather than in spite of them. For instance, in *TR Networks Ltd and Others v Elixir Health Holdings Pte Ltd and Others* [2005] SGHC 106, Tay Yong Kwang J first invoked O 19 r 9 (granting the Court the power to set aside an irregular judgment in default of pleadings) before continuing at [26]:

> If a default judgment is found to be irregular and incapable of being corrected by varying it by amending any documents, the defendant may have it set aside *as a matter of right*. [emphasis added]

This principle is of some significance because it clarifies that setting aside a judgment *ex debito justitiae* is no more than the exercise of rights conferred and limited by the Rules of Court.

12 The second question, which is related to the first, is whether the "right" spoken of here means that the irregular judgment can and must be set aside *in any circumstance* or whether the right is a qualified one. In the present context, the relevant "circumstance" refers to the merits of the defence.

13 There is Malaysian authority which supports Mercurine's position mentioned earlier. In *Tenaga Nasional Bhd v Prorak Sdn Bhd & Anor* [2000] 1 MLJ 479, Gopal Sri Ram JCA for the Court of Appeal said, in relation to a default judgment entered in breach of an express understanding reached between counsel and sanctioned by the court that only the issue of liability, and not the assessment of quantum, was to be tried:

> The default judgment being irregular, it was liable to be set aside *ex debito justitiae* without reference to merits. We take the principle to be well settled and beyond controversy. But, if authority is required in its support, it may be found in the judgment of Edgar Joseph Jr FCJ, in *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 AMR 215, at p 225:
>
> > It is elementary that an irregular judgment is one which has been entered otherwise than in strict compliance with the rules or some statute or is entered as a result of some impropriety which is considered to be so serious as to render the proceedings a nullity.
> >
> > The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside *ex debito justitiae*, that is to say, irrespective of the merits and without terms. Having said that, it should be added that the application to set aside such a judgment should be made: (a) with reasonable promptitude, in other words within a reasonable time; and (b) before the defendant has taken any fresh step after becoming aware of the irregularity. (See O 2 r 2(i) of the Rules of the High Court 1980.)
>
> [emphasis in original]

13 Canberra has urged me to take the opposite approach. *Faircharm Investments Ltd v Citibank International plc*, (1998) *The Times*, February 20 ("*Faircharm*") was cited for the proposition that:

> … (in England at least) setting aside an irregular judgment is no longer a matter of right on the part of the defendant; the courts have 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. [*Singapore Civil Procedure 2003* at para 13/8/4]

Sir Christopher Staughton for the Court of Appeal (Civil Division) noted that it was accepted in this case that the judgment was irregular in that judgment in default of defence was entered before the time for service of defence had even begun. It was argued by the defendants' counsel that the irregularity was so fundamental that no exercise of the court's discretion could uphold the judgment. Sir Staughton said:

> 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 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:
>
> > "We are not here to punish people for their mistakes in procedure but to do justice."

14 In my view, the position in *Faircharm* and *Standard Chartered Bank v Chip Hong Machinery (S)* is sound in principle and policy. *Faircharm* has not been cited in Singapore and Canberra invited me to apply it here. I agree with *Faircharm* insofar as it stands for the proposition that if the defendants were "bound to lose", it would be pointless to set aside the irregular judgment. However, I believe that this is already the position in Singapore at least in relation to setting aside writs of possession and it requires no great legal innovation to extend the principle to default judgments. In *Standard Chartered Bank v Chip Hong Machinery (S) Pte Ltd and Another* [1990] SLR 1230 ("*SCB v Chip Hong Machinery"*), Punch Coomaraswamy J said at [12]:

> I agree that, as a rule, writs of possession obtained irregularly ought to be set aside almost, if not altogether, as of right. However, in very exceptional cases where it is clear that setting aside the writ of possession would be an exercise in futility, the court ought not to act in vain. And for reasons that will follow, this was a case in which the second defendants had absolutely no defence to the plaintiffs` claim for possession.

15 It is somewhat misleading to speak of the defendant's "right" to set aside an irregular judgment, unless it is also made clear that such a "right" is of a qualified nature. In the first place, it is clear that the court does not set aside an irregular judgment because it is a nullity. In *Khor Cheng Wah v Sungai Way Leasing* [1996] 1 MLJ 223, Gopal Sri Ram JCA for the Malaysian Court of Appeal said:

> After the coming into force of the Rules of the High Court 1980, the distinction between irregularities and nullities ceased to exist. All acts and omissions that amount to non-compliance with one or more of the rules of court result in their being curable irregularities and not nullities. Indeed it is quite inappropriate to say of an order or decision of a court of unlimited jurisdiction (such as the High Court and other superior courts) that it is a nullity.

This contrasts with a void contract where it is as if the contract had never existed, and there is no question of the court having a discretion to enforce the contract nonetheless. The fact the irregularities are curable leaves it open to argue that the court has a discretion whether to set aside the irregular judgment.

16 In view of the above, it is unsurprising that there are established circumstances in which a court could decide not to set aside an irregular judgment. For instance, instead of setting aside an irregular judgment, a court may choose to vary it in the appropriate circumstances: see *Philip Securities (Pte) v Yong Tet Miaw* [1988] SLR 594 ("*Philip Securities v Yong Tet Miaw*"), discussed at [65], where the court amended the amount in the judgment because it exceeded the correct amount due. The court may also take into consideration whether the defendant had delayed in making the setting aside application. This particular aspect will be discussed later at [71].

17 In my view, when a defendant seeks to set aside an irregular judgment, this is not an unqualified right and the setting aside is not automatic. It is open to the court to consider the merits of defence. Where setting aside the default judgment would be an exercise in futility because of the weakness of the defence, the court ought not to do so. For this reason, even before I consider whether the Default Judgment is irregular, I ought to first evaluate the merits of Mercurine's defence.

The merits of Mercurine's defence

18 The main plank of Mercurine's defence comprised two limbs. First, that the rental arrears would be set off against certain outstanding sums owed by Canberra to Mercurine ("the Set-off Agreement"). Second, that there was an agreement with Canberra that the balance from this set-off ("the Shortfall") would not become due until after Mercurine's shareholders had made additional fund contributions to Mercurine ("the Pay-later Agreement").

Was there a Set-off Agreement?

19 According to Mercurine, on or about 18 November 2003, the parties met and agreed that the rental arrears due to Canberra would be set off by certain sums owing to Mercurine. These sums comprised two items: air-conditioning charges and the value of certain movie gift passes ("MGVs").

Air-conditioning charges

20 As for the first item, Mercurine alleged that, contrary to the terms of the Lease, air-conditioning charges for the Premises were being billed directly to Mercurine's account by Singapore Power Ltd. Under the Lease, Canberra was obliged to bear the cost of air-conditioning for the Premises for a maximum of 12 hours each day. Mercurine sought reimbursement for these charges, but Canberra was often tardy in making these payments. Canberra does not deny that the Set-off Agreement existed insofar as Canberra agreed to set off the air-conditioning charges from the rental arrears. There is, however, some dispute as to the quantum claimed by Mercurine.

Non-purchase of MGVs

21 As for the second item, Mercurine claimed that Canberra had failed to make good their commitment to purchase certain numbers of MGVs from Mercurine to promote the cineplex. Canberra had initially committed to purchasing 12,000 MGVs a year, but this was subsequently reduced by agreement to 8,000 MGVs a year. At a 14 September 2001 meeting between representatives from Eng Wah Organization and Clareville, a final figure of 5,000 MGVs a year at $8.50 each was reached. Not only did Canberra fail to purchase the requisite numbers of MGVs every year from 2000 onwards, but

after the 14 September 2001 meeting, Canberra also sought to purchase $7.00 MGVs instead of $8.50 MGVs.

22 However, Canberra denies that there was a contractual commitment for Canberra to purchase the numbers of MGVs as Mercurine has alleged. Canberra said that it would honour the agreement if Mercurine produced evidence of this commitment, but no such evidence had been forthcoming from Mercurine.

23 In a letter from Stephen Chan of Canberra to Lim Aitin of Mercurine dated 13 April 2004 (which is a significant document discussed further at [35] and [39]), Canberra said that:

> There were neither correspondences nor confirmation form [sic] your establishment to date reflecting the quantum of the MGVs that we promised to purchase from Eng Wah. However we have been assisting by purchasing the MGVs on an ad-hoc basis for our centre-wide promotions and company functions.

24 It appears to me that Canberra is accepting that there *was* an agreement for Canberra to buy MGVs from Mercurine. The dispute only relates to *how many* MGVs ought to be purchased by Canberra, and also whether Canberra had agreed that the value of these un-purchased MGVs could be set off against the rental arrears.

25 There is some evidence to suggest that at least from 14 September 2001 onwards, Canberra had indeed agreed to purchase 5,000 MGVs a year. The minutes of the 14 September 2001 meeting, recorded by Eng Wah Organization, disclosed that Canberra would purchase 5,000 MGVs a year at $8.50 each with immediate effect. There was a subsequent letter on 30 October 2001 from Goh Min Yen of Mercurine to Joseph Tan of Canberra in which Mercurine reminded Canberra that it ought to have been purchasing $8.50 MGVs and not $7.00 MGVs. This letter also referred to the agreement reached during the 14 September 2001 meeting. Some years later, Petrina Chua of Canberra sent an email on 10 December 2004 to Cynthia Goh and Oh Chee Eng of Mercurine asking for the delivery of 2,750 MGVs pursuant to "the 2004 Agreement to purchase a total of 5,000 tickets" for use in a planned Christmas "Instant Lucky Dip." In my view, this was likely to be a continuation of the earlier agreement to buy 5,000 MGVs a year since 14 September 2001.

26 The evidence of a set-off agreement encompassing the value of the un-purchased MGVs is somewhat weaker. Mercurine pointed to the minutes of an 18 November 2003 meeting between Canberra and Mercurine, which were also recorded by Eng Wah Organization. Item 1 of the minutes reads:

> Arrears
>
> …
>
> SC [Stephen Chan of Canberra] brought up the following:-
>
> - Rental arrears from April 03 to Nov 03 in total of S$249,600.00
>
> - SC proposed and agreed to allow MPL [Mercurine] to offset the total arrears for reimbursement of air con charges, cost of emergency ceiling repair work and sale of MGV from the rental arrears and requested MPL [Mercurine] to pay the balance rental arrears
>
> - LAT [Lim Aitin of Mercurine] will convey / put up above proposal for MPL's mgt [management]

approval.

27 I should note that this minute does not actually say that a set-off agreement was reached with respect to the un-purchased MGVs. The reference to the "sale of MGV" being set off from the rental arrears appears to me to be an allusion to an entirely different agreement. There was probably an agreement that when Canberra purchased MGVs from Mercurine, the purchase price of those tickets would be set-off from the rental arrears. Some reference to a similar agreement of that nature, albeit some time after 18 November 2003, can be found in an email dated 17 September 2004 from Nancy Chia of Sun Plaza (on the Canberra side) to Michelle Lim of Eng Wah Organization, which mentioned a proposal that Canberra purchase 3,850 MGVs to set-off the rental arrears.

28 If indeed such an agreement was reached on 18 November 2003, it is rather curious that at a 2 March 2004 meeting between Koh Brothers, Heeton, Canberra and Mercurine (once again minuted by Eng Wah Organization), the same proposal was made a second time. It is even stranger that this time, the proposal came from Mercurine. The relevant extract under Item 4 of the minute for this meeting is as follows:

> Purchase of Movie Gift Vouchers (MGV) by Canberra
>
> OCE [Oh Chee Eng of Mercurine] informed:-
>
> - Canberra had originally promised to purchase 12,000 MGV per annum to help promote EW Sun Plaza, however, the quantity was subsequently reduced to 8,000 and further reduced to 5,000 per annum
>
> - Despite the reduced quantity, the purchase of MGV was not forthcoming and not fulfilled
>
> OCE suggested to convert the "balance non-purchased" quantity of MGV (by good faith, agreed to reduce quantity to 5,000 per annum) to cash value for settlement of rental
>
> FK [Francis Koh of Koh Brothers] agreed that if agreement was made, then Canberra will have to honoured the agreement, however had requested for record such as minutes of previous meeting to verify the actual quantity
>
> Mercurine (LAT [Lim Aitin]) to furnish copy of the previous minutes of meeting and quantity of the "balance non-purchased" MGV to Canberra.

Under Item 5 the minute continues:

> Arrears and Payments
>
> FK suggested that the arrears/payment be offsetted against each account and Mercurine to pay the shortfall amount of rental due as at Feb 2004.
>
> OCE informed that to make payment, Mercurine would require fund contribution from shareholders. Mercurine will work out different scenario reflecting Mercurine's account status and the additional contributions required from shareholders as per following cases:-
>
> a. with balance non-purchased MGV converted to cash value
>
> b. without (a) above

29 This minute is of some importance and I will be returning to it later. In my view, Oh Chee Eng's proposal in Item 4 is the first mention of the possibility that the value of the un-purchased MGVs (rather than the purchased MGVs mentioned in the 18 November 2003 minute) would be set off against the arrears. Francis Koh's further proposal in Item 5 that "the arrears/payment be offsetted against each account" is a little puzzling because it appears to repeat Oh Chee Eng's proposal. Possibly it may be argued that since both parties were proposing the same thing, an agreement had in fact been reached. However, this is contradicted by the fact that at the end of Item 5, Mercurine offered to work out alternative scenarios concerning its account status as well as the fund contributions required from its shareholders with or without the value of the MGVs. This strongly suggests that no agreement was reached as to whether the value of the MGVs was to be included in the set-off. Canberra's response to Item 4 of the minutes in the 13 April 2004 letter has already been quoted at [23] above. It is silent on whether such an agreement was reached, but this silence is ambiguous and I draw no conclusions from it.

30 On the evidence available to me, although it was likely that some agreement as to Canberra buying MGVs from Mercurine was reached, I am not entirely persuaded the Set-off Agreement encompassed the value of the un-purchased MGVs. I should note, however, that this entire question is moot. Canberra has filed a summons (Summons No 2631 of 2007 or "SUM 2631/2007") to amend the Default Judgment sum of $864,388.31 (see claim (b) at [5]) to $725,116.81. The difference of $139,271.50, as stated by Canberra in its submissions, comprised "credit for various cross claims the Defendants had for air-conditioning charges, sale of movie gift passes and another item." This summons was filed an hour before the hearing of this matter, but most disappointingly its existence was not brought to my attention. With this summons filed, I do not believe that Canberra can argue that it is still disputing the inclusion of the MGVs in the Set-off Agreement.

31 There is also a further alleged sum owing by Canberra arising out of the failure of the air-conditioning for the Premises on 22 June 2003 to 23 June 2003. Mercurine said that it could not operate the Cineplex during these two days and suffered loss and damages for which it was demanding compensation from Canberra. However, Mercurine does not claim that this sum is part of the Set-off Agreement and thus it is not relevant to this dispute.

Was there a Pay-later Agreement?

32 The crucial issue which still remains is whether the Shortfall was due. According to Mercurine, the parties entered into the Pay-later Agreement on 2 March 2004. Fund contributions from Mercurine's shareholders were only completed on 2 June 2006. The existence of this agreement lies at the heart of this dispute. If it did, then Canberra had no business demanding payment of any sum from Mercurine. Further, the non-payment of the Shortfall could not constitute a repudiation of the Lease such as to entitle Canberra to seek possession of the Premises as well as damages.

33 Mercurine's case rested on two documents. The first was the minutes of the 2 March 2004 meeting, which I have already had occasion to refer to at [28]. In my opinion, this document is ambiguous. Item 5 does not explicitly record a proposal from Mercurine to the effect of the Pay-later Agreement. All it says is that Mercurine required fund contributions from its shareholders in order to make payment, and to that end, it would work out different scenarios based on the inclusion/exclusion of the value of the un-purchased MGVs. This could be interpreted in two ways: that the Pay-later Agreement was agreed to in principle and Mercurine was to work out the potential amounts involved; or alternatively, that there was no agreement and the parties would consider the matter when the alternative scenarios were presented.

34 The second document is a 5 April 2004 letter from Mercurine's Lim Aitin to Stephen Chan,

Petrina Chua and Goh Choo San of Canberra. The letter said:

> As per the conversation [between Petrina Chua and Lim Aitin], it was discussed in our meeting on 2 March 2004 with Mr Francis Koh, Mr Soh Beng Keng, Mr Stephen Chan and Ms Amy Leong that the rental arrears shall be offsetted against the arrears owing by Canberra Development Pte Ltd to Mercurine Pte Ltd. The shortfall amount of rental due will then be settled after additional fund contribution from shareholders of Mercurine Pte Ltd (ie Eng Wah Organization Limited and Canberra Development Pte Ltd). …
>
> In view of the above, you may wish to clarify/confirm the above before you commence legal proceedings against Mercurine Pte Ltd.

Mercurine argued that this letter shows that the Pay-later Agreement had been reached earlier on 2 March 2004.

35 Canberra counter-argued that such a conclusion could not be drawn. It referred to the 13 April 2004 letter. This letter was a reply to the 5 April 2004 letter. In this letter, Canberra pointed out that the minutes referred to in the 5 April 2004 letter were a draft copy and the contents were solely in favour of Mercurine. The letter went on to detail the various items in the minutes which Canberra disagreed with. Canberra stressed that the letter ended off with a demand that Mercurine immediately pay the rental arrears after off setting the air-conditioning reimbursement as well as a technician's transportation claim.

36 The demand for Mercurine to settle the rental arrears continued unabated in a string of letters from 20 May 2004 till 15 September 2005. Canberra argued that on each occasion, there was no mention of the Pay-later Agreement and indeed payment was to be immediate. Furthermore, there was absolutely no evidence that Mercurine raised the Pay-later Agreement as a defence to Canberra's demands at any time. Such behaviour was inconsistent with the Pay-later Agreement.

37 Canberra also argued that it would have been absurd and far-removed from commercial reality for it to have agreed to the Pay-later Agreement, which would have put it at the mercy of Mercurine's shareholders. Such an arrangement would mean that if Mercurine's shareholders failed or refused to pump in additional capital, Canberra would have to wait and would be prevented from taking action.

38 In reply, Mercurine made three points. The first was that the Pay-later Agreement was mentioned in Goh Min Yen's first affidavit filed in what is now S 244/2007 dated 22 December 2006. However, Francis Koh's reply affidavit in that suit on 23 January 2007 did not contradict her on this point. I find this point to be particularly damning because Goh Min Yen's account of the Pay-later Agreement in that affidavit is virtually identical with her account in her affidavit in the present action, except for an additional sentence at the end. One would have expected Francis Koh to object to her assertion if it was untrue.

39 The second point is that the 13 April 2004 letter contained point-by-point rebuttals of various items in the minutes of the 2 March 2004 meeting. Items 2, 3, 4, and 6 were specifically rebutted. However, there was no mention of Item 5 at all. In view of what I have said about the ambiguity of Item 5 above at [33], I do not believe that this omission is evidence that the Pay-later Agreement's existance was not contested by Canberra.

40 The third point argued by Mercurine is that Canberra's demands for immediate payment could be interpreted in a manner consistent with the Pay-later Agreement. That is, Canberra was asking

Mercurine to get its shareholders to contribute funds immediately, such that Mercurine's obligations to pay the arrears would become due, and that Mercurine would thereafter pay Canberra. In my view, this is taking a strained interpretation of the clear words of the demands, many of which begin with the title: "SUN PLAZA #04-01 & #05-01 OUTSTANDING BALANCE OVERDUE". The word "overdue" would mean that the obligation to pay the arrears had already arisen. This would not be the case if the Pay-later Agreement was in force such that the obligation to pay would only arise when the fund contributions were made. The Statements of Account attached to the demand letters also describe the balance as the "Total due from Mercurine". While this may also be explained away as the loose use of terminology by laypersons, it is telling that there was no objection from Mercurine at any point of time.

41 Some other documents which made mention of Mercurine's shareholders making fund contributions were brought to my attention. The first was an internal Canberra memorandum by Caren Foo to her superiors Vince Toh, Francis Koh and Tan Kuang Whye dated 15 April 2005. The letter referred to a written note from Mercurine's Joseph Tan (which was undated and not produced in evidence), and summarised it as follows:

> Whether Mr Vince Toh and Mr Francis Koh are agreeable that:-
>
> 1) Mercurine Pte Ltd pays CD [Canberra] $200,000.00
>
> 2) Both JV partners (Eng Wah & CD) pay $340,000.00

42 The next document was an email from Anthony Poon of Heeton to Caren Foo and Vince Toh dated 25 April 2005. The email made reference to another email dated 22 April 2005, in which Tan Kuang Whye told Caren Foo the following:

> Accordint [sic] to Joseph Tan of Eng Wah, Mercurine has at the moment $550,000 cash in hand which means we can:
>
> 1) let them pay say, $300,000 and the rest be owed by them, alternately
>
> 2) the balance of $240,000 shall come from the JV partners meaning Canberra shall with the agreement of Eng Wah each pays [sic] $120,000
>
> towards Mercurine to make up the deficiency so that the total outstanding amount can be settled.
>
> This is one way for Canberra to get back the $540,000 by an outlay of $120,000.

In response to the above, Anthony Poon commented in the 25 April 2005 email:

> Since Mercurine has the sufficient cash, would it be better that they pay off the full amount, not unless they are short of working capital.
>
> Furthermore, since we are giving notice for them to quit, it may be cumbersome for CD to go after the JV partners for the balance of money due.

43 The last document was a letter from Caren Foo to Oh Chee Eng dated 5 August 2005. This letter said:

> As of meeting of 01 August 2005 with yourselves, we have brought to your attention that there

was no rental payment since April 03 till todate. The outstanding due inclusive of August 2005 Rental is **$626,326.90** (see attached statement of account).

You will make arrangement with your shareholders to pay the outstanding rental payment to start paying off the 2003 rental payment first. … [emphasis in original]

44 According to Mercurine, these documents show that the Pay-later Agreement was in existence. Why else would Canberra make repeated references to Mercurine's shareholders making payment? In other words, the "payment" made by the shareholders was shorthand for them contributing funds to Mercurine, which would trigger the obligation to pay the arrears, which Mercurine would do using the fresh funds. In my view the opposite is true. These documents do no more than show that Canberra was aware that one alternative was for the payment for the rental arrears to come from Mercurine's shareholders. Even so, the 15 April 2005 memorandum and the 22 and 25 April 2005 emails all contemplated situations where Mercurine would make the payments out of its own pocket, as an alternative to its shareholders "paying" for it. In such a situation, there was no mention of the shareholders making contributions to Mercurine such that the payment obligation would be triggered. Clearly, these documents showed that in Canberra's opinion, Mercurine was still obliged to pay even without the infusion of funds from its shareholders.

45 It may well be that Mercurine would have no available funds to pay Canberra *unless* its shareholders contributed up some funds to it. This was a possibility contemplated by Anthony Poon in his email when he wrote about Mercurine possibly being "short of working capital." However, the fact that Mercurine would become *able* to pay only when its shareholders contributed funds to it is entirely different from the Pay-later Agreement, which would mean that Mercurine would become *liable* to pay only when its shareholders made such contributions.

Evaluation of the merits of Mercurine's defence

46 If this was a regular judgment, I ought to now ask myself if Mercurine's defence has "a real prospect of success" and "carried some degree of conviction": *Alpine Bulk Transport v Saudi Eagle Shipping* [1986] 2 Lloyd's Rep 221 ("*The Saudi Eagle*"). As it stands, I am bound by high and established authority which makes it clear that "a real prospect of success" entails a higher standard than that required to successfully resist an O 14 application. In *Abdul Gaffer v Chua Kwang Yong* [1995] 1 SLR 484, the Court of Appeal confirmed at [18] that:

… it is not sufficient to show merely an arguable defence that would justify leave to defend under O 14; it must both have a real prospect of success and carry some degree of conviction.

47 That decision has closed off the possibility of saying that *some* prospect of success is nonetheless a *real* prospect. I find some difficulty in applying the proposition in *Abdul Gaffer v Chua Kwang Yong* because in my view the two phrases "a real prospect of success" and "some degree of conviction", taken in their literal and everyday sense, are not synonymous. With respect, the former sets a far higher standard than the latter, and there may be cases where a defence has "some degree of conviction" but nevertheless, a judge would be hesitant to say that there is a "real prospect of success." This is such a case here.

48 As can be seen from my analysis of the defence above, this has been a paper trial. I did not think that Mercurine's defence was borne out by the minutes and the emails adduced in the affidavits. However, this can be no more than a provisional view. I have not heard what the makers of these documents might have to say about my interpretation of these documents. It is not implausible that they might have reasonable explanations which would reconcile Mercurine's version of the events with

the documents. I should also note that a large part of my findings has been based on Eng Wah Organization's minutes. These are secondary sources and I am particularly cognisant of the fact that minutes do not always record what transpired at meetings comprehensively or accurately. The best method for extracting the truth remains cross-examination, the benefit of which I have been denied in this case. Finally, there is also the glaring omission in Francis Koh's reply affidavit in S 244/2007 of any rebuttal of Goh Min Yen's assertion that the Pay-Later Agreement existed. Such an omission cries out for a proper explanation from Francis Koh.

49 Jeffrey Pinsler in *Supreme Court Practice 2006* has noted two difficulties with the approach in *The Saudi Eagle* at para 13/8/9:

> In the first place, the higher standard requires the court to enter into an evaluation of the evidence to determine the likely outcome of the case. This task may be compromised by the inconclusiveness of the affidavits, and allegations in the pleadings which have yet to be substantiated by evidence tested on oath.
>
> …
>
> Secondly, it may be unjust to deprive a defendant who can raise a genuinely triable issue (as opposed to a sham defence) of his opportunity to challenge a plaintiff's case at trial.

50 Both these considerations weigh heavily on me in this case. Mercurine's defence would probably have successfully resisted an application for summary judgment under O 14 as it had raised some triable issues, but it would not pass muster under *Abdul Gaffer v Chua Kwang Yong*. It seems odd that a defence which the courts would probably have thought worth hearing if Canberra had applied for summary judgment would not be heard simply because Mercurine had failed to enter an appearance and had default judgment entered against it in consequence.

51 A further difficulty now arises because it is presently argued that the Default Judgment is irregular. In such circumstances, as I have discussed earlier at [13] and [14] with reference to *Faircharm* and *SCB v Chip Hong Machinery*, the court would still refuse to set aside the judgment if doing so would be "an exercise in futility." The standard applied in the former case was that the defendant would not be able to resist the plaintiff's application for summary judgment. In the latter, it was held that the defendant was "bound to lose" as he had "absolutely no defence." It should be immediately apparent that the standard applied in these two cases is much lower than the standard propounded in *Abdul Gaffer v Chua Kwang Yong.* Moreover, if the *Abdul Gaffer v Chua Kwang Yong* standard applied to both regular and irregular judgments, it could hardly be an exercise in futility if the defence contained triable issues.

52 I am bound by *Abdul Gaffer v Chua Kwang Yong* at least in relation to regular judgments to conclude that the Default Judgment ought not to be set aside. However, in my view that case did not deal with irregular judgments, and it is open to me to say that in order to set aside a default judgment, the merits of a defence for a *regular* judgment must disclose a more than merely arguable defence such that there is a "real prospect of success" with "some degree of conviction", but a defence for an *irregular* judgment need only satisfy the requirements for resisting a summary judgment application—that is, it must show that there are issues which ought to be tried. This proposition can perhaps be justified on the basis that there is nothing wrong with a regular judgment and thus a plaintiff ought not to be too easily deprived of his prize, but for an irregular judgment, the plaintiff ought not to have obtained judgment in the first place. This is not an optimal solution, but the resolution of this dilemma does not lie in my hands.

53 Applying what I have just said to the instant case, I hold that *if* Mercurine can show that the Default Judgment was irregularly obtained, then it ought to be able to set it aside, because on the merits of its defence, Canberra would not have been able to obtain summary judgment.

Irregularities in the Default Judgment

54 Mercurine argued that the Default Judgment was irregular in three ways:

(a) Judgment was entered for claims which fell outside O 13 rr 1-4.

(b) The plaintiff failed to produce a certificate required by O 13 r 4(1).

(c) Judgment was entered for an excessive sum.

Judgment entered for claims falling outside of O 13 rr 1-4

55 The effect of O 13 rr 1-6 is that judgment in default of appearance can only be entered in certain situations. These are where a writ is endorsed with:

(a) A claim for a liquidated demand only (r 1);

(b) A claim for unliquidated damages only (r 2);

(c) A claim relating to the detention of movable property only (r 3);

(d) A claim for possession of immovable property only (r 4).

(e) Two or more claims mentioned in rr 1-4 (r 5).

56 Rule 6 states that where the claims do not fall under O 13 rr 1-4 above, then judgment in default of appearance cannot be entered and the plaintiff must proceed with the action as if the defendant had entered an appearance. This would happen if, for instance, the writ was endorsed with a claim for a liquidated demand as well as a claim for an injunction.

57 Mercurine cited the case of *Panwell Investments v Lau Ee Theow* [1995] 3 SLR 137 ("*Panwell Investments*") for the proposition that the word "only" in O 13 rr 1-4 means:

> … solely or solely as an alternative remedy which is able to stand up independently on its own, each case being considered in the light of its pleaded facts and claims made, with all ancillary, i.e. subordinate relief being disregarded.

It was then argued that Canberra had entered judgment for a claim of possession of immovable property and a claim for unliquidated damages. There was also a claim for liquidated damages from the rental arrears. The first two claims were premised on the repudiation of the Lease, which in turn, was in part based on the non-payment of the rent. As such, Mercurine argued that the two claims were in fact dependent on Canberra proving the third claim for liquidated damages. Thus, these claims could not be for "unliquidated damages only" or for "possession of immovable property only." Under O 13 r 6, default judgment should not have been entered.

58 I accept Canberra's argument that the judgment was entered for claims falling under O 13 r 5 —that is, the judgment was for a mixed claim. This is for two reasons. First, I do not agree with

Mercurine that the claim for possession of immovable property and the claim for unliquidated damages were each dependent on the claim for the rental arrears. This is because although Canberra may need to show that the rental arrears are due in order to establish the first two claims, this does not mean that the rental arrears *must* be claimed. In other words, the claims are entirely severable from each other.

59 Second, even if such a dependency could be established, this situation is entirely distinguishable from that pertaining in *Panwell Investments*. In that case, the judgment had been entered for claims for unliquidated damages as well as inquiries into the circumstances which gave rise to the dispute. Amarjeet Singh JC ruled that:

> … the respondent's counterclaim was therefore not in the circumstances for unliquidated damages only. The claim for unliquidated damages was wholly dependent on the determination by a court on the findings in respect of the antecedent prayers or claims made in paras (c) and (d).

It should be noted that the claim for inquiries to be held did not fall under any of O 13 rr 1-4. In contrast, all the three claims in the present Default Judgment do. Any combination of claims which individually would have fallen under O 13 rr 1-4 can properly be called mixed claims falling under O 13 r 5. If the judgment is limited to these claims, then it is not irregular.

Failure to produce certificate required under O 13 r 4(1)

60 It is undisputed that Canberra was required under O 13 r 4(1) to produce a certificate by its solicitor stating that Canberra was not claiming any relief in the action of the nature specified in O 83 r 1—i.e. a mortgagee's action for delivery of vacant possession. It is also undisputed that Canberra failed to do so.

61 Mercurine argued that this defect rendered the judgment irregular. Canberra argued that this defect is curable and moreover, no prejudice was caused to Mercurine by the omission because the action was not, after all, a mortgage action under O 83 r 1. I agree with Canberra.

62 An omission of this nature properly falls under the ambit of O 2 r 1. Mercurine 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.

Judgment entered for an excessive sum

63 Mercurine's position is that the Shortfall was not owing at all because of the Pay-later Agreement. However, it also argued that even if the Pay-later Agreement was not found to have been entered into, the judgment sum for liquidated damages amounting to $864,388.31 was excessive. This was because this sum included the air-conditioning charges as well as the purchase cost of the MGVs. I have discussed the facts relating to these items earlier and I have noted SUM 2631/2007 filed by Canberra. In such circumstances, there is no doubt that the judgment sum is excessive.

64 Mercurine urged me to accept that a judgment entered for an excessive sum was irregular

and ought to be set aside. The case of *CSR South East Asia Pte Ltd v Sunrise Insulation Pte Ltd* [2002] 3 SLR 281 was cited. In this case, by consent, the parties had agreed that the defendants would pay the plaintiffs a certain sum in four equal installments. It was also agreed that in the event of default on the defendants' part, the plaintiffs would be at liberty to enter judgment for the unpaid balance together with interests and costs. The fourth installment was late and default judgment was entered for the total sum minus the three paid installments. However, it later transpired that the plaintiffs had been paid the fourth installment prior to the entry of default judgment and the payment, in the form of a cheque, had been retained and appropriated by the plaintiffs. It was thus clear that the judgment sum was excessive. MPH Rubin J said:

> In my evaluation, the plaintiffs' holding on to the defendants' cheque was no mere accident or inadvertence but a conscious act. In my opinion, they had misjudged the legal implications of their action in retaining and subsequently cashing the said cheque. In my determination, the plaintiffs' proceeding to enter judgment, as they did, for a sum which did not take into account the amount stated in the fourth instalment cheque was irregular and ought to be set aside *ex debito justitiae*.

65 The case of *Philip Securities v Yong Tet Miaw* (supra at [16]) was also cited. In this case, the plaintiffs had entered judgment for an excessive sum because they had inadvertently omitted to instruct their solicitors that a certain sum had been received from the defendant which ought to have been reflected as a credit to the judgment sum. LP Thean J said:

> Where a judgment has been entered in default of defence for an amount in excess of that which is due, the court has juridiction to amend the judgment instead of setting it aside. … In this case, the plaintiffs had *inadvertently* entered judgment for the whole amount claimed without giving credit for the sum of $6,328.44 representing the net proceeds from the sale of the shares received by the plaintiffs for the account of the defendant. In these circumstances, the learned registrar was entitled under this rule to amend the judgment by reducing the amount to $292,450.81.

66 Mercurine argued that Canberra's decision to enter default judgment for an excessive sum was "no mere accident or inadvertence but a conscious act" because Canberra was well-aware of the Set-off Agreement. Not only that, but Canberra was also insisting during the hearing and in its submissions that the amount was correct. In such circumstances, no amendment to the judgment sum ought to be allowed. It appears to me that Mercurine was not aware of the filing of SUM 2631/2007 and thus its submissions naturally did not address the fact that Canberra *did* apply to amend the excessive judgment sum.

67 In its submissions, Canberra cited *Philip Securities v Yong Tet Miaw* and *Bayerische Landesbank Girozentrale v Dato Azlan bin Hashim* [2002] 4 SLR 838 ("*Bayerische Landesbank Girozentrale*"). The latter case involved a summary judgment application. MPH Rubin J had held that the court was granted the power to make amendments so as to reduce the judgment sum to the proper figure by para 14 of the First Schedule to the Supreme Court of Judicature Act (Cap 322, 1999 Ed). Canberra then cited the following passage:

> Furthermore, I am of the view that para 14 to the Sch 1 to the Supreme Court of Judicature Act (Cap 322, 1999 Ed) provides that the High Court shall have the "powers to grant all reliefs and remedies at law and in equity". These additional powers conferred on the High Court are a useful adjunct which the court may draw upon as necessary when it is just or equitable to do so. These powers are to be exercised with utmost care to right wrongs and to offer redress to applicants with promptitude particularly when circumstances make it plain that resiling from the exercise of

such powers would yield nothing but hardship and delay and profit none. In the case at hand, the plaintiffs' explanation that the error was occasioned by an accidental lapse in communication, not at the time the claim was presented, but later when the application was in train, and that they had moved swiftly to rectify the error to the advantage of the defendant, appeared to have considerable merit.

68 In applying *Bayerische Landesbank Girozentrale* to the facts, Canberra argued that:

> In the present case, no substantial prejudice has been caused to the Defendants by any excessive judgment sum (which is denied). If the judgment sum entered was, indeed, in excess of what was due to the Plaintiffs, this error arose by accidental lapse and it lies within the Court's discretion to cure clerical error, without having to set aside the entire Default Judgment.

69 The cases cited by Canberra do not assist it and indeed do no more than to underline Mercurine's point, which is that an amendment of an excessive judgment sum only occurs in cases of accidental errors. It appears to me that Canberra is trying to have its cake and eat it too. The judgment sum entered was not the product of any mere accident or clerical error. Canberra 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 Mercurine's arguments that this sum was excessive. It has pinned its colours to the mast. As it turns out, Canberra 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 Canberra 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.

Whether Mercurine should be allowed to enforce its right to set aside

70 I have said earlier that if the Default Judgment is irregular, it was still important to examine the merits of Mercurine's defence. If Mercurine's defence raised triable issues, as I have found, then setting aside the irregular judgment would not be an exercise in futility. However, this is not the end of the inquiry. Canberra has argued that even if Mercurine has established that it has a right to set aside the Default Judgment, it has nonetheless ought not to be allowed to enforce this right for two reasons: first, it had delayed in filing the setting aside application; and second, its conduct subsequent to the entering of the Default Judgment constituted a waiver of its rights to set the judgment aside.

Delay in filing setting aside application

71 Between the entering of the Default Judgment and the filing of Mercurine's setting aside application was a lapse of about one year and three months. Canberra argued that such delay should be taken into consideration when I decide whether to allow the setting aside application.

72 It appears to me that the central issue here is the interplay between O 13 r 8 and O 2 r 2(1). The former states:

> The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order.

The latter states:

> An application to set aside for irregularity any proceedings, any step taken in any proceedings or

any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

73 Do the two requirements of O 2 r 2(1)—that an application must be made within a reasonable time and before any fresh step has been taken—apply to applications to set aside an irregular default judgment under O 13 r 8?

74 It is clear that insofar as *regular* default judgments are concerned, delay is a relevant consideration. In *Ang Kim Soon v Sunray Marine Pte Ltd* [1997] 3 SLR 619 the defendant sought to set aside a regular default interlocutory judgment after a delay of about six months. Choo Han Teck JC (as he then was) said:

> [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 play a cat-and-mouse game with the shipowner using the plaintiff as cheese.

Delay was also a consideration when Woo Bih Li J refused to set aside another regular default judgment in *Lee Theng Wee v Tay Chor Teng* [2003] SGHC 173.

75 In respect of irregular default judgments, Mercurine cited a number of Malaysian cases —*Malayan Banking v Sykt Jaya Perkakas (Sabah)* [1993] 3 MLJ 503, *United Malayan Banking Corp Bhd v Mideast Development Sdn Bhd & Ors* [1991] 1 MLJ 55 and *Taman Pangkor Sdn Bhd v Doric Development Sdn Bhd & 2 Ors* [1987] 2 CLJ—for the proposition that because an irregular judgment is set aside *ex debito justitiae*, delay was irrelevant to whether such a judgment ought to be set aside.

76 I should note that all these cases, which are High Court decisions, precede the decision of the Malaysian Federal Court in *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance* [1996] 1 MLJ 30 ("*Tuan Haji Ahmed Abdul Rahman*"), which considered delay a relevant factor. It stated that the court still retained a discretion to set aside irregular judgements provided it was satisfied that:

(a) No one had suffered prejudice by reason of the defendant's delay;

(b) Alternatively, where such prejudice has been sustained, it can be met by an appropriate order as to costs; or

(c) To let the judgment stand would constitute oppression.

77 If anything, at least on the point of delays, *Tuan Haji Ahmed Abdul Rahman* would represent the current position of the law in Malaysia. I understand that the decision has encountered some criticism because of the use of the word "nullity" to describe an irregular judgment (see for example *Lee Tain Tshing v Hong Leong Finance Bhd* [2000] 3 MLJ 364 *per* NH Chan JCA), but this does not affect the principles enunciated above.

78 Mercurine also cited *Muir v Jenks* [1913] 2 KB 412 in which Buckley LJ said:

> Both the Master and the judge appear to have thought that the debtor himself ought to have taken steps to get the judgment corrected and that for default in so doing he was now precluded by delay from having the judgment set aside. In my opinion that is wrong. It is the duty of the

creditor if he obtains a wrong judgment to have it set right. It is not the duty of the debtor against whom he has obtained the judgment to do so.

79 It is my opinion that delay is also a relevant consideration for irregular default judgments even though the requirement of timeliness only appears in O 2 r 2(1) and not O 13 r 8. With respect, I do not think that *Muir v Jenks* or the Malaysian cases cited by Mercurine ought to be followed in Singapore. As I have noted before, an irregular judgment is not a nullity and its setting aside is not a reflex action by the court. I am more persuaded by Gopal Sri Ram JCA's statement in *Khor Cheng Wah v Sungai Way Leasing* (supra at [15]):

> It is a cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The maxim *vigilantibus, non dormientibus, jura subveniunt* is of universal application. Even in cases where a right is exercisable *ex debito justitiae*, a court may refuse relief to an indolent litigant.

80 I must now ask myself whether Mercurine's delay was of such a nature that the Default Judgment, although irregular, should not be set aside. According to Canberra, Mercurine had full knowledge of the Default Judgment and was aware of the impact of the Default Judgment on its legal rights, but instead chose not to apply to set the judgment aside.

81 Mercurine's version of the story is that when the Default Judgment was entered, Mercurine had two options. It could either apply to set aside the Default Judgment and contest Canberra's claims at trial, or it could negotiate with Canberra to try to resolve the dispute and avoid a trial. Because Koh Brothers and Heeton were ultimately shareholders in Mercurine, Mercurine preferred to resolve the dispute amicably and decided to take the latter route.

82 Oh Chee Eng then spoke to Francis Koh on or about 16 February 2006. Oh Chee Eng told Francis Koh that unless Canberra "withdrew" the Default Judgment, Mercurine would contest it. Francis Koh agreed to instruct Canberra's lawyers to "hold" the Default Judgment for the parties to resolve the issue. This is the alleged Compromise Agreement. The parties then entered into negotiations to resolve the disputes between them.

83 Subsequently, in July 2006, a dispute arose as to whether the parties had indeed entered into the alleged Compromise Agreement. From July 2006 to December 2006, the parties attempted to resolve this dispute but failed. It was at this point that Mercurine filed OS 2374/2006 seeking a declaration that the parties had entered into the alleged Compromise Agreement.

84 Mercurine argued that it refrained from applying to set aside the Default Judgment because of negotiations leading up to the alleged Compromise Agreement, and subsequently, because of the ongoing attempts to resolve the dispute arising from Canberra's refusal to acknowledge the agreement. It stressed that Mercurine's main concern was to avoid litigation. From its point of view, Canberra had agreed to "hold" the Default Judgment so it was not necessary to apply to set it aside. As such, Mercurine ought to not be faulted for not applying to set aside the judgment during that period.

85 Canberra's position was that even if Mercurine had wanted to negotiate the alleged Compromise Agreement, it ought to have applied to set aside the Default Judgment anyway so it could negotiate from a position of strength. At any rate, when Canberra made it clear that it was disputing the alleged Compromise Agreement in July 2006, Mercurine ought to have applied to have it set aside at that point. Mercurine had taken its time in making the current application without any regard for Canberra's rights under the Default Judgment and the sanctity of the court process.

86 I make no finding as to whether the alleged Compromise Agreement existed. That is the subject of S 244/2007. However, it is clear that there were negotiations going on both before and after the point in time when the alleged Compromised Agreement was reached. Mercurine was not just sitting back and doing nothing all this time. The filing of OS 2374/2006 is proof of this. Mercurine also had a legitimate desire to avoid unnecessary litigation and in the context of the ongoing negotiations it was not unreasonable for it to refrain from applying to have the Default Judgment set aside. I am mindful that there is no evidence that Canberra was prejudiced by the delay in a manner which cannot be compensated for with an appropriate order for costs. I also take into consideration that the Default Judgment was irregular and thus, while this did not mean that delay was entirely irrelevant, the balance ought to tip a little in the defendant's favour for that reason. For these reasons, even though there was some delay on Mercurine's part, I do not think that the delay was so inordinate such that Mercurine ought to be precluded from setting the Default Judgment aside.

Conduct subsequent to entry of Default Judgment

87 Canberra's position is that the very fact that the parties entered into negotiations over the Default Judgment assumes that it was valid and that Canberra's rights pursuant to the judgment was enforceable. Mercurine had recognised that Canberra had legitimate rights under the Default Judgment which were capable of being compromised. Mercurine had also sought OS 2374/2006, which was an act also premised on the fact that the Default Judgment was valid and capable of being compromised. As such, Mercurine could not on one hand conduct itself recognising the Default Judgment and on the other hand seek to set it aside.

88 As I have said before, an irregular Default Judgment is not a nullity. It remains valid and enforceable unless and until it is set aside. Mercurine's actions recognise this fact but I do not think that these actions constitute an admission that the Default Judgment was regularly obtained. Mercurine has provided a reasonable explanation why, even if the Default Judgment was irregularly obtained, it had chosen not to have it set aside. The existence of the alleged Compromise Agreement would have rendered any attempt to set the Default Judgment aside quite unnecessary so I do not think that the filing of OS 2374/2006 should be taken as a step inconsistent with the assertion of Mercurine's right to have the Default Judgement set aside.

89 In the circumstances I do not think that either Mercurine's delay in applying to set aside the Default Judgment or its conduct subsequent to the entry of the judgment constitute grounds on which Mercurine should be denied a right to have the judgment set aside for irregularities.

Expiry of the Lease

90 There was a preliminary argument by Canberra that this suit was pointless because the Lease was for a period of 7 years commencing 2 June 2000, and that it would have expired on 1 June 2007. There was an option to renew the Lease for a further period of 7 years but Mercurine had to make a written request not less than 6 months and not more than 8 months before the expiration of the Lease. This was not done. Canberra said that while the Lease had first been offered to Mercurine on the basis of a 14-year duration in a Letter of Offer dated 4 November 1999, subsequent negotiations amended the term to 7 years with an option to renew for a further 7 years. Mercurine's lawyers confirmed by letter that they had no objections to this amendment. Consistent with this amendment, Mercurine's audited statements for each of the years ended 31 March 2001 to 31 March 2005 contained references to the lease being granted for a period of 7 years. Mercurine's draft financial statement for the year ended 31 March 2006 reflected a term of 14 years but a disagreement arose over this point and the draft was not approved by the directors.

91 Mercurine points out that it had accepted the Canberra's initial offer in which the term was 14 years. The parties thereafter entered into negotiations for the written agreement. The option to renew term was a clause in Draft No. 2 resulting from these negotiations. While Mercurine's lawyers had indeed confirmed that they had no objections to the option to renew term, in the end, Draft No. 2 as a whole was not agreed to by both the parties. It was not signed and there was no other written agreement between the parties containing the option to renew. Mercurine argued that it was clear that Canberra had always understood the lease period to be for 14 years. Canberra's own Statement of Claim in this suit stated unequivocally that the Lease was for a period of 14 years. In OS 2374/2006, Goh Min Yen's first affidavit also stated that the Lease was for 14 years and Francis Koh's reply affidavit did not deny this.

92 It appears that there were some inconsistencies between parts of both parties' documents and the positions they have now taken. However, on balance I am inclined towards Mercurine's position. The resolution of this question is properly a matter for the trial in S 354/2007 but as for the present matter I do not think that Canberra has adequately shown that Mercurine's setting aside application is likely to be otiose.

Conclusion

93 The Default Judgment ought to be set aside because it is irregular. Canberra had entered judgment for a sum higher than it was entitled to and this was not an accidental slip or omission that ought to be corrected by an amendment of the Default Judgment. It would not be an exercise in futility to set the Default Judgment aside because Mercurine has raised triable issues in its defence. Neither the delay in Mecurine's application for the setting aside application nor Mercurine's conduct subsequent to the entry of the Default Judgment constituted grounds for denying Mercurine the right to have the judgment set aside.

94 I understand that Mercurine has asked for a stay of this suit in the event that it succeeds in setting the Default Judgment aside pending the outcome of S 244/2007. This is contested by Canberra. For itself, Canberra has asked for the difference between the market valuation of the current rental of the Premises (valued at $80,200 per month) and the rent under the Lease ($30,000 per month excluding GST) to be paid to an escrow account each month to fairly preserve the interests of both parties pending the final outcome of the suit. I will hear parties' submissions on these matters as well as on the issue of costs.