IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHCR 3

Suit No 751 of 2020 (Summons No 5367 of 2020)

Between

Muhammad Yusoff Shah bin Khmamarudin

… *Plaintiff*

And

Muhammad Taufiq Abdul Halim

… *Defendant*

Counterclaim of Defendant

And Between

Muhammad Taufiq Abdul Halim

… *Plaintiff in counterclaim*

And

Muhammad Yusoff Shah bin Khmamarudin

… *Defendant in counterclaim*

JUDGMENT

[Civil Procedure] — [Judgments and orders]

[Contract] — [Mistake] — [Non est factum]

[Contract] — [Consideration]

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Muhammad Yusoff Shah bin Khmamarudin
v
Muhammad Taufiq Abdul Halim

[2021] SGHCR 3

General Division of the High Court — Suit No 751 of 2020 (Summons No 5367 of 2020)
Kenneth Choo AR
9 March 2021

26 April 2021 Judgment reserved

Kenneth Choo AR:

Introduction

1 This is an application to set aside a default judgment (HC/JUD 446/2020) ("the Default Judgment") entered on 11 September 2020 in default of defence ("the Setting-aside Application"). A key dispute arises from the fact that the Default Judgment was entered against the Defendant around 47 minutes *after* the Defence and Counterclaim ("D&CC") was filed and served, *albeit* out of time. The Defendant claims that the Default Judgment was irregular and that he has a meritorious defence. In brief, I dismiss the application on the grounds that the Default Judgment is regular, and that no *prima facie* defence or triable issue has been raised by the Defendant. Rather, what the Defendant seeks to rely on are mere assertions which are unsubstantiated and wholly contradicted by the contemporaneous documentary evidence.

Facts

The parties and the funding agreements

2 The Defendant is a director and shareholder of a company known as 360 Brothers Pte Ltd ("the Company").[1]

3 The Plaintiff entered into the following four capital funding agreements with the Company in which the Plaintiff placed various sums with the Company for its business on a profit and loss sharing basis ("the Funding Agreements" or individually, "Funding Agreement"):[2]

(a) Agreement number 360BPL018 dated 25 November 2019 for $200,000;

(b) Agreement number 360BPL019 dated 30 November 2019 for $200,000;

(c) Agreement number 360BPL020 dated 21 December 2019 for $300,000; and

(d) Agreement number 360BPL021 dated 27 December 2019 for $200,000.

4 The Funding Agreements are based on a standard template and they each contain the following salient terms:[3]

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1 Defendant's 1st Affidavit dated 8 December 2020 ("Defendant's 1st Affidavit") at para 15.

2 Defendant's 1st Affidavit at para 15. D&CC at paras 6 and 7.

3 Defendant's 1st Affidavit at para 18 and pp 37 – 76.

(a) the Company requires financing and the Plaintiff agrees that he will invest in the Company an amount equal to the Investment Amount (defined as either "$200,000" or "$300,000", depending on the Funding Agreement (see [3] above)). The Investment Amount will be used for purposes including but not limited to any trading business;

(b) the Company agrees to pay the Plaintiff a profit of 75% of the Investment Amount ("Dividends"). The Dividends will be paid by way of five equal monthly instalments, commencing from the end of two months from the date of the Funding Agreement. The Dividends do not include the repayment of the Investment Amount;

(c) the Plaintiff acknowledges that the investment is accompanied by all business risks associated with a venture or project of such nature;

(d) the Company warrants and guarantees that the Plaintiff shall be paid the Investment Amount in full at or by the end of six months from the date of the Funding Agreement. In respect of the Funding Agreements referred to at [3(a)] and [3(b)] above, the aforesaid date of payment is set out in those agreements as 30 May 2020. As regards the Funding Agreements referred to at [3(c)] and [3(d)], the aforesaid date is set out in those agreements as 27 June 2020; and

(e) should there be any losses incurred, capital will be protected and returned to the Plaintiff.

5 According to the Defendant, the Plaintiff was aware that the Company was trading gold online *via* FXPRIMUS which carried various trading risks.

The Defendant also avers that the Company experienced cash flow issues in February 2020 as there was apparently a trade crash in January 2020.[4]

6 From 20 January 2020 to 10 June 2020, the Company made certain payments and the Plaintiff received a total of $240,000. This is undisputed.[5] It is also undisputed that the Plaintiff had placed a total investment sum of $900,000 with the Company.[6]

The Deed

7 On 3 July 2020, the Defendant signed a document titled "Deed of Acknowledgement of Debt dated 03 July 2020" ("the Deed") in favour of the Plaintiff. It is not disputed that the Deed was witnessed and sealed before a Commissioner for Oaths, one Mr M S Rajendran.[7]

8 As the Deed is just slightly over a page long, the terms of the Deed are reproduced as follows:[8]

> I, the undersigned, [the Defendant] (Singapore NRIC No. S[XXXXXXXX] of [Defendant's address] hereby agree accept and acknowledge to [the Plaintiff] (Singapore NRIC No. S[XXXXXXXX]) hereinafter called the Creditor, that I am INDEBTED to the Creditor in the sum of SGD 1,425,000.00 (SINGAPORE DOLLARS ONE MILLION FOUR HUNDRED AND TWENTY FIVE THOUSAND ONLY). In the premises, I herein DECLARE that:

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4 Defendant's 1st Affidavit at paras 17 and 19.

5 D&CC at para 11. Defence to Counterclaim ("DTCC") at para 9.

6 DTCC at para 10.

7 Plaintiff's 2nd Affidavit dated 7 January 2021 ("Plaintiff's Affidavit") at para 36. Defendant's 2nd Affidavit dated 17 February 2021 ("Defendant's Reply Affidavit") at para 19.

8 Defendant's 1st Affidavit at pp 89 – 90.

> 1 I ACKNOWLEDGE and DECLARE that I have entered into this Deed voluntarily and without any undue influence or duress and with the option to procure competent independent legal advice.
>
> 2 I AGREE ACCEPT and ACKNOWLEDGE that I have no defence should the Creditor use this document in a court of law as an ADMISSION OF LIABILITY on my indebtness (*sic*) to the Creditor for the sum of SGD 1,425,000.00 (SINGAPORE DOLLARS ONE MILLION FOUR HUNDRED AND TWENTY FIVE THOUSAND ONLY).
>
> 3 I agree accept and acknowledge that I will make full repayment of the sum of SGD 1,425,000.00 (SINGAPORE DOLLARS ONE MILLION FOUR HUNDRED AND TWENTY FIVE THOUSAND ONLY) to the Creditor in the following manner:
>
> (i) SGD 1,425,000.00 (SINGAPORE DOLLARS ONE MILLION FOUR HUNDRED AND TWENTY FIVE THOUSAND ONLY) in single or multiple transactions payable within the time window between 10th July 2020 and 15 August 2020 both dates inclusive.
>
> 4 I agree accept and acknowledge that any default in the aforesaid repayment by me in accordance with paragraph 3 above would be a breach of this acknowledgement and agreement with the Creditor and the entire sum of SGD 1,425,000.00(SINGAPORE DOLLARS ONE MILLION FOUR HUNDRED AND TWENTY FIVE THOUSAND ONLY) or such balance sum owing by me (if applicable) to the Creditor shall become immediately due owing and payable to the Creditor. No indulgence or waiver granted to me by the Creditor shall operate against the Creditor in respect of his strict legal rights under this Deed.
>
> 5 I shall be liable for all the Creditor's legal costs on an indemnity basis in the event that any legal proceedings are commenced.

9 The circumstances leading up to the signing of the Deed are disputed by the parties. I will elaborate on the parties' respective positions later below.

10 It transpired that the Defendant failed to pay $1,425,000 or any part of the alleged debt to the Plaintiff. By a letter of demand dated 12 August 2020 issued to the Defendant, the Plaintiff's solicitors demanded that the Defendant repays the aforesaid sum by 15 August 2020. The Plaintiff asserts that the Defendant did not respond to the letter.[9]

Procedural history

11 The procedural history for this matter is important because it *inter alia* forms the factual basis as to whether the Default Judgment is regular.

12 On 17 August 2020, the Plaintiff commenced the present action against the Defendant for breach of the Deed, claiming the sum of $1,425,000, interest and costs. The Writ and the Statement of Claim for this action were filed and served personally on the Defendant on that date.

13 The Defendant's solicitors filed a Memorandum of Appearance on behalf of the Defendant on 24 August 2020. Pursuant to O 18 r 2 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"), the deadline for the Defendant to file and serve his defence fell on 7 September 2020.

14 As no defence was filed by 7 September 2020, the Plaintiff's solicitors gave the Defendant's solicitors written notice on 9 September 2020 of their intention to enter default judgment by the close of business on 11 September 2020 pursuant to r 28 of the Legal Profession (Professional Conduct) Rules 2015 (Cap 161, S 706/2015) ("PCR").[10]

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9 Plaintiff's Affidavit at pp 7, 35 – 37.

10 Defendant's 1st Affidavit at p 18.

15 On 11 September 2020 at 3.13pm, the Defendant filed the D&CC. The Plaintiff's solicitors subsequently filed a request to enter judgment on that same day at 4pm and the Default Judgment was entered for the sum of $1,425,000, interest at 5.33% per annum from the date of writ to judgment and costs of $4,256.19.

16 On 14 September 2020, the Defendant's solicitors wrote to the Plaintiff's solicitors stating that as the request to enter judgment was filed after the D&CC was filed and served, the Default Judgment was improperly entered. As such, the Defendant's solicitors sought confirmation that the Plaintiff's solicitors will take steps to set aside the Default Judgment.[11]

17 By a letter dated 15 September 2020, the Plaintiff's solicitors replied that the Plaintiff will not be acceding to the Defendant's request.[12] By a further letter dated 16 September 2020, the Plaintiff's solicitors wrote to the Defendant's solicitors requesting that either the Defendant makes payment of the judgment sum or provide a written confirmation by 23 September 2020, that the Defendant will be making the necessary application to set aside the judgment within 14 days, i.e. by 30 September 2020.[13]

18 On 22 September 2020, the Defendant's solicitors wrote to the Plaintiff's solicitors confirming that the Defendant will be applying to set aside the Default Judgment.[14]

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11 Defendant's 1st Affidavit at p 31.

12 Defendant's 1st Affidavit at p 35.

13 Plaintiff's Affidavit at pp 42 – 43.

14 Plaintiff's Affidavit at p 45.

19 More than two weeks thereafter, on 8 October 2020, the Plaintiff took out an application *vide* Summons No 4371 of 2020 to garnish the Defendant's DBS bank account. A final garnishee order was made on 23 October 2020 in favour of the Plaintiff for the sum of $1,681.24.[15]

20 On 4 November 2020, the Plaintiff took out an application *vide* Summons No 4827 of 2020 for an examination of judgment debtor ("EJD") order to examine the Defendant. Pursuant to an Order of Court granted on the same day ("the EJD Order"), the Defendant was ordered to attend before a Registrar on 18 November 2020 for the EJD proceedings.

21 By a letter dated 9 November 2020, the Plaintiff's solicitors wrote to the Defendant's solicitors informing them of the EJD Order and asking whether they have instructions to accept personal service of the EJD Order on behalf of the Defendant. There was apparently no reply to this letter.[16]

22 The Plaintiff's solicitors made several attempts to effect personal service of the EJD Order but failed to do so. As such, the Plaintiff's solicitors applied for the EJD hearing fixed on 18 November 2020 to be rescheduled. The EJD hearing was re-fixed to 9 December 2020. On 21 November 2020, personal service of the EJD Order was finally effected on the Defendant.[17]

23 On 8 December 2020, a day before the EJD hearing, the Defendant filed the Setting-aside Application *vide* Summons No 5367 of 2020.

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15 Plaintiff's Affidavit at pp 52 – 53.

16 Plaintiff's Affidavit at pp 13 and 55.

17 Plaintiff's Affidavit at p 14.

The parties' cases

The Defendant's case for setting-aside

24 As judgment was entered against the Defendant approximately 47 minutes *after* the D&CC was filed and served, the Defendant submits that the Default Judgment was *irregularly* entered. The Defendant believes that the Plaintiff had deliberately applied to enter judgment after having read the D&CC and upon realising that the Defendant had a strong defence.[18]

25 The Defendant adds that no affidavit of service was filed by the Plaintiff prior to the filing of the request to enter judgment, and that there is no evidence of the identity of the person who served the Writ and the Statement of Claim on the Defendant and whether such a person was authorised to do so in compliance with the procedural rules.[19]

26 On the merits of the case, the Defendant avers that that there are triable issues raised. These, the Defendant claims, centre primarily on the validity and effect of the Deed.[20] As stated at [9] above, the Defendant disputes the circumstances leading up to the signing of the Deed. I set out the Defendant's account below.

27 According to the Defendant, the Company experienced cash flow issues in February 2020 as there was apparently a trade crash in January 2020.

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18 Defendant's Written Submissions dated 9 March 2021 ("Defendant's Submissions") at para 10.

19 Defendant's 1st Affidavit at para 12.

20 Defendant's 1st Affidavit at para 13.

Notwithstanding this, the Company made certain payments pursuant to the Funding Agreements and the Plaintiff received a total of $240,000.

28 To put things into context, the Defendant was required to pay the Plaintiff the Investment Amount and the Dividends under the respective Funding Agreements, by either end May or end June 2020 (depending on the Funding Agreement: see [4] above). The Defendant deposed that, in June 2020, the Company experienced delays in receiving payments and was not able to make any further payments to the Plaintiff as business was disrupted by the COVID-19 pandemic.[21]

29 The Defendant's pleaded position is that on 3 July 2020, the Defendant met with and spoke to the Plaintiff explaining the difficulties encountered by the Company. The Defendant avers that the Plaintiff insisted that the Defendant execute certain documents evidencing the debts in respect of the payments made by the Plaintiff to the Company. The Defendant was given the impression that this was merely to record the Company's acknowledgement of debt under the Deed and payment schedules and was surprised when the Plaintiff subsequently (whether by himself or his lawyers) started demanding that the Plaintiff personally pay the debt of the Company. The Defendant avers that he was not given any opportunity to review the document to be executed whether on his own or with any professional assistance.[22]

30 It is the Defendant's case that he did not personally receive any monies from the Plaintiff and is not indebted to the Plaintiff for the sums claimed which

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21 Defendant's 1st Affidavit at para 20.

22 D&CC at para 13.

arose out of the Plaintiff's Funding Agreements with the Company.[23] Further, the Defendant submits that the Deed does not explain how the Defendant became personally liable to the Plaintiff for the sum of $1,425,000.[24]

31 The two planks of the Defendant's defence are:

(a) the Defendant had executed the Deed under a mistake.[25] Mr Joseph Ignatius, counsel for the Defendant, confirmed during the hearing of the Setting-aside Application that this is the defence of *non est factum*[26]; and

(b) there was no consideration in respect of the Defendant undertaking payment on behalf of the Company to the Plaintiff.[27]

32 For completeness, I should add that in the Defendant's Counterclaim, he seeks a declaration that he is not indebted to the Plaintiff pursuant to the Deed, a declaration that the Deed is invalid and should be set aside and further or in the alternative, a declaration that the Deed was executed for and behalf of the Company attaching no personal liabilities to the Defendant.[28]

The Plaintiff's case against setting-aside

33 Broadly, the Plaintiff's case is that:

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23 D&CC at paras 5 and 19. Defendant's 1st Affidavit at para 14.

24 Defendant's Reply Affidavit at para 16.

25 D&CC at para 19.

26 Notes of Evidence, p 3, lines 3 – 13.

27 D&CC at para 20.

28 D&CC at p 8.

(a) the Default Judgment is regular;

(b) even if the Court is of the view that the Default Judgment is irregular, the *ex debito justitiae* rule does not apply; and

(c) in any event, on the merits, the Defendant is bound to lose.

34 The Plaintiff submits that the Defendant was out of time to file his defence. As of 9 September 2020, he had not filed a defence, with more than 14 days passing since the Defendant entered appearance on 24 August 2020. The Plaintiff further submits that the law is clear that the notice given by the Plaintiff's solicitors under r 28 of the PCR does not extend time for filing a defence. The Plaintiff argues that the defence had in fact not been filed and served because the Defendant had not obtained leave to file his defence out of time. Where leave was not obtained to file the defence out of time, the Plaintiff argues that he was entitled to proceed as if no defence had been filed at all, notwithstanding the Defendant's purported service of the D&CC.[29]

35 As for the Defendant's ancillary objection that the Plaintiff's failure to file an affidavit of service upon entry of the Default Judgment constituted an irregularity, the Plaintiff submits that there is no procedural requirement for an affidavit of service to be filed together with a request to enter judgment save where the Court, in its discretion, so directs. The Plaintiff highlights that in the present case, the Court did not direct for an affidavit of service to be filed with the request to enter judgment.[30]

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29 Plaintiff's Written Submissions dated 5 February 2021 ("Plaintiff's Submissions") at paras 21 – 26.

30 Plaintiff's Submissions at paras 29 – 32.

36 As such, the Plaintiff's position is that the Default Judgment was obtained regularly and there was no breach of any procedural rules by the Plaintiff.

37 The Plaintiff submits that this is not a proper case for the application of the *ex debito justitiae* rule as there is no egregious procedural injustice to the Defendant. The Defendant had been given his due fourteen days (from entry of appearance) to file a defence (and more). However, he chose not to do so and decided to enter a defence late. This is not a case where there is a premature entry of a default judgment or a failure to give proper notice. The Plaintiff states that it is quite the opposite and that the facts show that the Defendant had been given plenty of notice of both the Plaintiff's Statement of Claim, and the Plaintiff's intention to enter judgment in default of defence.[31]

38 The Plaintiff makes the following further submissions in support of his contention that the *ex debito justitiae* rule should not apply:[32]

> (a) the Defendant's undue delay in bringing the Setting-aside Application. The Setting-aside Application was filed on 8 December 2020, more than 12 weeks after the Default Judgment was entered and after enforcement proceedings were taken out. The Plaintiff also contends that there has been no credible explanation for the delay;[33]

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31 Plaintiff's Submissions at paras 36 – 41.

32 Plaintiff's Submissions at para 46.

33 Plaintiff's Supplementary Written Submissions dated 23 February 2021 ("Plaintiff's Supplementary Submissions") at pp 6 – 7.

(b) the contemporaneous documents and the Defendant's inaction (in the face of the Plaintiff's enforcement proceedings) all go to show that the Defendant did not dispute liability; and

(c) Finally, it is not the Defendant that has been unduly prejudiced in the matter, but the Plaintiff.

39 The Plaintiff asserts that the Defendant is bound to lose the Suit and that there are no triable issues raised in the D&CC. In essence, the Plaintiff's claim is a simple one and rests entirely on the Deed, voluntarily entered into by the Defendant and therefore binding on the Defendant. The Plaintiff relies on the following in support of his claim:[34]

(a) the terms of the Deed are clear and unequivocal. They include an express acknowledgment of a personal debt from the Defendant to the Plaintiff for the sum of $1,425,000 and an express agreement that the Defendant shall have no defence to the Plaintiff's claim;

(b) an alleged admission of liability at [20] of the D&CC;

(c) the Defendant's averment that he was not given any opportunity to review the Deed is contradicted by the documentary evidence, in particular, the WhatsApp text messages between the parties;

(d) some of the payments made by the Company to the Defendant referred to in [6] above were transferred from the Defendant's personal bank account which the Plaintiff says supports the fact that the Defendant knew he was personally liable for the debt;

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[34] Plaintiff's Submissions at paras 53 and 57. Plaintiff's Affidavit at paras 24 – 47.

(e) after the commencement of the Suit, the contemporaneous documents show *inter alia* that the Defendant made an offer to repay the debt in instalments and they constitute clear admissions of liability; and

(f) the defence of *non est factum* is baseless given that the Defendant is a director and shareholder of the Company and a savvy businessman. Taking the Defendant's case at face value, the Plaintiff argues that the Defendant was clearly careless and negligent to such an extent he cannot be allowed to rely on *non est factum*.

40 As regards the argument that there was no consideration, the Plaintiff states that the Deed has complied with all formal requirements being "signed, sealed and delivered" and that the Defendant has neither pleaded nor raised any objections that the Deed is formally deficient. The Plaintiff submits that the law is clear in that consideration is not required for the validity of a deed.[35]

41 Last, in respect of the Defendant's argument that the Plaintiff failed to explain that the debt arose out of the Funding Agreements with the Company and that the debtor is the Company, the Plaintiff submits that the main point is that the Defendant had signed the Deed and has admitted personal liability for the debt.[36]

The law applicable to setting-aside applications

42 The legal principles relating to the setting aside of default judgments are well settled. These legal principles are set out in the seminal Court of Appeal

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35 Plaintiff's Supplementary Submissions at pp 7 – 8.

36 Plaintiff's Supplementary Submissions at pp 8 – 9.

decision of *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR(R) 907 ("*Mercurine*").

43 In *Mercurine*, the Court of Appeal drew a clear distinction between default judgments which have been obtained regularly and those that have been obtained irregularly. As such, an important preliminary question is whether the default judgment sought to be set aside is regular or irregular.

44 The key principles that may be distilled from *Mercurine* are as follows:

(a) In assessing whether a regular default judgment should be set aside, the appropriate test was that laid down in *Evans v Bartlam* [1937] AC 473, *ie*, whether the defendant could establish a *prima facie* defence in the sense of showing that there were triable or arguable issues: *Mercurine* at [60];

(b) Notwithstanding the courts' wide discretion to uphold or vary irregular default judgments, the *ex debito justitiae* rule should continue to be the starting position in assessing an application to set aside an irregular default judgment, because litigants are expected to observe procedural rules. However, this starting position could be departed from if there were proper grounds for doing so. The key question for the court is whether there had been such an egregious breach of the rules of procedural justice to warrant setting aside the irregular default judgment as of right: *Mercurine* at [74] – [76], [96];

(c) Where an irregular default judgment was not set aside as of right, the court may nonetheless set it aside if there are merits in the defence. Should the court find that the defendant was "bound to lose" (*per* Sir

Staughton in *Faircharm Investments Ltd v Citibank International plc* [1998] EWCA Civ 171 ("*Faircharm*")) if the default judgment was set aside and the matter re-litigated, the court should ordinarily uphold the default judgment, subject to any variation which the court deemed fit to make and/or any terms which it deemed fit to impose: *Mercurine* at [77], [91] – [93], [96] and [97];

(d) Where the default judgment has been regularly obtained, the legal burden rests on *the defendant* to show that its defence raises triable issues. In contrast, where it is alleged that the default judgment was irregularly obtained, *the plaintiff* has the burden of persuading the court that the *ex debito justitiae* rule should not be followed and if successful, the plaintiff has the additional burden of showing that the defendant is "bound to lose" in the event that the judgment in question is set aside and the matter re-litigated: *Mercurine* at [98]; and

(e) The defendant's delay in applying to set aside a default judgment – whether regular or irregular – was a relevant consideration and could be determinative where there had been undue delay. As a rule of thumb, the longer the delay, the more cogent the merits of the setting-aside application would have to be: *Mercurine* at [30] – [36], [97].

Issues to be determined

45 In accordance with the framework espoused in *Mercurine*, the issues that arise sequentially for determination are:

(a) whether the Default Judgment is regular or irregular;

(b) if regular, has the Defendant raised any triable issue such that the Default Judgment ought to be set aside;

(c) if irregular, does the *ex debito justitiae* rule apply such that the Default Judgment must be set aside as of right; and

(d) if the *ex debito justitiae* rule does not apply, whether the Defendant is bound to lose.

The Default Judgment: regular or irregular?

The relevant authorities

46 At first blush, the Defendant seems to have a somewhat compelling case. The Defendant's main objection is that that the Plaintiff had filed a request to enter judgment and judgment was entered against the Defendant *after* the Defendant filed and served his D&CC.[37]

47 Indeed, O 19 r 2(1) of the ROC states that "[w]here the plaintiff's claim against a defendant is for a liquidated demand only, then, *if that defendant fails to serve a defence on the plaintiff*, the plaintiff may, after the expiration of the period fixed under these Rules for service of the defence, enter final judgment against that defendant …". Accordingly, an argument may be raised that the Plaintiff's act of entering judgment against the Defendant *after* the Defendant had filed and served his D&CC does not accord with O 19 r 2(1).

48 Furthermore and as stated at [14] above, the Plaintiff's solicitors had on 9 September 2020 given the Defendant's solicitors written notice of their intention to enter default judgment by *close of business* on 11 September 2020

[37] Defendant's Submissions at paras 6 and 10.

pursuant to r 28 of the PCR. Yet, the Default Judgment was entered before the stipulated deadline on 11 September 2020 *at 4pm*.

49 There appears to be a dearth of local reported decisions in respect of the particular scenario where a defence is served after the time for service of the defence expired but before default judgment was entered. In this regard, paragraph 19/2/2 of *Singapore Civil Procedure 2020* vol 1 (Chua Lee Ming gen ed) (Sweet & Maxwell, 10th Ed, 2020) is instructive. The relevant parts are reproduced below:

> If before judgment is entered, the defendant serves a defence, even though it be out of time, judgment in default cannot be entered (*Gill v. Woodfin* (1884) 25 Ch.D. 707, *Gibbings v. Strong* (1884) 26 Ch.D. 66, *M.J.H. Sdn. Bhd. v. Jurong Granite Industries Sdn. Bhd.* [1991] 3 C.L.J. 2885). However, in *Lady Elizabeth Anson (t/a Party Planners) v. Trump* [1998] 3 All E.R. 331, the courts declined to follow *Gibbings* and held that a judgment in default entered after such service is regular, although liable to be set aside by the court, not as of right but as a matter of discretion. A plaintiff in such a case will not be blameworthy in entering judgment in default. In *Real Marble Works Sdn. Bhd. v. Teh Khoon Chuan Trading Sdn. Bhd. & Ors.* [1999] 6 M.L.J. 140, the court while adopting Gibbings, stated that the rule was not mandatory and "leaves the court with a discretion to do what in the circumstances of the case is just".
>
> The court will have regard to the content of the defence delivered out of time and deal with the case in such a manner that justice can be done even after notice of judgment has been served (*Idris bin Haji Salleh v. Federal Auto Holdings Bhd.* [1979] 2 M.L.J. 141). This was subsequently applied in *Arab-Malaysia Finance Bhd. v. Malacca Development Corp Sdn. Bhd. & Ors.* [1997] 5 M.L.J. 685 and *Metrojaya Bhd. & Anor. v. B.T.C. Clothier Sdn. Bhd. & Anor.* [1996] 5 M.L.J. 45.

50 Prior to the hearing of the Setting-aside Application, I directed the Registry to give notice to the parties of this Court's intention to refer to the authorities in paragraph 19/2/2 and I invited both counsel to make submissions on the same. In short, Mr Azri Imran Tan, counsel for the Plaintiff, submitted

that the said authorities support the Plaintiff's case. Mr Ignatius, on the other hand, did not make any oral submissions on the authorities but he did refer to *Metrojaya Bhd. & Anor. v. B.T.C. Clothier Sdn. Bhd. & Anor.* [1996] 5 MLJ 45 ("*Metrojaya*") in the Defendant's written submissions to support the Defendant's case.[38] I shall now analyse each of the relevant authorities in turn.

51 In *Gibbings v. Strong* (1884) 26 Ch.D. 66 ("*Gibbings*"), the defendant Strong gave Gibbings a charge upon costs due from another defendant, Burbidge, to Strong. Gibbings brought an action against both defendants, asking for an account and foreclosure against Strong, and that Burbidge be ordered to pay the amount of the bill of costs, £359, into Court. The time for serving the defence was extended from 1 August to 16 August 1882. No defence having been served, notice of motion of judgment was served on 18 November 1882. On 2 December 1882, Burbidge took out a summons for leave to serve a defence, which was dismissed on 6 December 1882. Burbidge's defence was that there were other dealings between Burbidge and Strong, that no substantial part of the bill of costs was due, and moreover, that Burbidge was going to have the bill taxed. On 19 February 1883, the motion for judgment came on for hearing. The Court refused to look at the defence and gave judgment directing an account against Strong and ordering Burbidge to put the sum of £359 into Court. On appeal, the appellate court held that on a motion for judgment for want of defence, if a defence has been put in, though irregularly, the court will not disregard it, but will look at the merits of defence which, if proved, will be material, and if so, will deal with the case in such manner that justice can be done. The appellate court therefore ordered that the order for placing the £359

[38] Defendant's Submissions at para 30.

into Court be discharged, and an account directed of what was due from Burbidge from Strong in respect of the bill of costs.

52 The next authority is *Lady Elizabeth Anson (t/a Party Planners) v. Trump* [1998] 3 All ER 331 ("*Anson*"). In *Anson*, the plaintiff, Lady Elizabeth Anson, commenced proceedings against the defendant, Mrs Ivana Trump, for breach of contract. The defendant was ordered to serve a defence within 21 days of service of the amended statement of claim, but she failed to comply with that order or to apply for an extension of time. The plaintiff's solicitors indicated the date on which they intended to enter judgment in default of defence pursuant to O 19 r 2(1) of the English Rules of the Supreme Court ("UK RSC") (which is *in pari materia* with O 19 r 2(1) of our ROC). At 9.42am on that date, the defendant's solicitors faxed a defence to the plaintiff's solicitors, who had no knowledge of the fax, entered judgment in default of defence. On the defendant's application to set aside the judgment, the deputy judge held *inter alia* that a judgment entered under O 19 r 2 of the UK RSC was regular where the defence was served outside the time limit provided by the rules or order of the court and that, in any event, under O 65 r 5(2B) of the UK RSC, the defence had not been served when judgment was entered. The deputy judge refused to exercise his discretion to set aside the judgment on the ground that the defence was unarguable.

53 On appeal, Otton LJ referred to the commentary on O 19 r 2 of the UK RSC and the two 19th century decisions (one of which is *Gibbings*) to which reference was made. Otton LJ cautioned that those decisions should be considered in light of the then existing procedural rules, which were fundamentally different from the judicial process in place under O 19 r 2 of the UK RSC. He held that, consequently, little assistance may be gained from those

earlier decisions. More importantly, Otton LJ held that the plaintiff had neither been blameworthy nor acted irregularly in entering judgment since she had no knowledge and could not reasonably have discovered that the defendant had purported to serve a defence; that a defence served out of time and without leave of the court, was served irregularly, and a judgment in default entered pursuant to O 19 r 2 of the UK RSC in those circumstances was regular, although it was liable to be set aside by the court as a matter of discretion. Crucially, Otton LJ agreed with the deputy judge that the reference to a defence under O 19 r 2(1) of the UK RSC must mean a regular defence and cannot include an irregular defence. The appeal was allowed in part as the English Court of Appeal found that the deputy judge had erred in concluding that the defence was unarguable, and leave was granted to defend part of the claim.

54 We turn next to the Malaysian High Court's decision in *Metrojaya*. The Defendant cites the following passage from Jeffrey Pinsler, *Singapore Court Practice 2014* vol 1 (LexisNexis, 2014) at p 804:

> A judgment in default may be pre-empted by the service of a legitimate defence out of time but before the actual entry of the judgment. The court should take the defence into account, even if served beyond the period of validity; otherwise, the court's time would be wasted by a subsequent application to set aside the judgment in default on the basis of merits in the defence. See *Metrojaya v BTC Clothier* [1996] 5 MLJ 45; …

55 The facts in *Metrojaya* are simple. The defence was filed out of time. The plaintiffs subsequently applied to enter judgment in default of defence. The defendants thereafter filed a defence and counterclaim, along with an application for an extension of time to file their defence. The plaintiff then took out an application to set aside the defence. The court allowed the defendants' application for an extension of time to file their defence and held that insofar as procedural non-compliance is concerned, the court would always weigh the

default as against the achievement of justice as a whole and that a defence delivered out of time must nevertheless be considered. It was further held that the courts in a case of this nature prefer that it be decided on merits and do not invoke procedural rules to prevent a defendant from defending an action *unless it has no merits in its application*. In *Metrojaya*, the defendants showed that there was a real dispute as to the subject matter and the court held that it would be a waste of time to shut out the defence because if judgment in default was given, the defendants would apply to set it aside.

56 I pause here to make two brief observations. First, the term "legitimate defence" in the quote from *Singapore Court Practice 2014* (at [54] above) refers to a meritorious defence as opposed to a procedurally regular defence. This is clear from the decision in *Metrojaya*, coupled with the fact that there was no discussion therein on whether the defence was regular or irregular. Second, the facts in *Metrojaya* also show that whilst there was an application to enter judgment in default of defence, no default judgment had been obtained. As such, there was no discussion in the decision on the regularity of a default judgment to be entered. It is therefore difficult to see how *Metrojaya* would assist the Defendant in his submission that the Default Judgment is irregular.

57 Lastly, paragraph 19/2/2 of *Singapore Civil Procedure 2020* makes reference to a recent English High Court decision in *MacDonald and another v D & F Contracts Ltd* [2018] 1 WLR 5695 ("*MacDonald*"). In that case, the claimant property owners claimed against the defendant building contractor for damages arising from the defendant's alleged repudiatory breach of a building contract entered into by the parties. The defence was filed out of time without leave. The plaintiff, unaware of the defence, applied to enter judgment in default of defence. The Court held that if a defence was filed out of time, an application

for an extension of time to file the defence must be made in order for there to be a valid defence under the English Civil Procedure Rules 1998 (SI 1998 No 3132) ("UK CPR"). The Court went on to state that in that scenario, default judgment should be entered, and the onus is on the defendant to make the application to set aside the default judgment if he has grounds for doing so on the merits. Otherwise, the refusal to enter judgment in default because a defence has been filed would wrongly shift the procedural burden from the defaulting defendant to the plaintiff, to compel the plaintiff to apply for summary judgment.

58 In my view, although *MacDonald* was decided based on the UK CPR, the above principles are equally applicable to the Singapore context. Our ROC allows for such an application.

Analysis of the parties' submissions

59 The crucial fact remains that the Defendant was out of time to file his defence. As alluded to above, the time limited for the Defendant to file and serve his defence fell on 7 September 2020 and he failed to do so. As at 9 September 2020, he still had not filed a defence which resulted in the Plaintiff's solicitors issuing notice under r 28 of the PCR.

60 Even though Default Judgment was entered on 11 September 2020 *at 4pm* which is just an hour before the stipulated deadline of close of business in the notice, I agree with the Plaintiff that, at law, the notice given under r 28 of the PCR does not extend time for filing a defence. Indeed, this is the position stated in paragraph 19/2/4 of *Singapore Civil Procedure 2020*:

> Under r.28 of the Legal Profession (Professional Conduct) Rules 2015, it is a matter of professional practice that before applying

> for a default judgment, at least 2 working days' notice must be given to opposing counsel. *Failure to comply with this would not affect the application for judgment. The breach of etiquette would be dealt with professionally.*
>
> [emphasis added]

61 In addition, r 28(3) of the PCR provides:

> To avoid doubt —
>
> (a) *this rule does not extend the time stipulated by an order of court, or by any provision of the Rules of Court, for taking any action or step*; and
>
> (b) a legal practitioner need not give any notice under paragraph (1) before taking any action or step on a failure to comply with an order of court within the time stipulated by the order of court.
>
> [emphasis added]

62 It is apt at this juncture to state that it is not for this court to decide if r 28(1) of the PCR was breached in the present case as that is ordinarily a matter for another forum: see *Karats Pte Ltd v Asia Capital and Brokerage Pte Ltd* [2019] SGMC 20 at [21].

63 What is pertinent to note is that the Defendant neither obtained leave to file the D&CC out of time nor applied for an extension of time to file the D&CC. O 18 r 2(1) of the ROC states that "[a] defendant who enters an appearance in, and intends to defend, an action must, *unless the Court gives leave to the contrary*, serve a defence on the plaintiff before the expiration of 14 days after the time limited for appearing …".

64 I accept the Plaintiff's submissions that the consequence of the Defendant not obtaining leave, but proceeding *anyway* to file and serve the D&CC is that the D&CC was "*as good as not having been filed at all*": see *Panwell Investments Pte Ltd v Lau Ee Theow* [1996] 3 SLR(R) 73 at [15]. It is

incumbent on the Defendant to comply with the procedural rules. Where leave was not obtained to file the D&CC out of time, the Plaintiff was entitled to proceed as if no defence had been filed at all, notwithstanding the Defendant's purported service of the D&CC.

65 Applying the legal principles in *Anson* and *MacDonald* to the present facts, the D&CC, being served out of time and without leave of court, was served irregularly, and the Default Judgment entered pursuant to O 19 r 2 was regular, although it is liable to be set aside by this court as a matter of discretion. It follows that the reference to "a defence" under O 19 r 2(1) of the ROC (see [47] above) must mean a regular defence and not an irregular defence, *ie*, one which has either been served within the time permitted by the ROC or in respect of which leave of court or an extension of time has been granted.

66 As regards the Defendant's objection that the Plaintiff's failure to file an affidavit of service upon entry of the Default Judgment constituted an irregularity, this objection should be viewed with reference to the applicable provisions, such as O 19 r 8A of the ROC and paragraph 76(4) of the Supreme Court Practice Directions, both of which are reproduced below:

> O 19 r 8A of the ROC
>
> **Entry of judgment (O. 19, r. 8A)**
>
> 8A. Judgment shall not be entered against a defendant under this Order unless a request to enter judgment in Form 79A is filed with the judgment in Form 79.
>
> Paragraph 76(4) of the Supreme Court Practice Directions
>
> **76. Judgment in default of appearance or service of defence**
>
> (4) In order to satisfy itself that a defendant is in default of appearance or service of defence, the Court *may* require an affidavit to be filed stating the time and manner service of the

> Writ of Summons was effected on the defendant, as well as the steps taken to ascertain that the defendant had failed to enter an appearance or serve a defence, as the case may be.
>
> [emphasis added]

67 In the premises, I agree with the Plaintiff that there is no procedural requirement for an affidavit of service to be filed together with a request to enter judgment save for where the Court, in its discretion, so directs. In the present case, the Court did not direct for an affidavit of service to be filed with the request to enter judgment.

68 In light of the above, I find the Defendant's submission (that the Default Judgment is irregular) untenable.

69 For the above reasons, I find that there had been no breach of O 19 r 2(1) on the Plaintiff's part and that the Default Judgment is regular.

Should the Default Judgment be set aside?

70 Having considered the Defendant's pleaded defence of *non est factum* and lack of consideration, I find that they do not give rise to any triable issues.

71 I have also considered the miscellaneous points raised by the parties and I am satisfied that none of them assist the Defendant in raising a triable issue.

72 Having considered the Defendant's explanation for the default and the delay as well as the prejudice to the Plaintiff, I find that these matters further weigh in favour of dismissing the Setting-aside Application.

73 I set out my detailed reasons below.

Defence of non est factum

The Defendant's account on affidavit

74 It is apposite to analyse the Defendant's full account of this defence as set out in his 1st Affidavit filed in support of the Setting-aside Application:

> 21. On 3rd July 2020, I met with the Plaintiff and updated him on the ongoinng (*sic*) difficulties encountered by the Company. The Plaintiff insisted that I execute a document to acknowledge the debt owed by the Company to the Plaintiff pursuant to the [Funding Agreements] and included a revised payment schedule. Exhibited herewith and marked MT-1 (Tab 10) is a copy of the said document which is titled "Deed of Acknowledgment of Debt dated 03 July 2020".
>
> …
>
> 24. I was shocked when the Plaintiff began to later demand both directly and via his solicitors for payment of the debt of the Company.
>
> 25. I wish to state that I was not given any opportunity to review the "Deed of Acknowledgment of Debt dated 03 July 2020" which was to be executed whether on my own or with any professional assistance, prior to signing the same. I believed that I was simply acknowledging the debt owed by the Company to the Plaintiff and I signed the Deed to reassure the Plaintiff that the Company would make all efforts to honour its commitment.
>
> 26. I did not sign the Deed to personally undertake payment of the Company's debts to the Plaintiff and am in no way liable for the Company's debts. Further, I have no personal debts to the Plaintiff. The contents of the Deed, insofar as it purports to be an acknowledgment of debt by me to the Plaintiff, are false and inaccurate as I do not owe the Plaintiff any money at all.
>
> 27. I aver that given the foregoing, there is a Defence on the merits in my Defence.

The applicable law

75 In *Oversea-Chinese Banking Corp Ltd v Yeo Hui Keng (Tan Peng Chin LLC, third party*) [2019] 5 SLR 172 ("*Yeo Hui Keng*"), the High Court opined at [51] and [53]:

> 51. I would like to state that the defence of *non est factum* should only be allowed in exceptional situations to rectify injustice and unfairness. It is fundamental that the sanctity of contract or agreement must be adhered to and respected. If the doctrine of *non est factum* is allowed to be invoked liberally, then anyone who is not satisfied with the contract or agreement that he has entered into will easily renege on his contractual obligations by invoking the doctrine of *non est factum*. This will lead to chaos and uncertainty to business and commerce …
>
> …
>
> 53. It is, therefore, proper that the doctrine of *non est factum* must be a narrow one and is applicable only in very exceptional cases.

76 The requirements for the application of the doctrine of *non est factum* were laid out in the Court of Appeal's decision in *Mahidon Nichiar bte Mohd Ali and others v Dawood Sultan Kamaldin* [2015] 5 SLR 62 at [119]:

> *Non est factum* is a specific category of mistake that operates as an exception to the general rule that a person is bound by his signature on a contractual document even if he did not fully understand the terms of the document. If successfully invoked, the transaction entered into by the document so signed is void. Two requirements need to be established for this doctrine to apply … *First, there must be a radical difference between what was signed and what was thought to have been signed. Second, the party seeking to rely upon the doctrine must prove that he took care in signing the document, that is, he must not have been negligent.*
>
> [emphasis added]

77 Accordingly, in order to succeed on the defence of *non est factum*, the Defendant must prove that:

(a) the Deed which the Defendant signed was radically different from the document that the Defendant had thought he signed ("the First Requirement"); and

(b) the Defendant had exercised reasonable care and was not negligent when he signed the Deed ("the Second Requirement").

78 The First Requirement is easily disposed of. The Defendant needs to prove, or at least for the purposes of this Setting-aside Application, raise a triable issue that he was under a mistaken belief at the material time that he had signed a document to acknowledge the debt owed by the Company to the Plaintiff pursuant to the Funding Agreements. The clear terms of the Deed and the contemporaneous documentary evidence belie the Defendant's assertion that he was labouring under any mistake when he signed the Deed. In fact, his conduct and the documentary evidence show an admission of liability on his part to the Plaintiff's claim under the Deed.

Terms of the Deed are clear and unequivocal

79 I agree with the Plaintiff's submission that the terms of the Deed (see [8] above) are unequivocal. The Deed contains the following:

(a) in the recital or introductory paragraph, the names of the Defendant and the Plaintiff are capitalised and in bold. The Plaintiff is referred to as "the Creditor". There is an express acknowledgment of a personal debt from the Defendant to the Plaintiff for the sum of $1,425,000;

(b) in paragraph 1, an express acknowledgment and declaration that the Defendant entered into the Deed voluntarily and without any undue

influence or duress and with the option to procure independent legal advice;

(c) in paragraph 2, an express acceptance and acknowledgment that the Defendant shall have no defence should the Plaintiff use the Deed in court and an express admission of liability on the Defendant's indebtedness to the Plaintiff for the sum of $1,425,000;

(d) in paragraph 3, an express acceptance and acknowledgment that the Defendant will make full repayment of the sum of $1,425,000 between 10 July 2020 and 15 August 2020;

(e) in paragraph 4, an express acceptance and acknowledgment by the Defendant that any breach of the Deed will result in an acceleration of any balance sum being immediately due and payable to the Plaintiff; and

(f) in paragraph 5, an express statement that the Defendant shall be liable for all the Plaintiff's legal costs on an indemnity basis if legal proceedings are commenced.

80 In my view, the clear wording of the Deed leaves little room for doubt that a person in the Defendant's position, being presented the Deed, would fully understand that he would owe the Plaintiff a *personal* debt for the sum of $1,425,000 upon signing.

Contemporaneous documentary evidence

81 To recapitulate, the Defendant deposed that he "was not given any opportunity to review the [Deed] which was to be executed whether on [his]

own or with any professional assistance, prior to signing the same". I agree with the Plaintiff that this averment is contradicted by the documentary evidence.

82 According to the Plaintiff, the Defendant was aware at the material time that he was taking on personal liability under the Deed and this was made clear in discussions held in person and over the telephone conversations between them.[39] The Plaintiff relies on WhatsApp text messages exchanged between the Plaintiff and the Defendant exhibited in the Plaintiff's Affidavit.[40]

83 The WhatsApp text messages begin with a message sent on 20 June 2020 from the Plaintiff asking the Defendant: "how come no funds come in this week what happened?" The next message was sent on 2 July 2020 at 8.29pm from the Plaintiff to the Defendant: "Bro pls find the below verbiage for the personal guarantee that u hve (*sic*) agreed to sign for the balance funds due to me". The Defendant then replied on the same day at 8.45pm: "Bro verbiage nya mana?" According to the Plaintiff, this means "Where is the verbiage?" in English.

84 The WhatsApp text messages thereafter show a message sent from the Plaintiff at 9.04pm that was deleted. There was a subsequent message from the Plaintiff sent at 9.12pm which purports to show the text of the Deed *sans* the names of the Plaintiff and the Defendant, their respective NRIC numbers and the debt amount. I use the term "purports" because the said message only shows the introductory paragraph and paragraphs 1 and 2, with the "Read more" option at the end of the message. In any event, the Defendant did not state in his Reply

39 Plaintiff's Affidavit at para 33.

40 Plaintiff's Affidavit exhibited at Tab B, at p 33.

Affidavit that the text of the Deed in the message was incomplete. All the Defendant could say in his Reply Affidavit was self-serving and that the Deed does not express any undertaking on his part to take on the Company's liability. As we have seen, the text for the introductory paragraph and paragraphs 1 and 2 adequately show that the Defendant's response is simply untrue. Hence, contrary to what he is asking this court to believe, the Defendant *had* the opportunity to either review the Deed or seek independent legal advice on the same.

85 The Defendant also deposed that "the Plaintiff insisted that [he] execute a document to acknowledge the debt owed by the Company to the Plaintiff pursuant to the [Funding Agreements]" and that he "did not sign the Deed to personally undertake payment of the Company's debts to the Plaintiff and [is] in no way liable for the Company's debts". The Defendant further deposed that he "was shocked when the Plaintiff began to later demand both directly and *via* his solicitors for payment of the debt of the Company". These averments are also contradicted by the contemporaneous documentary evidence.

86 First, the letter of demand dated 12 August 2020 from the Plaintiff's solicitors to the Defendant clearly states that pursuant to the Deed in which the Defendant accepted and acknowledged that *he* is indebted to the Plaintiff for the sum of $1,425,000, the Plaintiff's solicitors demanded that the Defendant repays the aforesaid sum by 15 August 2020.[41] The terms of the Deed were also summarized in the letter. The letter of demand was sent to the Defendant on 12 August 2020 by email. Yet, instead of replying to state that he should not be liable for the Company's debt, the Defendant inexplicably replied by email on

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41 Plaintiff's Affidavit exhibited at Tab C, at pp 35 – 37.

18 August 2020 requesting to repay the sum by way of four equal monthly instalments from August to December 2020 at $356,250 per month. It would appear that the Defendant only responded on 18 August 2020 after the Writ and the Statement of Claim were served personally on him on 17 August 2020. When the Defendant's request to repay the debt by way of instalments was rejected on 19 August 2020, the Defendant replied by way of a further email on 20 August 2020 to the Plaintiff's solicitors stating: "Please do advise what need to be added for the settlement."[42]

87 The above documentary evidence not only refute the Defendant's assertions, but they also allow an ineluctable inference to be drawn from the Defendant's conduct, *ie*, there is an admission of liability on his part.

Further analysis

88 I accept that, as the Plaintiff puts it, the Defendant "is a man who is sophisticated and can understand complex financial transactions, such as the terms of the [Funding Agreements] and "trading gold online via FXPRIMUS." He is further a self-admitted Director and Shareholder of [the Company] and is a savvy businessman … it does not lie in the mouth of the Defendant to now claim he could not understand a simple two-page Deed for an acknowledgment of a debt owed to [the Plaintiff]. The wording is clear and unequivocal, certainly more defined and understandable that the [Funding Agreements] …".

89 Moreover, the Defendant is sufficiently proficient in the English language to have signed his affidavits without the need for translation.

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42 Plaintiff's Affidavit at pp 39.

90 The Defendant submits that from the Plaintiff's own use of the word "guarantee", the Plaintiff was himself not sure what the Deed was about.[43] This relates to the WhatsApp text message sent on 2 July 2020 at 8.29pm from the Plaintiff to the Defendant where the Plaintiff referred to the eventual Deed as a "personal guarantee". In my view, nothing turns on this submission as I accept the Plaintiff's explanation that "the word "guarantee" was used in layperson terms and did not refer to a guarantee at law."[44] Second, I am cognisant that the Defendant's pleaded case (set out fully at [29] above) is that he was under a mistaken belief at the material time that the document he was signing was merely to record the Company's acknowledgement of debt. Accordingly, any assertion by the Defendant that he was under a mistaken belief that he was signing a personal guarantee contradicts his own pleaded case.

91 In light of the above, the Defendant cannot, in my view, succeed in proving the First Requirement because the Defendant could not have been mistaken as to what he signed.

Defendant was at the very least negligent and careless

92 I turn now to the Second Requirement for the defence of *non est factum*. In *Oversea-Chinese Banking Corp Ltd v Frankel Motor Pte Ltd and others* [2009] 3 SLR(R) 623 ("*Frankel Motor*") at [26], the High Court rejected a plea of *non est factum* because, *inter alia*, the prominent presence of the words "personal guarantee" and "guarantor's name" on the guarantee left the appellant in a position where, *even if he did not realise he was signing a guarantee*, he

43 Defendant's Reply Affidavit at para 20.

44 Plaintiff's Affidavit at para 38.

was precluded by his own negligence and carelessness from relying on such a defence.

93 Taking the Defendant's case at its highest, given the plain and simple terms of the Deed, the Defendant was, at the very least, careless and negligent. What sets the present case apart from *Frankel Motor* is the fact that the Deed was witnessed and sealed before a Commissioner for Oaths. The Plaintiff further contends that at no time did the Defendant voice any objection to signing the Deed, whether over WhatsApp or before the said Commissioner.[45] The Defendant's response in his Reply Affidavit is crucial and reproduced as follows:[46]

> With respect to paragraph 36 of the said Affidavit, the commissioner for oaths did not explain the document to me and so I was no wiser *even as he asked me whether I understood what I was signing.*
>
> [emphasis added]

94 From the Defendant's own evidence, the Commissioner had asked him whether he understood what he was signing. The Defendant stops short of stating his response to the Commissioner's question. It is not in dispute that he had signed the Deed and thus, the only two possible scenarios were that, despite the Commissioner's question, he signed the Deed:

(a) being fully aware of its terms and nature; or

(b) choosing to be oblivious about the Deed and its terms.

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45 Plaintiff's Affidavit at para 36.

46 Defendant's Reply Affidavit at para 19.

95 Either way, I do not see even a fair probability of a *bona fide* defence or triable issue being raised. If the Defendant was fully aware of the Deed's terms and nature during the signing of the Deed, he would fail the First Requirement. If the Defendant chose to be oblivious about the Deed and its terms, despite its clear wording and the Commissioner's cautionary question, his negligence and carelessness would disentitle him from relying on the defence of *non est factum*.

Defence of no consideration

96 As regards the Defendant's defence that there was no consideration in respect of the Defendant undertaking payment on behalf of the Company to the Plaintiff, I find that this is a non-starter.

97 It is trite that a deed is an enforceable agreement without proof of consideration. Consideration is not required for the validity of a deed: see *Lim Zhipeng v Seow Suat Thin and another matter* [2020] 2 SLR 1151 at [54]. I accept the Plaintiff's submissions that the Deed has complied with all formal requirements being "signed, sealed and delivered" and that the Defendant has neither pleaded nor raised any objections that the Deed is formally deficient.

98 The abovementioned purported defence, to my mind, does not assist the Defendant in raising a triable issue.

Miscellaneous points raised by the parties

Alleged admission of liability in the D&CC

99 The Plaintiff refers to [20] of the D&CC which reads: "Further there was no consideration offered in respect of the Defendant *undertaking the burden of payment on behalf of the Company to the Plaintiff*." The Plaintiff argues that the

italicised words above is a "clear as day admission" that pursuant to the execution of the Deed, the Defendant has assumed the Company's liability and is personally liable to the Plaintiff.[47]

100 I do not see any force in this submission. It is clear that the upshot of the pleading in [20] of the D&CC relates to the defence of a lack of consideration and not so much the averment that the Defendant had assumed the Company's liability to the Plaintiff. Further, [20] of the D&CC must be read subject to the other parts of the D&CC such as [5], where the Defendant avers that he is not indebted to the Plaintiff in any manner whatsoever.

Funds transferred from personal bank account

101 The Plaintiff argues that out of the $240,000 received by the Plaintiff from the Company (see [6] above), $175,000 was transferred from the Defendant's personal POSB bank account. The Plaintiff could verify this because the said POSB bank account is the same account that was the subject of the Plaintiff's successful garnishee application (see [19] above). The Plaintiff therefore says that this supports the fact that the Defendant knew he was personally liable for the debt.[48] The Defendant deposed in response that the payments came not only from him but also the Company. He added that as a director of the Company, he was ensuring that the Company was adhering to its commitment but that does not make him personally responsible.[49]

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47 Plaintiff's Affidavit at para 30.

48 Plaintiff's Affidavit at paras 39 – 42.

49 Defendant's Reply Affidavit at para 21.

102 In my view, the Plaintiff's submission is a neutral point, and at best, only goes to prove that the Plaintiff had a propensity to use his personal funds to pay for the Company's debts. Further, the said payments were transferred from 3 April 2020 to 10 June 2020 and they pre-dated the Deed. Accordingly, this submission neither aids the Plaintiff's case nor assists the Defendant in raising a triable issue.

Alleged failure to explain how debt arose

103 For completeness, I shall now deal with the Defendant's argument that the Plaintiff failed to explain that the debt arose out of the Funding Agreements with the Company and that the debtor is the Company. The Defendant also argues that the Deed does not explain how the Defendant became personally liable to the Plaintiff for the sum of $1,425,000.

104 In my view, this is a red herring. The upshot is that the Defendant had signed on the Deed and has admitted liability for the debt on that document, *ie*, the Defendant has recognised that this was a debt he was personally liable for. The Plaintiff, in this action, is suing the Defendant on that document, *ie*, the Deed. The provenance of the debt is completely irrelevant.

Delay and prejudice

105 In the recent decision of *First Property Holdings Pte Ltd v U Myo Nyunt @ Michael Nyunt* [2020] SGHC 276 ("*First Property*"), the Court held that a defendant's delay in applying to set aside a default judgment will be viewed differently depending on whether the default judgment is entered without a trial (*eg*, in default of appearance, pleadings or discovery) or after a trial in the defendant's absence. The Court further held that in the former, if the defendant

is able to show triable issues, the Court would be slow to refuse to set aside the judgment on the ground of delay (even if the delay is deliberate and contumelious) unless the delay was to gain some litigation advantage or the prejudice to the plaintiff outweighs the fact that there are triable issues. However, where the default judgment has been obtained after a trial, the Court would be most reluctant to set aside the judgment in the face of deliberate and contumelious delay unless there are very compelling countervailing factors. The dicta in [59] of *First Property* is instructive and reproduced as follows:

> 59 Where a defendant applies to set aside a default judgment entered without a trial:
>
> (a) the question of whether there is a defence on the merits is the dominant feature to be weighed against the applicant's explanation for the default and any delay as well as against prejudice to the other party: *Su Sh-Hsyu v Wee Yue Chew* [2007] 3 SLR(R) 673 ("*Su Sh-Hsyu*") at [42]–[43]; and
>
> (b) the court will scrutinise the reasons for the delay; where the delay is deliberate, with the intent to gain some litigation advantage, a late application should *prima facie* be viewed uncharitably. Procedural rules must not occasion injustice by unfairly depriving a party of an opportunity to argue its case but the indolent cannot as a matter of course be awarded the same measure of justice as the diligent. The greater the delay, the more cogent the explanation must be as to why a miscarriage of justice would be occasioned if the default judgment were allowed to stand: *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR(R) 907 ("*Mercurine*") at [32] and [35]–[36].

106 From the above legal principles, where a defendant applies to set aside a default judgment entered without a trial, the question of whether there is a defence on the merits is the *dominant* factor. In such a situation and going back to first principles, if the defendant is *unable* to show triable issues, the Court should *not* set aside the judgment. A court should uphold a default judgment where there is no meritorious defence as "it is in line with the goal of efficient case and resource management that the courts continuously strive towards":

Mercurine at [87]. Ordinarily, the court may dismiss the setting-aside application on this ground (that there are no merits in the defence) alone. However, the court may, in my view, also take into account the defendant's explanation for the default and delay as well as any prejudice to the other party.

107 First, the Defendant's only explanation for the default, *ie*, the reason why the D&CC was filed out of time, is because he "took some time to accumulate [his] supporting documents".[50] This is not a satisfactory explanation.

108 Second, as one will observe from the procedural history of this action, there has been delay on the Defendant's part in bringing the Setting-aside Application. The said application was filed on 8 December 2020, more than 12 weeks after the Default Judgment was entered and after enforcement proceedings (a garnishee application and EJD proceedings) were taken out. The Defendant offered the following explanation:

> I had been on reservist on 2nd November to 7th November 2020 … As I was staying in camp, I had to go back to work thereafter in order to secure funds for the company and to meet all liabilities. It has been a difficult time because covid 19 (*sic*) has shut down all our contracts. The company was also contemplating other lines of business including entering the provision of personal protection equipment for hospital staff.

109 The reasons given above, simply put, do not justify the Defendant taking more than 12 weeks to file the Setting-aside Application.

110 The procedural history also shows that the Defendant was indolent in the conduct of his defence or in setting-aside the Default Judgment despite the

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50 Defendant's 1st Affidavit at para 5.

reasonable opportunities or notice given by the Plaintiff. For instance, whilst it is true that the Defendant's solicitors wrote to the Plaintiff's solicitors confirming that the Defendant will be applying to set aside the Default Judgment, that occurred on *22 September 2020*. Prior to that, the Plaintiff's solicitors wrote to the Defendant's solicitors by way of a letter dated 16 September 2020 requesting that either the Defendant makes payment of the judgment sum or provide a written confirmation by 23 September 2020, that the Defendant will be making the necessary application to set aside the Default Judgment within 14 days, *ie*, *by 30 September 2020*. I agree with the Plaintiff that it would not have been reasonable to wait indefinitely for the Defendant to apply to set aside the Default Judgement. I therefore find it reasonable that the Plaintiff waited for more than three weeks before filing the garnishee application on 8 October 2020.

111 On another occasion, the Plaintiff's solicitors wrote to the Defendant's solicitors by way of a letter dated 9 November 2020 informing them of the EJD Order and asking whether they had instructions to accept personal service of the EJD Order on behalf of the Defendant. There was no reply to this letter thereby resulting in many attempts to effect personal service of the EJD Order on the Defendant. Much time and resources were wasted.

112 I turn now to the issue of prejudice against the Plaintiff. Should the Default Judgment be set aside, quite apart from the significant time and costs incurred by the Plaintiff, I am mindful of the principle in *MacDonald* where the procedural burden is wrongly shifted from the defaulting defendant to the plaintiff, *ie*, the Plaintiff in this action will be compelled to apply for summary judgment notwithstanding that the default lies with the Defendant. As such, I

find that, if the Default Judgment is set aside, there will be undue prejudice to the Plaintiff.

113 I also find that there will inevitably be some prejudice or inconvenience caused to third parties such as the garnishee bank if the Default Judgment is set aside. The question that arises is whether the garnishee order and the EJD Order will be deemed as nullities. If so, does that mean the sums garnished ought to be returned to the Defendant's DBS bank account? What about the impact on the garnishee bank that has acted on the garnishee order? All these questions could have been easily avoided had the Defendant simply not been dilatory.

114 For the above reasons, I find that the Defendant has not raised any *prima facie* defences or triable issues to set aside the regular Default Judgment. All in all, I am of the view that no miscarriage of justice would arise if the Default Judgment is allowed to stand. My view is fortified by the Defendant's explanation for the default and the delay as well as the prejudice to the Plaintiff.

Remaining issues need not be considered

115 Given the findings in [69] and [114] above, it is not necessary for this Court to consider the issues pertaining to the application of the *ex debito justitiae* rule and the test for setting aside an irregular default judgment. Accordingly, I pass no comment on these issues.

Conclusion

116 For the foregoing reasons, I decline to set aside the Default Judgment. I therefore dismiss prayer 2 and make no order in respect of the rest of the prayers contained in the Setting-aside Application.

117 I will hear the parties on costs.

Kenneth Choo
Assistant Registrar

Mr Azri Imran Tan and Mr Joshua Chow Shao Wei (I.R.B. Law LLP) for the Plaintiff;
Mr Joseph Ignatius (Ignatius J & Associates) for the Defendant.