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

[2023] SGHCR 22

Originating Claim No 295 of 2023 (Summons No 2812 of 2023)

Between

NW Corp Pte Ltd

… *Claimant*

And

HK Petroleum Enterprises Cooperation Ltd

… *Defendant*

GROUNDS OF DECISION

[Civil Procedure — Service — Service out of Singapore]
[Civil Procedure — Judgments and orders — Setting aside]

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NW Corp Pte Ltd
v
HK Petroleum Enterprises Cooperation Ltd

[2023] SGHCR 22

General Division of the High Court — Originating Claim No 295 of 2023
(Summons No 2812 of 2023)
AR Perry Peh
10 November, 19 December 2023

27 December 2023

AR Perry Peh:

Introduction

1 HC/SUM 2812/2023 ("SUM 2812") was the defendant's application to set aside a default judgment HC/JUD 252/2023 ("JUD 252") that the claimant had obtained against it in HC/OC 295/2023 ("OC 295") pursuant to the defendant's failure to file a notice of intention to contest under O 6 r 6(5) of the Rules of Court 2021 ("ROC 2021"). The claimant had served the originating process in OC 295 on the defendant, a Hong Kong-incorporated company, by way of registered post and without having obtained the court's approval for service out of jurisdiction under O 8 r 1(2) of the ROC 2021. The claimant had done so on the basis that a written contract, which it claimed was the operative agreement between the parties, permitted for service out of Singapore and so, in accordance with O 8 r 1(3) of the ROC 2021, the court's approval was not

required. The defendant disputed that the written contract was the operative agreement between the parties, and that in any event, it did not permit for service out of Singapore.

2 There were two issues of interest raised in SUM 2812. First, what are the requirements of a contract allowing for "service out of Singapore" coming within O 8 r 1(3) of the ROC 2021? The claimant's case in SUM 2812 was that a clause in the written contract, which provided for the Singapore courts to have jurisdiction over disputes arising therefrom and "service of process by registered mail", gave rise to such a contract coming within O 8 r 1(3). Secondly, in the determination of whether a default judgment was regular or irregular, is the court limited only to those materials and grounds that the claimant had relied on in obtaining the default judgment? This issue arose because the defendant's primary position in SUM 2812 was that the operative agreement between the parties is found in some other contract (and not the written contract) that contained no provision whatsoever on service of originating process. The claimant however did not rely on this other contract in obtaining JUD 252 and it also denied that this other contract was the operative agreement between the parties. Could this other contract even be relevant to the determination of whether JUD 252 was a regular or an irregular default judgment?

3 In the event, I allowed the setting-aside application in SUM 2812. These grounds set out my reasons for doing so, as well as my views on the two issues identified above.

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Background

4 The claimant, NW Corporation Pte Ltd ("NWC"), is a Singapore-incorporated company. The defendant, HK Petroleum Enterprises Cooperation Limited ("HKE"), is a Hong Kong-incorporated company. Both NWC and HKE are in the business of trading of chemical products and commodities.

5 The claims in OC 295 arose out of two transactions that NWC and HKE had entered into: (a) a transaction for the sale of light Naphtha crude ("the Naptha Transaction"); and (b) a transaction for the sale of Gasoil ("the Gasoil Transaction") (collectively, "the Transactions"). In SUM 2812, HKE did not dispute that it had entered into the Transactions, but it disputed the terms applicable to the Transactions and whether it had, as NWC alleged, acted in breach of the relevant agreement to which each of the Transactions relate.

NWC's case

6 NWC's case is that on or about 27 December 2022, it entered into an agreement with HKE in connection with the Naptha Transaction ("the Naptha Agreement"). The terms of the Naptha Agreement were first set out in a term sheet and subsequently set out in a formal written contract dated 3 March 2023 ("the Written Contract"). NWC pleaded in its Statement of Claim ("the SOC") that it had prepared the Written Contract and sent it by e-mail to HKE, but HKE did not sign and return a copy of the Written Contract to NWC. Nonetheless, NWC's position was that HKE had, by virtue of its subsequent conduct, accepted the terms of the Written Contract as the terms of the Naptha Agreement.[1]

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[1] Statement of Claim ("SOC") at para 3.

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7 The Written Contract is exhibited in the SOC[2] and it contains the following clause on "Law and Jurisdiction" (which I will refer to as the "Law and Jurisdiction clause"):[3]

> This Agreement shall be governed by and construed in accordance with the English law. Any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, *shall be referred to and finally resolved by Singapore court [sic] without recourse to arbitration and to service of process by registered mail. …*
>
> [emphasis added]

8 According to NWC, it had paid sums amounting to around US$2.234m to HKE pursuant to two invoices issued by HKE.[4] NWC pleaded that HKE had acted in repudiatory breach of the Naptha Agreement as it failed to deliver the light Naptha crude.[5] This breach also led to NWC suffering loss and damage as a result of NWC's inability to perform a contract that it had entered into with another PTT International Trading Pte Ltd ("PTT") for the onward sale of the light Naptha crude after it was delivered by HKE.[6] NWC further pleaded that, despite the demands it has made, HKE failed to return the deposit paid for the Naptha Transaction.[7] For the Naptha Agreement, NWC claimed from HKE in OC 295, among other things: (a) a sum corresponding to the deposit it had paid for the Naptha Transaction; and (b) a sum of $350,000, corresponding to the liquidated damages that it had to pay to PTT by reason of its inability to perform the onward sale contract with PTT.

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2 SOC at Appendix B.

3 SOC at pp 6–7.

4 SOC at para 4.

5 SOC at para 7.

6 SOC at para 10.

7 SOC at para 9.

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9 As for the Gasoil Transaction, NWC's case was that this had been entered into with HKE in connection with another written partnership agreement made between NWC, HKE and another Dubai-incorporated company ("the Partnership Agreement") under which HKE was to acquire, collect and store target volumes of Gasoil, while NWC and the Dubai-incorporated company would provide financing and arrange for the sale of the Gasoil, with the profits arising from the sale to be shared among the parties equally.[8] In pursuit of the Partnership Agreement, NWC and HKE entered into a separate agreement under which NWC would purchase from HKE specified quantities of Gasoil at the price fixed under the Partnership Agreement ("the Gasoil Agreement").[9] The Gasoil Agreement was reduced in writing and a copy of the same is exhibited in the SOC.[10] The Gasoil Agreement however does not contain a provision equivalent to the Law and Jurisdiction clause found in the Written Contract or any provision relating to the service of process for legal proceedings.

10 According to NWC, it paid sums amounting to US$750,000 to HKE pursuant to invoices issued by HKE as deposits for the Gasoil Transaction.[11] However, despite NWC's payment, HKE was unable to confirm the supply and delivery of the Gasoil cargo, and thus it acted in repudiatory breach of the Gasoil Agreement.[12] HKE has since only returned half of the sums paid by NWC in connection with the Gasoil Transaction, with the other half remaining

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8 SOC at para 12.

9 SOC at para 13.

10 SOC at Appendix D.

11 SOC at para 14.

12 SOC at para 15.

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outstanding.[13] For the Gasoil Agreement, NWC claimed from HKE in OC 295, among other things, a sum of $375,000, corresponding to what it claims is the outstanding deposit for the Gasoil transaction.

HKE's case

11 HKE did not deny having entered into the Naptha Transaction, but it disagreed that the terms of the Naptha Agreement are contained in the Written Contract. HKE's case was that the terms of the Naptha Agreement are found in a deal recap between HKE and NWC circulated on 19 December 2022 ("the 19 Dec Deal Recap"), with the terms relating to delivery/laycan period, quantity and pricing subsequently varied on 3 March 2023 following an in-person meeting and discussion between the parties.[14] HKE averred that the Written Contract, which had been sent by NWC to HKE and which HKE never signed or responded to (see also [6] above), was one instance of NWC's several attempts to vary the terms of the Naptha Agreement unilaterally.[15] The 19 Dec Deal Recap contains no equivalent of the "Law and Jurisdiction" clause found in the written contract, and simply stated "English Law/Singapore Arb" under the "Law and Arbitration" section. It was not in dispute that this meant that the Naptha Agreement was governed by English law and disputes therefrom were to be resolved by way of arbitration seated in Singapore.[16]

12 HKE did not dispute that no light Naptha crude had been delivered to NWC under the Naptha Transaction, but it averred that this was a result of NWC's own breach of the payment terms under the Naptha Agreement. Those

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13 SOC at para 16.

14 2nd Affidavit of Morteza Morsali ("2MM") at paras 30, 33–34.

15 2MM at para 35.

16 2MM at para 43 and p 86.

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terms were set out in the 19 Dec Deal Recap, and it stated that NWC was to make payment by way of an assignment of proceeds ("AOP") issued by Standard Chartered Bank ("SCB").[17] However, sometime in March 2023, NWC informed that it would only be able to procure an AOP issued by CIMB Bank ("CIMB"), and not SCB as agreed. This variation, however, was not accepted by Emirates National Petroleum Company ("ENPC"), the seller from which HKE was to purchase the light Naptha crude in fulfilment of the Naptha Agreement, and HKE therefore could not agree to the variation.[18] Therefore, while HKE had been ready to load the Naptha cargo for delivery, it was unable to do so in the absence of an acceptable AOP.[19] HKE therefore treated the Naptha Agreement as repudiated and decided to turn to NWC for the damages and losses that it would suffer as a result of the Naptha Transaction not going through, and it therefore also viewed NWC's request for return of the deposit paid in connection with the Naptha Transaction as unjustified.[20]

13 As for the Gasoil Transaction, there was no dispute between the parties as to where its terms were contained – both HKE and NWC exhibited the same document as evidence of the Gasoil Agreement.[21] However, HKE pointed out that the Gasoil Agreement in fact provided for NWC to make two tranches of payments, before HKE is contractually obliged to deliver the Gasoil cargo: (a) a first tranche of US$750,000 as a deposit; and (b) a subsequent sum of US$2.5m as prepayment for the Gasoil cargo.[22] HKE however only received

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17 2MM at para 26.

18 2MM at para 38.

19 2MM at para 39.

20 2MM at para 42.

21 SOC at Appendix D; 2MM at pp 326–330.

22 2MM at para 45.

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payment from NWC for the first tranche of US$750,000, but never received payment of the balance US$2.5m. Accordingly, NWC was in repudiatory breach of the Gasoil Agreement and HKE came under no obligation to deliver the Gasoil cargo to NWC.[23] HKE further averred that it was entitled to refuse NWC's request for a refund of its deposit, and that it was entitled to hold on to the deposit given the damages and likely losses that it would suffer as a result of NWC's breach of the Gasoil Agreement. These losses arose from the contracts that HKE had entered into to purchase Gasoil for delivery under the Gasoil Agreement to NWC.[24]

14 NWC obviously disputed the rather different account put forward by HKE, and HKE subsequently also filed an affidavit in response, refuting NWC's reply. I will come to these conflicting accounts later where they are relevant to the issues in SUM 2812 (see [64]–[65] below).

Procedural history leading up to SUM 2812

15 The Originating Claim and the SOC in OC 295 ("the Cause Papers") were filed on 15 May 2023. On 2 June 2023, NWC filed a Memorandum of Service, stating that the defendant had been served with the Cause Papers on 2 June 2023 by way of (a) copies of the same left at HKE's last known office address in Kowloon, Hong Kong ("the Kowloon Address") and (b) registered post to the Kowloon Address and "pursuant to Order 8 Rule 1(3) of the Rules of Court 2021".

16 On 5 June 2023, NWC's counsel sent a copy of the Originating Claim to two officers of HKE, informing them that NWC had commenced legal

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23 2MM at para 49.

24 2MM at para 50.

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proceedings against HKE and advised HKE to take legal advice from Singapore lawyers.[25] HKE claimed that this was the first time it had notice of OC 295, and it alleged that it was unknown whether OC 295 had indeed been served at the Kowloon Address, and even if service had taken place, it was in any event not brought to HKE's attention.[26] According to NWC, on 12 June 2023, HKE responded to NWC's solicitors by e-mail, asking for amicable resolution of the dispute.[27] It did not appear that anything negotiation or settlement transpired out of this.

17 On 26 June 2023, NWC filed an application for judgment in view of HKE's failure to file a notice of intention to contest within the 21-day timeline provided for in O 6 r 6(2) of the ROC 2021. The Registry reviewed the application and sought clarifications from NWC's counsel on whether approval of court was required for service of the Cause Papers out of jurisdiction.[28] In their response, NWC's counsel cited the Law and Jurisdiction clause in the Written Contract (see [7] above) and stated that no such approval of court was required in view of that clause.[29] The application for default judgment was subsequently approved by the Registry.

18 HKE appointed solicitors in OC 295 on 18 July 2023.[30] The next day, HKE's solicitors filed a Request for Permission to file an application for an extension of time to set aside JUD 252. The court granted permission and that

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25 1st Affidavit of Morteza Morsali ("1MM") at para 7.

26 1MM at para 8.

27 2nd Affidavit of Tan Kok Loon Jason ("2TKL") at para 14(d).

28 2MM at para 12(a).

29 2MM at paras 12(b)–12(e).

30 1MM at para 15.

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directed that HKE file the intended application by 21 July 2023.[31] The application for extension of time in HC/SUM 2183/2023 was filed on 20 July 2023,[32] and in the event it was granted by the court, pursuant to which HKE filed SUM 2812.

The applicable principles

19 The setting aside of a default judgment – a judgment entered into on account of the defendant's non-compliance with procedural rules (see *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR(R) 907 ("*Mercurine*") at [43]) – entails an exercise of the court's discretionary powers. The principle underlying this discretionary power is that, unless and until the court has pronounced a judgment upon the merits or by consent of the parties, it is to have the power to revoke the expression of its coercive power where that has been only obtained by a failure to follow any of the rules of procedure (see *Evans v Bartlam* [1937] AC 473 at 480, cited in *Lim Quee Choo (suing as co-administratrix of the estate of Koh Jit Meng) and another v David Rasif and another* [2008] SGHC 36 at [60]).

20 As the Court of Appeal explained in *Mercurine* (at [43]), the case law draws a distinction between (a) *regular* default judgments which have been properly entered into and (b) *irregular* default judgments which have been entered into by a claimant who had itself been in breach of procedural rules. This distinction reflects the court's concern with the *reasons* for the defendant's setting-aside application, which would affect the factors relevant to the exercise

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31 Defendant's written submissions ("DWS") at para 14(d).

32 DWS at para 14(f)–14(g).

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of its discretionary powers and the approach to be taken in determining if the default judgment was to be set aside (see also *Mercurine* at [43]).

21 In the Rules of Court (2014 Rev Ed) ("ROC 2014"), the relevant Orders relating to judgments in default of appearance or default of pleadings (see O 13 and O 19) each contain a rule stating that the court may "set aside or vary any judgment entered in pursuance of this Order" (see O 13 r 8 and O 19 r 9). The ROC 2021 is slightly different in that, instead of a similar rule specified in connection with each type of default judgment that can be obtained by a claimant under O 6 rr 6, 7 and 9, the power of the court to set aside any such default judgment obtained by the claimant is now expressed in O 3 r 2(8), which is a general provision intended to emphasise the "far-ranging inherent jurisdiction of the court" to set aside its judgments or orders obtained in specified circumstances, so long as doing so was in the interests of justice (see also *Singapore Civil Procedure 2022* vol I (Cavinder Bull SC gen ed) (Sweet & Maxwell, 2022) at para 3/2/8). Order 3 r 2(8) of the ROC 2021 states:

> The Court may, on its own accord or upon application, if it is in the interests of justice, revoke any judgment or order obtained or set aside anything which was done —
>
> (*a*) without notice to, or in the absence of, the party affected;
>
> (*b*) without complying with these Rules or any order of Court;
>
> (*c*) contrary to any written law; or
>
> (*d*) by fraud or misrepresentation.

22 It goes without saying that the distinction between regular and irregular default judgments continues to be relevant under the ROC 2021. Although O 3 r 2(8) specifies a list of circumstances in which the court's judgments or orders (which would include a default judgment) may be set aside, as a provision giving expression to the court's inherent jurisdiction, it is obviously not the

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intention of O 3 r 2(8) to delineate or circumscribe the circumstances in which that inherent jurisdiction may be exercised. The court's discretionary powers to set aside a default judgment stem from its inherent jurisdiction (see [19] above), and how those discretionary powers are to be exercised would depend on the application of established common law principles, namely, whether the default judgment in question is regular or irregular (see [20] above). In any case, I add that the setting aside of an irregular default judgment comes within O 3 r 2(8)(*b*) (since such a judgment would be one obtained by the plaintiff without compliance with the Rules) while the setting aside of a regular default judgment comes within O 3 r 2(8)(*a*) (since any default judgment obtained under O 6 rr 6, 7 or 9 of the ROC 2021 would necessarily have been obtained in the absence of the defendant). I further add that the provision in O 3 r 2(8) that a judgment or order be set aside if it is "in the interests of justice" does not, in my view, add new substantive criteria that the court has to consider in determining whether a default judgment is to be set aside. It is trite that the rules of procedure – of which the court's discretionary powers to set aside a default judgment and the distinction between regular and irregular default judgments form part – ultimately exist to serve the ultimate and overriding objective of substantive justice (see *Mercurine* at [99], citing *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537 at [82]), and the words "in the interests of justice" in O 3 r 2(8) merely gives expression to this.

23 Where the case concerns a *regular* default judgment, the legal burden is on the defendant to establish a *prima facie* defence in the sense of showing that there are triable or arguable issues (see *Mercurine* at [60]). The merits of the defence, while a highly significant consideration in its own right, is not the sole consideration that the court takes into account in deciding whether to set aside a regular default judgment, and it is to be balanced against all other relevant

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considerations, such as the defendant's explanation for the default and for any delay in pursuing the setting-aside application, as well as any prejudice caused to the other party (see *Mercurine* at [65]).

24 Where the case concerns an *irregular* default judgment, the starting point is that the default judgment is to be set aside pursuant to an application of the *ex debtio justitiae* rule, which provides for the defendant's entitlement to set aside an irregular default judgment as of right (see *Mercurine* at [67] and [76]). The legal burden is then on the claimant to persuade the court that the *ex debtio justitiae* rule should not be applied, with the consequence that the starting point is departed from (see *Mercurine* at [98]). The key question for the court, when deciding whether to adhere to or depart from the *ex debtio justitiae* rule, is whether there has been such an egregious breach of the rules of procedural justice, and in connection with which the following factors are relevant: (a) the blameworthiness of the respective parties – the nature of the irregularity, whether the breach of procedural rules by the claimant had been committed in bad faith and/or whether there was undue delay by the defendant in filing the setting-aside application; (b) whether the defendant had taken a fresh step in the proceedings after becoming aware of the irregular default judgment; and (c) whether the defendant would be unduly prejudiced if the irregular default judgment was allowed to stand (see *Mercurine* at [76] and [96]).

25 If the court concludes that the breach of the rules of procedural justice is not of such an egregious nature that warrants the default judgment being set aside as of right, the court goes on to consider whether there is nonetheless some other basis, apart from the *ex debtio justitae* rule, pursuant to which the irregular default judgment may be set aside (see *Mercurine* at [77]). Similarly, the legal burden to persuade the court that some other basis for setting aside exists, apart from the *ex debtio justitiae* rule, falls on the claimant (see *Mercurine* at [92]).

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At this juncture, one of the most crucial factors to be considered is the merits of the defence, and it is for the claimant to show that the defendant is "bound to fail" even if the irregular default judgment were set aside and the matter re-litigated (see *Mercurine* at [92] and [96]). The Court of Appeal in *Mercurine* also emphasised two points that are relevant in this analysis: (a) first, the threshold of "bound to fail" is obviously distinct from the test of showing a triable issue or a *prima facie* defence; (b) secondly, the court must take a nuanced approach when applying the "bound to fail" test and have regard to the nature of the irregularity and the overall justice of the case, and in particular, avoid an outcome where the claimant is allowed to take advantage of its own non-compliance with the procedural rules (see *Mercurine* at [90]).

The submissions

26 I now turn to the parties' submissions. HKE argued that JUD 252 is irregular because NWC failed to obtain the requisite approval of the court pursuant to O 8 r 1(2) of the ROC 2021 before serving the Cause Papers on HKE in Hong Kong:[33]

> (a) In so far as the claims under the Naptha Agreement were concerned, the operative agreement is set out, not in the Written Contract, but in the terms of the 19 Dec Deal Recap and the subsequent variations made on 3 March 2023 (collectively referred to as "the Recap Terms") (see also [11] above).[34] Nothing in the Recap Terms allow for the service of originating process out of Singapore. Order 8 r 1(3) of the ROC 2021, which provided that no such approval needs to be obtained if the parties' contract allowed for "service out of Singapore", was

[33] DWS at para 45.

[34] DWS at para 54.

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therefore inapplicable, and NWC had to obtain the approval of court before serving the Cause Papers on HKE in Hong Kong.

(b) In any event, even if the operative terms of the Naptha Agreement were those set out in the Written Contract, the Law and Jurisdiction clause cannot be construed as a contract that allowed for "service out of Singapore" coming within O 8 r 1(3).[35] The Law and Jurisdiction clause, which provided for "service of process by registered mail", only states the *method* by which service of originating process may be effected, but is silent on *where* such service may be effected, such as a location like Hong Kong or any location outside of Singapore.[36]

(c) In so far as the claims under the Gasoil Agreement were concerned, there is no provision whatsoever relating to the service of originating process out of Singapore, and NWC ought also to have obtained the approval of court pursuant to O 8 r 1(2) before serving the Cause Papers on HKE in Hong Kong.

(d) Accordingly, for both sets of claims under the Naptha Agreement and the Gasoil Agreement, the service of the Cause Papers on HKE in Hong Kong was improper, and hence JUD 252 is irregular.

27 JUD 252 therefore attracted the *ex debtio justitiae* rule, which should not be departed from, because there had been an egregious breach of the rules of procedural justice, in view of the following: (a) NWC's failure to obtain approval of court pursuant to O 8 r 1(2) prior to service of the Cause Papers on HKE in Hong Kong, which meant that NWC had obtained JUD 252

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35 DWS at paras 57–58.

36 DWS at para 61.

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prematurely; (b) HKE did not take fresh steps in OC 295 after becoming aware of JUD 252, and it also promptly took the necessary steps to set aside JUD 252 and so there was no undue delay; and (c) in its application to obtain JUD 252, NWC had referred to the Law and Jurisdiction clause in the Written Contract to justify that the Cause Papers were properly served on HKE, but yet it now conceded that there was no "single contract" for both the Naptha Transaction and the Gasoil Transaction.[37] In any event, HKE argued that it has a sufficient case on the merits, and so it was not "bound to fail" if the matter were re-litigated, and in any event it has a *prima facie* defence to NWC's claims in OC 295.[38]

28 NWC argued that the part of JUD 252 relating to the claims under the Naptha Agreement is regular because the Written Contract, which provided for service on HKE out of Singapore by virtue of the Law and Jurisdiction clause, was the operative contract for the Naptha Agreement.[39] NWC however accepted that the part of JUD 252 relating to the claims under the Gasoil Agreement is irregular, because the Gasoil Agreement makes no provision whatsoever for the service of originating process out of Singapore and consequently the service of the Cause Papers on HKE in Hong Kong had been improper, in so far as the claims under the Gasoil Agreement were concerned.[40] However, the *ex debtio justitiae* rule should be departed from as there had been no egregious breach of procedure on NWC's part.[41] In any event, HKE's defences to both claims under the Naptha Agreement and the Gasoil Agreement are so unmeritorious that they

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37 DWS at para 64.

38 DWS at para 66.

39 Claimant's written submissions ("CWS") at para 26.

40 CWS at para 27.

41 CWS at para 30.

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were "bound to fail" and so there would have been no ground for setting aside even if the entirety of JUD 252 were irregular.[42] Although NWC did not state so expressly, it would follow from this that it was also its position that HKE failed to demonstrate a *prima facie* defence, and so there was no ground for setting aside, even if the part of JUD 252 relating to the claims under the Naptha Agreement were a regular default judgment.

The issues

29 Before setting out the issues, I make three observations. First, I considered it appropriate in this case to regard the part of JUD 252 relating to NWC's claims under the Naptha Agreement ("the Naptha JUD") as being separate from the part of JUD 252 relating to NWC's claims under the Gasoil Agreement ("the Gaosoil JUD"), so that the setting aside of each of those parts of JUD 252 was considered separately. As the High Court held in *Powercom Yuraku Pte Ltd v Sunpower Semiconductor Ltd and others* [2023] 4 SLR 867 ("*Powercom Yuraku*") (at [15]) in the context of a default judgment obtained under the ROC 2014, the court possesses the discretion to set aside a default judgment only in part, rather than wholly, because among other things, the relevant rule on setting aside in the ROC 2014 was drafted in broad terms and allowed the court to "set aside *or vary any judgment*" [emphasis in original]. Although O 3 r 2(8) is worded in different terms from its equivalents in the ROC 2014, given its broad language (see [21] above), it is not inconsistent with, and suggests that the court continues to enjoy, a discretion to set aside a default judgment wholly or in part.

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42 CWS at paras 37 and 45.

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30 In my view, it was justified to view the Gasoil JUD and the Naptha JUD as separate for the following reasons: (a) first, the Gasoil JUD is undisputedly an irregular default judgment (see [28] above), unlike the Naptha JUD, the regularity of which turned on whether the operative contract for the Naptha Agreement contained a contract that allowed for "service out of Singapore" coming within O 8 r 1(3); and (b) secondly, the transactions to which the claims under the Naptha Agreement and the Gasoil Agreement respectively relate are separate and distinct and each involve an independent factual matrix (see [6] and [9] above), and so matters relating to the merits of HKE's defences in respect of each of those claims, which may be relevant in the determination of whether JUD 252 is to be set aside, have to be analysed separately, and it was consistent with that for the Gasoil JUD and the Naptha JUD to be dealt with separately.

31 Secondly, I noted that the only dispute raised by HKE in challenging JUD 252 is that NWC failed to obtain approval of court pursuant to O 8 r 1(2) of the ROC 2021 before serving the Cause Papers on HKE in Hong Kong. HKE did not dispute that service of the Cause Papers on HKE by way of registered post at the Kowloon Address was an effective method of service. Thus, the question of whether HKE had been properly served with the originating process in OC 295 only raised the issue of whether NWC's failure to obtain approval of court for service out of Singapore pursuant to O 8 r 1(2) of the ROC 2021 had rendered service of originating process improper. This issue only had to be considered with respect to the Naptha JUD, to which the Law and Jurisdiction clause in the Written Contract was relevant. In respect of the Gasoil JUD, service is undisputedly improper given NWC's acceptance that the Gasoil Agreement – the terms of which the parties were in agreement on (see [13] above) – contained no provision whatsoever relating to the service of processes

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for legal proceedings. For completeness, I noted that, although HKE appears to have alleged that the service of the Cause Papers by registered post at the Kowloon Address did not bring OC 295 to its attention (see [16] above), this was not a ground that HKE relied on in SUM 2812 in arguing that there was improper service that rendered the Naptha JUD irregular and therefore did not arise for consideration.

32 Finally, there was in my view also a threshold issue as to whether the Recap Terms, on which HKE relied primarily in challenging the Naptha JUD (see [11] and [26(a)] above), was relevant in determining whether the Naptha JUD is a regular or an irregular default judgment. In so far as HKE contended that the Law and Jurisdiction clause does not constitute a contract that allowed for service out of Singapore coming within O 8 r 1(3) of the ROC 2021 and therefore the Naptha JUD is irregularly obtained, that contention raises no difficulty because it is simply a matter of assessing whether NWC had been entitled to obtain the Naptha JUD in view of the materials that it had relied on when applying for the Naptha JUD. However, to the extent that HKE contended that the Naptha JUD is irregular because the operative contract between the parties is found in the Recap Terms and not the Written Contract and so for that reason there was no contract between the parties that allowed for service out of Singapore, this raised some difficulty because NWC did not rely on the Recap Terms in applying for JUD 252. Can the court even consider the Recap Terms, which NWC had not relied on in obtaining JUD 252, in determining if the Naptha JUD is regular or irregular?

33 Accordingly, the following issues arose for determination in SUM 2812:

(a) Whether the Recap Terms were relevant in determining if the Naptha JUD is regular or irregular?

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(b) If not, whether the Law and Jurisdiction clause in the Written Contract constitutes a contract that allowed for "service out of Singapore" coming within O 8 r 1(3) of the ROC 2021, and in view of this, whether the Naptha JUD is regular or irregular?

(c) If both the Naptha JUD and the Gasoil JUD are irregular default judgments, whether (i) the *ex debtio justitiae* rule should be adhered to and the default judgments be set aside as of right; or (ii) if not, whether there was nevertheless some other ground for the default judgments to be set aside, and in particular, whether HKE's defence to NWC's claims under the Naptha Agreement and the Gasoil Agreement were "bound to fail"?

(d) If the Naptha JUD was a regular default judgment, whether (i) HKE has shown a *prima facie* defence to NWC's claims under the Naptha Transaction; and (ii) if so, whether the Naptha JUD should be set aside in the circumstances of this case?

Whether the Recap Terms were relevant in determining if the Naptha JUD is regular or irregular

34 As the Court of Appeal explained in *Mercurine* ([19] above) (at [74]–[77] and [96]), in the context of irregular default judgments, the *ex debtio justitiae* rule operates as the starting point, and the questions to be asked by a court are: (a) whether the *ex debtio justitiae* rule should be adhered to or departed from; and (b) if the *ex debtio justitiae* rule is to be departed from, whether there is nonetheless some other sufficient reason which justifies the setting aside of the default judgment, one of which is that the defendant's defence on the merits is "bound to fail". The claimant seeking for the irregular

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default judgment to be upheld bears the legal burden in respect of the latter two questions, as the Court of Appeal explained in *Mercurine* (at [98]):

> The defendant's setting-aside application will ordinarily be dismissed only if the plaintiff manages to convince the court *both* that, first, the *ex debtio justitiae* rule should not be followed *and*, second, the defence is bound to fail. In other words … where the defendant seeks to set aside an *irregular* default judgment, it is for the *plaintiff* to show (after it has successfully persuaded the court that the *ex debtio justitiae* rule should not be applied) the lack of merit in the defence – based on the '*bound to lose*' test – for the purposes of countering the defendant's setting-aside application.
>
> [emphasis in original]

35 The defendant's burden in an application to set aside an irregular default judgment therefore only requires it to establish that the case is one in which the *ex debtio justitiae* rule ought to operate. The operation of the *ex debtio justitiae* rule, which provides for a defendant's entitlement to set aside an irregular default judgment *as of right*, turns solely on whether there had been an *irregularity* in the default judgment (see *Mercurine* at [71]). This requires an assessment of whether the default judgment in question had been obtained in compliance with or in breach of the relevant procedural rules. To this end, the overarching question is whether the claimant had been procedurally entitled to the default judgment at the material time, in view of the procedural grounds on which it relied in obtaining the default judgment. How this question is answered operates as the dividing line between a regular and an irregular default judgment. As explained in B C Cairns, *Australian Civil Procedure* (9th Ed, Lawbook Co, 2011) (at para 12.290):

> For a default judgment to be regular it must strictly comply with the rules and be for the relief to which the plaintiff is entitled on the pleading. The record must show the plaintiff to have a right to the judgment, and the judgment entered must follow the relief claimed. If these requirements are not met the judgment is irregular and it will be set aside. … Apart from this,

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> the court record must show that all the necessary interlocutory steps were properly followed in entering the judgment.

36 That the question of whether a default judgment is regular or irregular turns solely on whether the claimant had been procedurally entitled to the default judgment at the material time, has some significance on the scope of matters that can be relevant where a defendant seeks to challenge a default judgment as being irregular. First, the focus of the defendant's challenge ought to be based on the procedural grounds that the claimant had relied on in obtaining the default judgment and whether those grounds were satisfied at the material time when the default judgment had been applied for. In discharging its legal burden, the defendant need not delve into the merits of its defence and why the claimant is substantively not entitled to the judgment sought, unlike the case involving a regular default judgment.

37 Secondly, and following from the first point, what is of most immediate relevance to a defendant in demonstrating that the claimant had not been procedurally entitled to the default judgment at the time of obtaining the same, ought to be the material and grounds that the claimant had relied on when applying for the default judgment. At the time when the application for default judgment is made, the court determines if the default judgment should be granted by reference to the materials and grounds on which the claimant relies in support of the application. Where the regularity of the default judgment subsequently comes under challenge and the procedural entitlement of the claimant to the default judgment comes under scrutiny, the question being asked is whether the claimant was procedurally entitled to the default judgment in view of the materials and grounds that the claimant had relied on; the court does not consider *afresh* the question of whether the application for default judgment ought to have been granted in the first place.

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38 With these principles in mind, I considered whether the Recap Terms were relevant in determining the Naptha JUD is regular or irregular. In this case, JUD 252 was obtained pursuant to O 6 r 6 of the ROC 2021. Reading O 6 r 6 as a whole, there are the following procedural requirements to be be satisfied, before a claimant can come to be entitled to a default judgment pursuant to that rule: (a) the defendant must have been "served" an originating claim, whether "in Singapore" or "out of Singapore"; (b) the defendant failed to file and serve a notice of intention to contest or not contest within the relevant prescribed time (14 days or 21 days, depending on whether the defendant was served within or out of Singapore); and (c) the application for default judgment is made in the prescribed form and accompanied by a Memorandum of Service filed by the claimant. Whether NWC was procedurally entitled to JUD 252 (and more specifically the Naptha JUD) turns on whether the threefold procedural requirements of O 6 r 6 have been satisfied. According to the Memorandum of Service dated 2 June 2023, HKE was served with the Cause Papers by way of registered post at the Kowloon Address on 2 June 2023. The application for JUD 252 was filed on 26 June 2023, and by that time, no notice of intention to contest or not contest had been filed by HKE. For these reasons, it is not in dispute that the requirements in (b) and (c), when considered in isolation from the issue of whether that had been proper service of originating process, are satisfied.

39 The only issue is whether the requirement in (a) has been satisfied – that is, whether HKE has been properly served the originating process in OC 295. This issue is to be assessed with reference to the materials and grounds that NWC had relied on when it applied for JUD 252. NWC did not rely on the Recap Terms in applying for JUD 252; it relied solely on the Written Contract and in particular that the Written Contract contained the Law and Jurisdiction

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clause which permitted for service of the Cause Papers on HKE in Hong Kong by way of registered post. The Recap Terms, which did not form part of the grounds and materials that NWC had relied on in applying for JUD 252, were therefore not relevant in determining whether the Naptha JUD is a regular or an irregular default judgment. The question of whether HKE had been properly served the originating process in OC 295 therefore turned solely on whether the Law and Jurisdiction clause in the Written Contract constitutes a contract which allowed for "service out of Singapore" coming within O 8 r 1(3) and thus rendered it unnecessary for NWC to obtain approval of court before serving the Cause Papers on HKE, in so far as the claims under the Naptha Agreement were concerned. It is to this issue that I next turn.

Whether the Law and Jurisdiction clause constitutes a contract that allowed for service of originating process out of Singapore without prior approval of court

40 For ease of reference, I reproduce here the Law and Jurisdiction clause of the Written Contract:

> This Agreement shall be governed by and construed in accordance with the English law. Any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, *shall be referred to and finally resolved by Singapore court [sic] without recourse to arbitration and to service of process by registered mail. …*
>
> [emphasis added]

41 Despite the rather clunky language of the words in italics, the parties were not in dispute that the *literal* meaning (in contradistinction with its legal effect, a matter which was disputed) of the Law and Jurisdiction clause is an *agreement* between the parties to the Written Contract for service of originating process on either party to the contract by registered post. To reiterate, the material question is whether this part of the Written Contract gives rise to a

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"contract between the parties" that allowed for "service out of Singapore" within the meaning of O 8 r 1(3) of the ROC 2021, so that no prior approval of the court was required for NWC to serve originating process in OC 295 on HKE in Hong Kong.

42 The main argument made by HKE's counsel was that the Law and Jurisdiction clause is deficient and does not give rise to an agreement coming within O 8 r 1(3) because it only provides for a *method* of service but does not specify *where* originating process was to be served, namely, that such service could take place outside of Singapore. Counsel argued that, for an agreement to give rise to a contract that allowed for service out of jurisdiction coming within the scope of O 8 r 1(3), it must have some minimum content, and O 10 r 3 of the ROC 2014, which sets out one of four methods of service provided for under the ROC 2014, was instructive. Order 10 r 3 states:

> 3.—(1) Where —
>
> > (*a*) a contract contains a term to the effect that the Court shall have jurisdiction to hear and determine any action in respect of a contract or, apart from any such term, the Court has jurisdiction to hear and determine any such action; and
> >
> > (*b*) the contract provides that, in the event of any action in respect of the contract being begun, the process by which it is begun may be served on the defendant, or on such other person on his behalf as may be specified in the contract, *in such manner or at such place (whether within or out of the jurisdiction),* as may be so specified, then if an action in respect of the contract is begun in the Court and the writ by which it is begun is served in accordance with the contract the writ shall, subject to paragraph (2), be deemed to have been duly served on the defendant.
>
> [emphasis added]

43 Placing emphasis on the italicised words, counsel argued that any contract that allowed for "service out of Singapore" coming within O 8 r 1(3)

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of the ROC 2021 must state, not only the *manner* or *method* of service (on which count the Law and Jurisdiction clause was not deficient) but also the *place* at which such service was to be effected (which the Law and Jurisdiction clause did not specify). Counsel argued that, notwithstanding the absence of an equivalent of O 10 r 3 in the ROC 2021, that rule was nevertheless instructive in how O 8 r 1(3) should be interpreted. Counsel further emphasised that, since a plaintiff under the ROC 2014 had to obtain leave for service out of jurisdiction pursuant to O 11 even where there existed a contract coming within the scope of O 10 r 3, *a fortiori*, the requirements attaching to a "contract" coming within O 8 r 1(3) of the ROC 2021 cannot be any lesser than those imposed by O 10 r 3, as permission for service out of jurisdiction was no longer required under the ROC 2021 in a case to which O 8 r 1(3) applied.

44 At this juncture, I make two observations. First, O 10 r 3 of the ROC 2014 provides for a *method* of service. It is not a rule providing for service out of jurisdiction, which is contained in O 11 of the ROC 2014. The equivalent of O 10 r 3 in the ROC 2021 can be found at O 7 r 2(1)(*d*), which states that personal service may be effected "in any manner agreed with the person or the entity to be served". Order 7 r 2(1)(*d*) is less prescriptive than O 10 r 3 of the ROC 2014 and does not specify the matters which the parties must agree on, before it can constitute an agreement for service coming within the Rules of Court. Secondly, O 10 r 3 of the ROC 2014 was in any event not a comprehensive code on the form of agreements that parties could make with respect to service of process. As the High Court held in *Pacific Assets Management Ltd and others v Chen Lip Keong* [2006] 1 SLR(R) 658 (at [8]), apart from O 10 r 3, the parties could reach an agreement between themselves as to another mode of service of a writ outside of the Rules of Court. It would appear that O 7 r 2(1)(*d*) has been worded in recognition of the position at

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common law, and any *agreement* that the parties had reached with respect of service was recognised as an effective method of service, without having to come within certain confines of the Rules of Court or contain particular terms.

45 At the outset, let me also state that I disagreed with counsel that only an agreement specifying the *method* of service and the *place* at which service was to be effected is capable of coming within O 8 r 1(3) of the ROC 2021. Such a narrow interpretation is contrary to the literal meaning of O 8 r 1(3). There is nothing in O 8 r 1(3) or indeed in the "Definitions" section in O 1 r 4 which suggests that a "contract" coming within O 8 r 1(3) must minimally provide for the *method* of service and the *place* at which service was to be effected. Crucially, O 8 r 1(3) uses the words "service ***out*** of Singapore" and not "service ***outside*** of Singapore" [emphasis added in bold italics]. This, as I explain later, is of some significance (see [53] below). In any case, affording such a narrow interpretation to O 8 r 1(3) would run contrary to what I have posited is the likely intent behind O 7 r 2(1)(*d*), which appears to have been worded in recognition of the position at common law that parties were free to agree on methods of service, and that such *agreed* methods were effective without having to come within the strict confines of the Rules of Court.

How should O 8 r 1(3) be interpreted?

46 I now turn to consider how O 8 r 1(3) proper. To facilitate the discussion that follows, I reproduce it in full:

> The Court's approval is not required if *service out of Singapore* is allowed under a contract between the parties.
>
> [emphasis added]

47 The critical question is what it means for a contract to allow for "service out of Singapore" within the meaning of O 8 r 1(3) of the ROC 2021. This is an

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exercise in the interpretation of a legislative provision like O 8 r 1(3), to which the following principles are relevant (see *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [37]):

> … the court's task when undertaking a purposive interpretation of a legislative provision involves three steps:
>
> (a) First, ascertain the possible interpretations of the provision, having regard not just to the text of the provision but also to the context of that provision within the written law as a whole.
>
> (b) Second, ascertain the legislative purpose or object of the statute.
>
> (c) Third, compare the possible interpretations of the text against the purposes or objects of the statute.

48 As a starting point in this exercise, I do not think the following can be disputed: (a) first, a contract allowing for "service out of Singapore" is a contract between the parties that provides for "service out of Singapore" or put another way, an agreement between the parties for "service out of Singapore"; and (b) secondly, having regard to O 8 r 1(1), "service" in O 8 r 1(3) must refer to the service of "[a]n originating process or other court document" issued by the Singapore courts. Therefore, the only remaining question is the meaning that is to be attached to the words "service *out of Singapore*" [emphasis added].

49 There were in my view two possible interpretations of "service out of Singapore". First, interpreting these words literally, it meant that an agreement could only come within O 8 r 1(3) if it expressly provided for the service of originating process at a location other than Singapore, whether by stating that: (a) originating process could be served at a *specified location* that is not Singapore; or (b) originating process could be served *outside* of Singapore but without specifying any such location at which it is to be served. Secondly, and in the alternative, an agreement could come within O 8 r 1(3) even if it did not

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expressly state that originating process could be served at a location other than Singapore or outside of Singapore, so long as the agreement is one for the service of originating process of the Singapore courts on a defendant who is not ordinarily located within Singapore (hereafter referred to as a "foreign defendant").

50 The relationship between jurisdiction and service of originating process sheds some light on the purpose and object of O 8 r 1(3) of the ROC 2021. I begin with two principles of trite law. First, the jurisdiction of the Singapore courts is *territorial* – the court has jurisdiction as of right over a defendant who is *within* Singapore, but jurisdiction over a foreign defendant is discretionary (see *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 ("*Zoom Communications*") at [26]). Secondly, the service of originating process operates as one of the main or primary avenues by which the civil jurisdiction of the Singapore courts can be established (see *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills and others* [2023] SGHC 149 at [25]). Section 16(1)(*a*) of the Supreme Court of Judicature Act 1966 (2020 Rev Ed) provides that the civil jurisdiction of the General Division of the High Court is founded over a defendant where the defendant is served with originating process in Singapore, or outside Singapore in the circumstances authorised by the Rules of Court. Order 8 r 1(1) of the ROC 2021 authorises the service of originating process out of Singapore only where approval of court has been obtained, in reflection of the principle that the jurisdiction of the Singapore courts over a foreign defendant, *ie*, a defendant that is located outside of Singapore, is discretionary. Thus, where a defendant is located outside of Singapore and thus beyond the territorial jurisdiction of the Singapore courts, the claimant has to seek approval of the court to serve originating process on the foreign defendant pursuant to O 8 r 1(2) of the ROC 2021, and the

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jurisdiction of the Singapore court over the foreign defendant is established only where originating process is validly served on the foreign defendant pursuant to the approval of the Singapore courts for service out of jurisdiction (see also *Zoom Communications* at [26]).

51 The purpose of O 8 r 1(3) is to render it unnecessary for the claimant to obtain approval of the court under O 8 r 1(2) for service of originating process on a foreign defendant. Having regard to the territorial nature of the Singapore courts' jurisdiction, the role of service of process in establishing the jurisdiction of the court over a defendant, and the fact that ordinarily, the originating process of the Singapore courts may only be validly served on a foreign defendant pursuant to the court's approval under O 8 r 1(2), it implies that what a foreign defendant must have agreed to as part of any contract allowing for "service out of Singapore" coming within O 8 r 1(3), is that the jurisdiction of the Singapore courts can be founded over him by way of service of originating process, notwithstanding him not being within the territorial jurisdiction of the Singapore courts. Because the foreign defendant had agreed that the jurisdiction of the Singapore courts could be established over him by the service of originating process, it is unnecessary for the claimant to go through the redundant step of obtaining the approval of the court to serve originating process on a foreign defendant, and this accordingly brings the case within O 8 r 1(3).

52 Having regard to the identified purpose of O 8 r 1(3) and the scenario which it is intended to capture, an agreement for "service out of Singapore" coming within that rule is one where a foreign defendant had agreed to the service of originating process of the Singapore courts on him, so that any service of originating process pursuant to the method contemplated by the agreement necessarily also meant service out of Singapore. What a foreign defendant must consent to – where the foreign defendant agrees for the jurisdiction of the

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Singapore courts to be founded over him by way of service of originating process – is the service of originating process of the Singapore courts on him, in his capacity as a foreign defendant, who is otherwise not within the territorial jurisdiction of the Singapore courts. It is not an essential part of such an agreement that he also consents to *where* the originating process of the Singapore courts is to be served. The second of the two possible interpretations of "service out of Singapore" (see [49] above) therefore achieves greater consistency with the purpose of O 8 r 1(3).

53 Further, the language of O 8 r 1(3) also supports the second of the two possible interpretations, and that it is not an essential part of an agreement coming within O 8 r 1(3) that a foreign defendant must also agree as to *where* the originating process of the Singapore courts is to be served. Order 8 r 1(3) uses the language service "out" of Singapore, and not service "outside" of Singapore. If the intention was for an agreement to come within O 8 r 1(3) only where it provided for service of process at a location other than Singapore, the word "outside" would have been used. The reference to "service out of Singapore" in O 8 r 1(3) is essentially a reference to the service of originating process of the Singapore courts on a foreign defendant as provided for in O 8 r 1(1), which ordinarily can only be performed where approval of court is obtained pursuant to O 8 r 1(2). Where O 8 r 1(3) applies because the foreign defendant agreed to "service out of Singapore", what the foreign defendant would have agreed to is the service of originating process of the Singapore courts on him, without the claimant having to obtain the prior approval of the court. As I have mentioned earlier, it is not an essential part of such an agreement that the foreign defendant also agrees on where he is to be served; the essence of the agreement is that the foreign defendant, in his capacity as a foreign defendant, agrees to be served the originating process of the Singapore

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courts, notwithstanding him not being within the territorial jurisdiction of the Singapore courts (see [52] above).

54 Additionally, in my view, the second of the two possible interpretations of "service out of Singapore" also achieves consistency with the Ideals of achieving "expeditious proceedings" and "efficient use of court resources" in O 3 r 1(2)(*b*) and O 3 r 1(2)(*d*) of the ROC 2021 ("the Identified Ideals"). Where O 8 r 1(3) applies, any service of originating process on the defendant would be effective to found the jurisdiction of the Singapore courts over him, even if no prior approval of the court under O 8 r 1(2) for service out of Singapore had been obtained. Therefore, it would not be open to a foreign defendant who was served pursuant to an agreement coming within O 8 r 1(3) to dispute the *existence* of the Singapore courts' jurisdiction over him, and he is only limited to challenging whether a Singapore court ought to *exercise* its jurisdiction over him on natural forum grounds (see *Singapore Rules of Court: A Practice Guide 2023 Edition* (Chua Lee Ming editor-in-chief) (Academy Publishing, 2023) at p 131; see also *Zoom Communications* at [27] and [34]). If the first of the two possible interpretations of "service out of Singapore" were adopted, and so an agreement coming within O 8 r 1(3) must specify the location at which originating process is to be served or that it be served outside of Singapore, it effectively allows the foreign defendant to resort to a play of words and technicalities in seeking to mount challenges to the existence of the Singapore courts' jurisdiction over him, even if the case on a whole can only be understood as one where the foreign defendant had agreed to the jurisdiction of the Singapore courts being founded over him by service of originating process. Such a result would be plainly inconsistent with the Identified Ideals as it protracts the proceedings and wastes court resources on apparently unmeritorious jurisdictional challenges. On the other hand, the second of the

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two possible interpretations would prevent the foreign defendant from mounting challenges against the *existence* of the Singapore courts' jurisdiction if he had agreed to the jurisdiction of the Singapore courts being founded over him by service of originating process, a result which is consistent with and furthers the Identified Ideals.

55 For the reasons above, in my view, a contract that allows for "service out of Singapore" coming within O 8 r 1(3) is simply an agreement for the service of originating process of the Singapore courts on a foreign defendant, *ie*, a defendant who is not ordinarily located within Singapore. Where this is the case, the defendant to be served is outside the territorial jurisdiction of the Singapore courts, and so any service of originating process on that defendant pursuant to the parties' agreement necessarily also meant service out of Singapore. For the agreement to come within O 8 r 1(3), it is not a requirement that it specifies that originating process of the Singapore courts is to be served at a location other than Singapore or outside of Singapore. Of course, if the parties to an agreement are ordinarily not within the territorial jurisdiction of the Singapore courts, and the agreement expressly provides that originating process could be served on either or both parties to the dispute at a location other than Singapore or outside Singapore, then the case unambiguously comes within O 8 r 1(3), but this ought *not* to be an essential requirement of an agreement coming within O 8 r 1(3).

Whether the Law and Jurisdiction clause gave rise to a contract that allowed for "service out of Singapore" coming within O 8 r 1(3)?

56 With the above in mind, I considered whether the Law and Jurisdiction clause gives rise to a contract that allowed for "service out of Singapore" coming within O 8 r 1(3). In my view, this had to be answered in the affirmative.

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57 Reading the Law and Jurisdiction clause in context with the remainder of the Written Contract, it could only be understood as one where HKE agreed to the service of originating process of the Singapore courts by the method specified in the Law and Jurisdiction clause, in its capacity as a foreign defendant. In other words, HKE agreed to the jurisdiction of the Singapore courts being founded over it by way of service of originating process pursuant to the mode specified in the Law and Jurisdiction clause, *ie*, registered post.

(a) Clauses 1 and 2 of the Written Contract record NWC and HKE respectively as the parties to the agreement, and in particular, it specifies the Kowloon Address as HKE's place of business. I should add that HKE did not in SUM 2812 dispute the Kowloon Address as being its address, and affidavits filed by HKE in support of SUM 2812 also identified the Kowloon Address as HKE's address.

(b) The Law and Jurisdiction clause provided that disputes arising from the Written Contract are to be resolved by the Singapore courts, and that parties agreed to "service of process by registered mail". Given the near-immediate reference to the Singapore courts, any reference to service of process must refer to the service of process *of the Singapore courts*.

(c) By agreeing to the *service of process by registered mail* notwithstanding it not being ordinarily resident or having a place of business within Singapore, a fact which is undisputed given clause 2 of the Written Contract (see [57(c)] above), HKE agreed to the service of originating process of the Singapore courts by registered post in its capacity as a foreign defendant. In other words, HKE agreed to the Singapore courts founding its jurisdiction over it by way of service of

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originating process by registered post, notwithstanding it not being within the territorial jurisdiction of the Singapore courts.

58 For these reasons, the Law and Jurisdiction clause constitutes a contract that allowed for "service out of Singapore" within O 8 r 1(3) of the ROC 2021 and so there was no need for NWC to obtain approval of the Singapore courts before serving originating process on HKE by registered post in respect of the claims arising under the Naptha Agreement. Accordingly, the service of the Cause Papers on HKE on 2 June 2023, in so far as the claims under the Naptha Agreement were concerned, is not improper. The Naptha JUD is therefore a regular default judgment.

Whether the Gasoil JUD is to be set aside as of right or on some other basis

59 With the above, the question of whether the *ex debtio justitiae* rule ought to be adhered to or departed from need only be considered in connection with the Gasoil JUD. The applicable principles on this question are set out by the Court of Appeal in *Mercurine* ([19] above) (at [76]):

> … In addressing this issue, the court should consider, *inter alia*:
>
> (a) the nature of the irregularity, in particular, whether it consists of:
>
> (i) entering a default judgment prematurely; or
>
> (ii) failing to give the defendant proper notice of the proceedings;
>
> (b) whether the defendant took a fresh step in the proceedings after becoming aware of the irregular default judgment
>
> (c) whether there was any undue delay by the defendant in filing its setting-aside application; and
>
> (d) where a judgment is irregular because of the plaintiff's breach of procedural rules (which would be the case for

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> the majority of irregular default judgments), whether the breach was committed in bad faith.

60 In my view, the *ex debtio justitiae* rule ought not be departed from for the Gasoil JUD, which ought to be set aside as of right. I arrived at this conclusion namely for two reasons.

61 First, and most significantly, the nature of the procedural irregularity in respect of the Gasoil JUD is *fundamental*. The jurisdiction of a court is its authority to hear and determine a dispute that is brought before it (see *Muhd Munir v Noor Hidah and other applications* [1990] 2 SLR(R) 348 at [19]). The Singapore court had *no* jurisdiction over HKE, in so far as the claims under the Gasoil Agreement were concerned, because NWC failed to obtain approval of court for service of originating process on HKE pursuant to O 8 r 1(2), and HKE, being a foreign defendant that is outside of the territorial jurisdiction of the Singapore courts, also did not agree to have the jurisdiction of the Singapore courts established over it by way of service of process. NWC had obtained the Gasoil JUD in circumstances where the Singapore courts' jurisdiction had not even been established over HKE in connection with the claims under the Gasoil JUD. This, in my view, constitutes one of those "plain instances of injustice that offend the essence of due process" (see *Mecurine* at [76]) in which a court would readily set aside the irregular default judgment.

62 Secondly, the circumstances of this case militated in favour of the court exercising its discretion in *adhering* to the *ex debtio justitiae* rule. There was no undue delay on HKE's part in taking steps to have JUD 252 set aside. After JUD 252 was obtained on 26 June 2023, HKE took no further steps in the Singapore proceedings, save for its appointment of solicitors on 18 July 2023 and the subsequent Request for Permission to file an application for extension of time made on 19 July 2023, which in the event was filed a day later on 20 July 2023.

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According to HKE, it was only notified of JUD 252 on 5 July 2023 after NWC wrote to it demanding payment of sums due under JUD 252.[43] This does not appear to have been disputed by NWC, but in any case, the period of time between 27 June 2023 and 19 July 2023 would not have amounted to "undue delay", and that is all the more so if I were to accept that HKE only became notified of JUD 252 on 5 July 2023. Furthermore, it is significant that NWC had proceeded to obtain the Gasoil JUD, despite being apparently aware that the materials it had relied on in obtaining the Gasoil JUD made no provision for service of originating process on HKE in Hong Kong without prior approval of the court under O 8 r 1(2) – the written version of the Gasoil Agreement exhibited in the SOC does not contain any provision relating to service of process for legal proceedings, and it is also not NWC's case in the SOC that the Written Contract applied in respect of the Gasoil Transaction. It would certainly be prejudicial to HKE if the Gasoil JUD were allowed to stand. For the avoidance of doubt, however, I do not make any finding on whether NWC's improper service of originating process on HKE in respect of the claims under the Gasoil Agreement had been committed in bad faith, a point which was not argued.

Whether the Naptha JUD is to be set aside on account of the merits of HKE's defence

63 I now turn to the question of whether the Naptha JUD, which is a regular default judgment, is to be set aside. In this analysis, the merits of HKE's defence was a highly significant factor, though it nevertheless had to be assessed and balanced against other relevant considerations (see *Mecurine* ([19] above) at [65]).

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[43] 1MM at para 10.

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64 On this issue, the differing accounts that the parties had proffered in respect of the Naptha Transaction had to be considered. As I have set out in the introduction of these grounds, NWC's case is that the terms of the Naptha Agreement are contained in the Written Contract (see [6] above). In its affidavit for SUM 2812, NWC further averred the following:

(a) While it did not dispute the existence of the 19 Dec Deal Recap, NWC stated that the terms of the parties' contractual relationship were eventually reduced in writing and culminated in the Written Contract. NWC accepted that the Written Contract had not been signed by either party in writing, but it attributes this to the fact that the communications between the parties took place mostly over phone or by WhatsApp messaging.[44]

(b) The date of delivery of the Naptha cargo and relevant payment terms were subsequently varied because of HKE's inability to deliver cargo of the required specification. The reason why no cargo was delivered is not because HKE had no security of payment, but because HKE was unable to provide cargo that met the required specification.[45]

(c) HKE had agreed over a telephone conversation on 10 March 2023 to a change of payment terms for the Naptha Agreement, namely that the issuer of the AOP be changed from SCB to CIMB.[46] Neither was NWC aware of nor did HKE ever mention the fact that the AOP had to be on terms acceptable to HKE's supplier, ENPC.[47] NWC claimed that

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44 2TKL affidavit at para 7.

45 2TKL affidavit at paras 9, 11 and 23.

46 2TKL affidavit at para 19.

47 2TKL affidavit at para 19(d).

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HKE was using the change in payment terms as an excuse for HKE's own failure to deliver the cargo.[48]

(d) From the outset, HKE was aware that NWC had entered into the Naptha Transaction to procure cargo to fulfil NWC's contract with PTT.[49] On the other hand, NWC was not aware of the identity of the supplier that HKE was to obtain the cargo from, as it was irrelevant to NWC so long as the source was legitimate.[50]

65 On the other hand, HKE's case is that the terms of the Naptha Agreement are contained in the Recap Terms (see [11] and [26(a)] above). In affidavits filed for SUM 2812, HKC further averred the following:

(a) The Written Contract sent over by NWC to HKE on 3 March 2023, which HKE never responded to or acknowledged, was one of the several attempts that NWC had made to unilaterally vary the terms of the Naptha Agreement.[51]

(b) HKE disputed NWC's account that it (HKE) had failed to deliver cargo of the required contractual specification. The contemporaneous documents showed the cargo which HKE had procured was within the required contractual specifications, and which NWC also acknowledged at the material time.[52] HKE had also made arrangements for the charter

48 2TKL affidavit at para 19(c).

49 2TKL affidavit at paras 16–17.

50 2TKL affidavit at para 18.

51 2MM at para 35.

52 3rd Affidavit of Morteza Morsali ("3MM") at paras 12 and 14.

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of a vessel for the cargo,[53] which NWC disputed.[54] The cargo had been ready for loading, but the parties could not proceed because NWC was unable to procure an AOP issued by SCB.[55] Because HKE had no security of payment, it could not proceed to load and deliver the cargo.[56]

(c) HKE never agreed with NWC for the payment terms of the Naptha Agreement to be varied, and in particular for the issuer of the AOP to be changed from SCB to CIMB. In fact, NWC was informed that HKE was not agreeable to the change, because ENPC rejected the change.[57] From the outset, NWC knew from the various discussions that took place between the parties that the payment terms for the Naptha Agreement had to be acceptable to ENPC.[58]

(d) HKE had not been aware that NWC had any end-buyers for the cargo such as PTT.[59] On the other hand, it appeared HKE's position was that NWC knew of the identity of HKE's supplier, *ie*, ENPC.[60] Finally, HKE also suffered losses as a result of NWC's breach, because it had made payments to ENPC for the supply of the cargo and for the charter of the vessel to carry the cargo.[61]

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53 2MM at para 32.

54 2TKL at para 21.

55 3MM at para 14.

56 2MM at para 39.

57 3MM at para 17.

58 3MM at para 18.

59 2MM at para 39; 3MM at para 21.

60 3MM at paras 17–18.

61 3MM at para 25.

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66 The parties' contrary accounts, which starkly contradict each other, raise obvious disputes of fact that can only be ventilated through a full fact-finding process at trial. There were at least four triable issues and in respect of each of them I was satisfied that HKE had shown a *prima facie* defence:

(a) First, whether the operative contract for the Naptha Agreement is contained in the Written Contract or the Recap Terms. Questions about the significance of HKE's lack of response to the Written Contract sent over by NWC on 3 March 2023 – whether it was because HKE did not accept the Written Contract, or because HKE had in fact acknowledged those terms, as NWC's counsel argued – can only be resolved with the benefit of fuller evidence at trial.

(b) Secondly, whether there had been an agreement between the parties for the payment terms of the Naptha Agreement to be varied, and in particular, for the issuer of the AOP to be varied from SCB to CIMB. NWC claimed that such an agreement was reached through a phone conversation between itself and HKE, while this was denied by HKE, which maintained that NWC knew at the outset from the parties' discussions that the issuer of the AOP had to be acceptable by HKE's supplier and that NWC was informed by HKE that the variation of the AOP issuer was unacceptable. Whether NWC's or HKE's account is true requires cross-examination of the relevant witness testimony and an examination of all other evidence.

(c) Thirdly, the reasons as to why the cargo was not delivered, and whether this was a result of NWC's breach or HKE's breach. In this regard, I found it significant that HKE was able to point to contemporaneous documentary evidence which showed that it had

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procured cargo within the required contractual specifications, and that it had entered into a charterparty for the delivery of cargo.[62]

(d) Fourthly, if HKE had been in breach, whether NWC was entitled to recover from HKE losses arising from NWC's failure to fulfil its contract with PTT. HKE's defence is that NWC never had any buyer for the cargo, and in any event, it was not aware of any such buyer NWC might have had. It also appeared from HKE's allegations that it had suffered losses arising from its own contract with ENPC and the charterparty it purportedly entered into to carry the cargo, and so HKE might even have counterclaims against NWC in respect of HKE's own losses arising out of the Naptha Agreement.

67 As it would be apparent from the above, I was satisfied that HKE had demonstrated a *prima facie* defence in respect of the entirety of NWC's claims under the Naptha Agreement. This, in my view, was a sufficient factor in and of itself to justify the court's exercise of discretion to set aside the Naptha JUD. I accept, of course, that HKE had been guilty of procedural default by failing to file its notice of intention to contest or not contest within the requisite timeline under O 6 r 6(2). It would however be disproportionate to the nature and gravity of this default to refuse to set aside the Naptha JUD when in fact HKE has an arguable defence to the entirety of the claims underlying the Naptha JUD, and the proper manner to account for HKE's procedural default was through the costs orders to be made in SUM 2812 (see [69(a)] below), to which I will come later.

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62 2MM at para 32(b); 3MM at para 14.

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Conclusion

68 For the reasons above, I allowed HKE's application to set aside the entirety of JUD 252. In respect of the Gasoil JUD, I found that it is an irregular default judgment that is to be set aside as of right. There had been an egregious breach of procedural justice because the improper service of originating process on HKE in respect of the claims under the Gasoil Agreement meant that the Gasoil JUD had been obtained without the Singapore courts' jurisdiction over HKE being established in the first place, in so far as those claims were concerned. As for the Naptha JUD, I found that it is a regular default judgment because the Written Contract, on which NWC relied in obtaining JUD 252, contained an agreement that allowed for "service out of Singapore" within O 8 r 1(3) of the ROC 2021 and so service of the Cause Papers on HKE by way of registered post in respect of the claims under the Naptha Agreement was effective to found the Singapore courts' jurisdiction over HKE. Nevertheless, I concluded that the Naptha JUD is to be set aside because HKE had shown a *prima facie* defence to the entirety of NWC's claims under the Naptha Agreement.

69 Turning now to the costs of SUM 2812, I noted the following guidance of the Court of Appeal in *Mecurine* ([19] above) (at [105]–[106]):

> (a) a defendant typically bears the costs of a setting-aside application where a regular default judgment is set aside on the ground that the defence had sufficient merit;
>
> (b) a claimant typically bears the costs for the application if it involved the setting aside of an irregular default judgment; and

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(c) the usual rule that costs follow the event should not be the starting point in an application to set aside an irregular default judgment, and even if a defendant fails to have an irregular default judgment set aside, it does not follow that the defendant ought to bear the costs of the application, and depending on the reasons for the irregularity, it may well be appropriate for the claimant instead to bear the costs of the setting aside application or for no costs orders to be made.

70 In this case, I found the Naptha JUD to be a regular default judgment but I set it aside on the ground of the merits of HKE's defence, and as for the Gasoil JUD, I found it to be an irregular default judgment. In view of the guidance of the Court of Appeal in *Mecurine*, and in the circumstances of this case, I considered it appropriate to make no order as to costs and for the parties to bear their own costs for SUM 2812. As it would have been apparent from the structure of these grounds, the majority of the arguments in SUM 2812 had been dedicated to issues arising from the Naptha JUD rather than the Gasoil JUD, and so any such costs that HKE would have been entitled to in respect of the setting aside of the Gasoil JUD would have been lower than those costs that it would have been liable to pay NWC in respect of the setting aside of the Naptha JUD. That being said, I did not consider this as justifying NWC to recover any costs in respect of the setting aside of the Naptha JUD because it would be rather contrary to common sense for NWC to be paid any costs for SUM 2812, which ultimately was an application that in large part had been necessitated by NWC's default of procedural rules in the first place.

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Perry Peh
Assistant Registrar

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