Mercurine Pte Ltd v Canberra Development Pte Ltd
[2008] SGCA 38

Case Number : CA 143/2007

Decision Date : 08 September 2008

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Christopher Chong and Kelvin Teo (Legal Solutions LLC) for the appellant; Harpreet Singh Nehal SC, Kelly Fan and Lin Yan Yan (Drew & Napier LLC) for the respondent

Parties : Mercurine Pte Ltd — Canberra Development Pte Ltd

Civil Procedure – Judgments and orders – Applicable tests on merits for setting aside regular and irregular default judgments

Civil Procedure – Judgments and orders – Power to amend irregular default judgment – Whether part of default judgment specifying excessive amount claimed could be amended instead of setting aside entire default judgment – Whether one part of irregular default judgment could be severed from another part

Civil Procedure – Judgments and orders – Relevance of delay in application to set aside default judgment

8 September 2008

V K Rajah JA (delivering the grounds of decision of the court):

Introduction

1 This appeal raised for consideration some important procedural issues relating to the appropriate legal tests to be applied in assessing whether to set aside a default judgment. It also posed squarely for determination the relevance of a delay in making an application to set aside such a judgment (referred to hereafter as a "setting-aside application").

2 The respondent, Canberra Development Pte Ltd ("Canberra"), owns Sun Plaza, a shopping mall at No 30 Sembawang Drive. The appellant, Mercurine Pte Ltd ("Mercurine"), claims to be the tenant of units #04-01 and #05-01 at Sun Plaza ("the Premises"), where it operates a six-screen cinema complex and concessionaire stands. Canberra is Mercurine's direct landlord in respect of the Premises.

3 Canberra commenced Suit No 861 of 2005 ("Suit 861") on 30 November 2005 claiming unpaid rent and vacant possession of the Premises. The writ was served on Mercurine on 1 December 2005. When Mercurine failed to enter an appearance by the deadline of 9 December 2005, Canberra entered default judgment against it on 9 January 2006 ("the Default Judgment"). Some fifteen months later, on 26 April 2007, Mercurine applied, via Summons No 1843 of 2007 ("SUM 1843"), to set aside the Default Judgment. This application was granted by Assistant Registrar Lim Jian Yi ("AR Lim") (see *Canberra Development Pte Ltd v Mercurine Pte Ltd* [2007] SGHC 107 ("the AR's Judgment")), but his decision was subsequently reversed by a judge ("the Judge") in *Canberra Development Pte Ltd v Mercurine Pte Ltd* [2008] 1 SLR 316 ("the Judge's Judgment") following Canberra's appeal. Mercurine then appealed to this court against the Judge's order reinstating the Default Judgment.

4 This court was asked to determine whether Mercurine was entitled to set aside the Default Judgment, taking into consideration:

(a) the regularity or otherwise of the Default Judgment;

(b) the merits of Mercurine's defence; and

(c) the reason for the long lapse of time between the entry of the Default Judgment and the filing of SUM 1843.

We were initially minded to allow the appeal in full. However, as two separate writ actions commenced by Mercurine against Canberra in connection with an inter-related dispute had already been set down for trial (see [15]–[16] below), the logical result – as we shall explain – was to make the setting aside of the Default Judgment contingent upon the outcome of the writ actions – *ie*, if Mercurine succeeds in those proceedings, the Default Judgment will be deemed to be set aside. We thus varied the Judge's orders rather than simply set aside the Default Judgment (see further [22] below). Before we give our reasons for this, we will first summarise the salient facts. We also set out below the outline of these grounds of decision so as to give an overview of the approach which we adopted in considering this appeal.

INTRODUCTION..... 1

THE FACTS..... 4

The parties..... 4

The dispute..... 5

Suit 861..... 6

Canberra's claim..... 6

Communications between the parties after the entry of the Default Judgment..... 7

Commencement of related proceedings by Mercurine..... 9

THE DECISIONS BELOW ON SUM 1843..... 11

AR Lim's decision..... 11

The Judge's decision..... 12

THE ISSUES ON APPEAL..... 13

OVERVIEW OF OUR DECISION..... 14

THE THRESHOLD ISSUE: WHETHER MERCURINE'S DELAY IN FILING SUM 1843 WAS REASONABLE..... 14

Actions taken by Mercurine before filing SUM 1843..... 14

The effects of delay on a setting-aside application..... 18

Whether there was undue delay on Mercurine's part..... 22

Summary of our ruling on the threshold issue of delay..... 25

THE LEGAL PRINCIPLES RELATING TO SETTING-ASIDE APPLICATIONS..... 25

Regular default judgments..... 26

The orthodox position..... 26

The decision in *The Saudi Eagle*..... 28

Criticisms of the *Saudi Eagle* test..... 32

The test presently applicable to the setting aside of regular default judgments..... 38

Irregular default judgments..... 42

Whether irregular default judgments must be set aside as of right. 42

(1) The historical position: *Anlaby v Praetorius*..... 42

(2) The modern approach: Order 2 rule 1 of the Rules of Court..... 43

(3) The symmetry between Order 2 rule 1 and Order 13 rule 8 as well as Order 19 rule 9..... 46

The test for determining whether or not the *ex debito justitiae* rule should be applied..... 47

The legal position where the *ex debito justitiae* rule is not applied: Whether the court may consider the merits of the defence..... 50

(1) The decision in *Faircharm*..... 51

(2) The significance of *Faircharm*..... 55

(3) Should *Faircharm* be adopted in Singapore?..... 58

How an application to set aside an irregular default judgment should henceforth be assessed..... 61

Synopsis of the legal principles applicable to setting-aside applications.. 64

WHETHER THE DEFAULT JUDGMENT SHOULD HAVE BEEN SET ASIDE..... 68

AN ASIDE ON THE QUESTION OF COSTS IN SETTING-ASIDE APPLICATIONS..... 70

CONCLUSION..... 71

The facts

The parties

5 Mercurine and Canberra are both joint venture entities. As a result of the linkages between their joint venture partners, there are two common ultimate shareholders in the corporate structures of both Mercurine and Canberra, *viz*, Koh Brothers Group Limited ("Koh Brothers") and Heeton Holdings Limited ("HH"). Mercurine is the corporate vehicle for the joint venture between Eng Wah Organization Ltd ("Eng Wah"), Koh Brothers and HH. EWO Entertainment Concepts Pte Ltd ("EWO") and Clareville Investments Pte Ltd ("Clareville") each have a 50% shareholding in Mercurine. EWO's holding company is Eng Wah Investments Pte Ltd, which is in turn wholly-owned by Eng Wah. Fifty per cent of Clareville is held by Batam Vision Pte Ltd, whose ultimate shareholder is Koh Brothers; the other 50% is held by Heeton Land Pte Ltd, a wholly-owned subsidiary of HH. As for Canberra, it is a joint venture between Koh Brothers Development Pte Ltd, a wholly-owned subsidiary of Koh Brothers, and HH. Broadly speaking, Mercurine can be identified with Eng Wah, and Canberra, with Koh Brothers.

The dispute

6 Mercurine took possession of the Premises on or about 25 February 2000. To date, no written agreement for the lease of the Premises ("the Lease") has been executed between the parties. Disagreements arose over the term of the Lease, with Mercurine contending that the Lease was valid for 14 years as stated in Canberra's letter of offer dated 4 November 1999. Canberra, on the other hand, asserted that, in subsequent discussions, the term of the Lease was reduced to seven years, with an option to renew for a further seven years upon Mercurine making a written request within a stipulated time. Since Mercurine did not meet this requirement, Canberra claimed, the Lease had expired. While the issue of the actual term of the Lease was not crucial to the outcome of this appeal, it was nevertheless of some relevance because the alleged expiry of the Lease was one of the grounds upon which Canberra staked its right to vacant possession of the Premises.

7 Between April 2003 and November 2005, Mercurine did not pay the contractual monthly rent

for the Premises. This alleged breach of the Lease was the foundation of Suit 861. Mercurine's explanation for its non-payment of rent was that Canberra was frequently late in carrying out its obligation to reimburse Mercurine's air-conditioning charges as earlier agreed. In her affidavit filed on 26 April 2007 in respect of Suit 861 ("Ms Goh's Suit 861 affidavit"), Ms Goh Min Yen ("Ms Goh"), a director of Mercurine, averred that, as at June 2005, Canberra owed Mercurine $297,287.97 in air-conditioning reimbursement. Ms Goh also claimed that Canberra had failed to purchase annually the agreed number of movie gift vouchers ("MGVs") from Mercurine. This shortfall amounted to 18,390 MGVs for the years 2000–2004. Further, Canberra had not purchased any MGVs since the beginning of 2005.

8 The parties met on or about 18 November 2003 in an attempt to resolve their differences. Mercurine claimed that an agreement was reached whereby the air-conditioning charges and the purchase cost of the MGVs that Canberra was supposed to bear would be set off against Mercurine's accrued rental arrears ("the Set-Off Agreement"). Mercurine further alleged that during a subsequent meeting on 2 March 2004, the parties affirmed the Set-Off Agreement, and it was further agreed that Mercurine would make good the shortfall in rent *after* it received an additional injection of funds from its shareholders ("the Pay Later Agreement"). Canberra, needless to say, denied the existence of the Pay Later Agreement.

Suit 861

Canberra's claim

9 In Suit 861, Canberra claimed rental arrears in the amount of $1,005,916.81 for the period from April 2003 to November 2005. Canberra also sought possession of the Premises on the grounds that Mercurine, by failing to execute the engrossed lease agreement sent to it on 2 August 2000 within the stipulated 21-day period and failing to pay rent for the Premises as it fell due, had evinced an intention to repudiate the Lease, which repudiation Canberra had accepted.

10 As stated earlier (at [3] above), Mercurine did not enter an appearance and the Default Judgment was duly entered against it on 9 January 2006. Pursuant to the Default Judgment, Mercurine was ordered to:

(a) deliver possession of the Premises to Canberra ("the Possession Order");

(b) pay the outstanding rental balance of $864,388.31 to Canberra ("the Money Judgment"); and

(c) pay damages to be assessed, interest and costs of $4,524 to Canberra.

It should be noted that although Canberra had initially pleaded rental arrears of $1,005,916.81 in its statement of claim for Suit 861, the Money Judgment was for the sum of $864,388.31 only in view of a payment made by Mercurine towards rent on 11 November 2005.

Communications between the parties after the entry of the Default Judgment

11 According to Ms Goh's Suit 861 affidavit, Mercurine learnt of the Default Judgment only on 16 January 2006 when Eng Wah's investment consultant, Mr Oh Chee Eng ("Mr Oh"), attended a pre-trial conference in respect of Suit 861 on Mercurine's behalf. That same day, Mr Oh allegedly told Canberra's director, Mr Koh Keng Siang ("Mr Koh"), that, if Canberra did not withdraw the Default Judgment, Mercurine would have to contest the judgment. If that happened, Koh Brothers and HH

would have to bear 50% of Mercurine's legal costs. Ms Goh deposed that Mr Koh had informed Mr Oh that he would instruct Canberra's lawyers to "hold"[note: 1] the Default Judgment pending the parties' efforts to resolve the matter. Mr Koh's version of the events, on the other hand, was that he had told Mr Oh that he would instruct Canberra's lawyers to withhold execution proceedings, but had not promised that this would be for an indefinite period.

12 Mercurine asserted that the parties arrived at a compromise agreement ("the Compromise Agreement") sometime in or around January or February 2006 whereby Canberra would withdraw the Default Judgment if Mercurine paid it the sum of $519,155.62. Yet, Mercurine subsequently received a letter from Canberra dated 17 April 2006 conveying the latter's offer to withhold execution of the Default Judgment and to accept the aggregate sum of $535,124.93 (comprising $518,998.12 plus interest of $11,602.81 and legal fees of $4,524) "in full satisfaction of the Orders in the [Default] Judgment obliging [Mercurine] to pay [Canberra] the balance sum of S$864,388.31".[note: 2]

13 Ms Goh replied on 28 April 2006 stating that Mercurine would pay the sum of $518,998.12 if the Default Judgment was duly withdrawn upon payment and the tenancy agreement for the Premises completed and returned to Mercurine. In a letter from Canberra's solicitors to Mercurine dated 5 May 2006, however, Canberra maintained that the Lease had been terminated by virtue of the Possession Order and that Mercurine was obliged to deliver possession of the Premises to Canberra. Ms Goh averred that she was "surprised"[note: 3] by that letter because it contradicted the understanding which Mercurine had reached with Mr Koh. She stated that Mr Oh called Mr Koh again after Mercurine received the letter dated 5 May 2006 and once again obtained Mr Koh's confirmation that Canberra would withdraw the Default Judgment after it received payment.

14 It was common ground that Mercurine paid the sum of $518,998.10 ("the Compromise Sum") (*cf* the sum of $519,155.62 allegedly agreed on earlier under the Compromise Agreement (see [12] above) as well as the sum of $518,998.12 mentioned in Ms Goh's letter of 28 April 2006 (see [13] above)) to Canberra on 6 June 2006 after receiving cash injections from its shareholders, Clareville and EWO, on 30 May 2006 and 2 June 2006 respectively. Mercurine claimed that, prior to these cash injections, it had sought and received another confirmation from Mr Koh on 24 May 2006 that once the conditions precedent attached to the cash injections (one of which was that Mercurine was to pay the Compromise Sum to Canberra within three business days of receipt of the cash injections) had been met, Canberra would withdraw the Default Judgment. However, Mercurine subsequently received a letter from Canberra's solicitors dated 10 July 2006 stating that Mercurine was required to deliver possession of the Premises pursuant to the Possession Order. The letter also stated that Canberra was prepared to give Mercurine an extension of time until 28 February 2007 to deliver possession provided certain terms were complied with. This letter was followed by another letter from Canberra's solicitors to Mercurine, dated 5 September 2006, denying that Canberra had confirmed that it would withdraw the Default Judgment upon Mercurine's payment of the Compromise Sum. In addition, this letter asserted that all payments made by Mercurine in consideration for its occupation of the Premises from 1 January 2006 onwards had been accepted by Canberra only as licence fees, and that Canberra had made no representation or given any warranty that it would continue to accept future payments and/or permit Mercurine to continue occupying the Premises. Canberra also demanded a further $19,343.20 which it claimed was still owed by Mercurine.

Commencement of related proceedings by Mercurine

15 On 21 December 2006, Mercurine filed Originating Summons No 2374 of 2006 ("OS 2374") seeking, *inter alia*:

(a) a declaration that the parties had entered into a full and final settlement of the disputes

which were the subject matter of Suit 861;

(b) a declaration that the Possession Order be set aside and that the Lease subsisted and had not been terminated; and

(c) a declaration that the Money Judgment had been effectively compromised and fully satisfied by Mercurine's payment of the Compromise Sum.

On 2 February 2007, a senior assistant register granted the declarations set out above. Canberra appealed against his decision via Registrar's Appeal No 49 of 2007 ("RA 49 of 2007"). At the hearing of RA 49 of 2007 on 29 March 2007, Belinda Ang Saw Ean J allowed Canberra's appeal and ordered that OS 2374 be converted into a writ action (this writ action is now proceeding as Suit No 244 of 2007 ("Suit 244")). The trial of Suit 244, consolidated with Suit No 354 of 2007 ("Suit 354") (see further [16] below), was set down for 7 April 2008 to 16 April 2008, and was subsequently adjourned until 30 October 2008 to 7 November 2008 (we shall refer to the consolidated suit hereafter as "the Consolidated Suit").

16 On 26 April 2007, following the hearing of RA 49 of 2007, Mercurine applied via SUM 1843 for, *inter alia*, an order that the Default Judgment be set aside. Mercurine stated that the grounds for its application were as follows:

(a) the Default Judgment was irregular because:

(i) Canberra had not complied with the requirements under O 13 r 4(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed); and

(ii) Canberra had entered judgment for an excessive sum, in that it had omitted to take into account (among other things) Mercurine's right to set off a sum of $139,271.50 for reimbursement of air-conditioning charges; and

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

Mercurine also commenced Suit 354 on 11 June 2007 for, *inter alia*, a declaration that the Lease was for a fixed term of 14 years commencing on 2 June 2000.

The decisions below on SUM 1843

AR Lim's decision

17 In arriving at his decision to set aside the Default Judgment, AR Lim analysed the following issues:

(a) whether Mercurine had a defence on the merits;

(b) what the applicable test for determining whether to set aside an irregular default judgment was;

(c) whether the Default Judgment was irregular because, *inter alia*:

(i) Canberra had not complied with the requirements under O 13 r 4(1) of the Rules of Court for the purposes of its claim for possession of the Premises; and

(ii) Canberra had claimed an excessive amount in rental arrears; and

(d) if Mercurine was entitled to set aside the Default Judgment, whether it should nevertheless be allowed to enforce this right given its delay in filing SUM 1843 and its conduct after the Default Judgment was entered.

18 In summary, AR Lim held that Canberra's failure to obtain a certificate stating that it was not claiming in Suit 861 any relief of the nature specified in O 83 r 1 – which is required under O 13 r 4(1) – was a curable irregularity (see the AR's Judgment at [62]). On the other hand, the Money Judgment was excessive. Since it was not the result of an accidental or a clerical error on Canberra's part, Canberra ought not to be permitted, in the prevailing circumstances, to amend this part of the Default Judgment. The Money Judgment, therefore, remained an irregular judgment (*id* at [69]). The entry of the Money Judgment – which was irregular and which, in AR Lim's view, should not be amended – was what prompted the assistant registrar to set aside the Default Judgment (*ibid*; see also [93] of the AR's Judgment).

The Judge's decision

19 On appeal against AR Lim's decision, the Judge held that Canberra's argument that only the Money Judgment, but not the Possession Order, should be set aside was untenable because Mercurine would be relying on the same defence in respect of both the Money Judgment and the Possession Order (see the Judge's Judgment at [22]–[23]). However, the Judge ultimately allowed Canberra's appeal and reinstated the Default Judgment – albeit with the sum stated therein reduced from $864,388.31 to $725,116.81 to take into account Mercurine's cross-claim against Canberra for air-conditioning charges (*id* at [45]) – because she considered that Mercurine had filed SUM 1843 far too late in the day (*id* at [37]–[44]).

20 The Judge held (*id* at [42]) that once Mercurine received the letter from Canberra's solicitors dated 10 July 2006 requiring Mercurine to deliver possession of the Premises by 28 February 2007 (see [14] above), it would have been plain that Canberra intended to enforce its rights under the Default Judgment. Mercurine should have promptly proceeded to apply to set aside that judgment in July or August 2006 (see [44] of the Judge's Judgment). Instead, Mercurine filed OS 2374 (see [15] above), which, if granted, would have meant that Canberra's claims in Suit 861 had been settled pursuant to a compromise agreement. This particular application, in the Judge's opinion, supported the view that Mercurine had abandoned any rights which it might have had to set aside the Default Judgment (see [44] of the Judge's Judgment).

The issues on appeal

21 Counsel for Mercurine raised the following issues before this court:

(a) whether Mercurine's delay in filing SUM 1843 and its act of filing OS 2374 precluded it from being granted an order setting aside the Default Judgment;

(b) what the requisite standard *vis-à-vis* the merits of the defence was for the purposes of a setting-aside application;

(c) whether the Default Judgment was irregular; and

(d) depending on whether the Default Judgment was regular or irregular, whether the merits

of Mercurine's defence met the requisite standard so as to warrant the setting aside of that judgment.

Overview of our decision

22 At the end of the hearing, we varied the Judge's orders and held that the Default Judgment would be deemed to be set aside in the event that Mercurine succeeds in the Consolidated Suit, inclusive of any appeal therefrom. The costs of the hearing before AR Lim would be Mercurine's costs in any event, while the costs of the hearing before the Judge and of this appeal would be costs in the cause of the Consolidated Suit. We also made the usual consequential orders, with liberty for the parties to apply.

23 At this juncture, we should point out that the order which we made in this appeal was based purely on practical considerations (in view of the pending trial of the Consolidated Suit), and did not involve any definitive determination of the merits of Mercurine's defence. The facts of this case and the procedural issues raised by counsel, however, highlighted the pressing need for clarification of the applicable principles for setting aside a default judgment, and we will now set out our views on this. Before we do that, it is only appropriate that we first address the threshold issue of delay as this constituted the crux of the Judge's reasoning in reversing AR Lim's decision. If we thought that there had been undue delay on Mercurine's part in filing SUM 1843, this could well have been fatal to Mercurine's appeal.

The threshold issue: Whether Mercurine's delay in filing SUM 1843 was reasonable

Actions taken by Mercurine before filing SUM 1843

2 4 The first fact which we had to consider was the filing and prosecution of OS 2374, which later metamorphosed into Suit 244 (and, subsequently, the Consolidated Suit). Canberra claimed that Mercurine's act of filing OS 2374 constituted a fresh step taken by Mercurine after the latter became aware of the irregularities in the Default Judgment. In the circumstances, Mercurine could not thereafter elect to apply to set aside the Default Judgment via SUM 1843 because such conduct would be tantamount to blowing hot and cold, contrary to the equitable doctrine prohibiting a party from approbating and reprobating.

25 Canberra relied on the House of Lords case of *Evans v Bartlam* [1937] AC 473 as purportedly supporting its assertion that Mercurine's conduct was redolent of approbation and reprobation. In that case, default judgment was entered against the defendant, who then requested for time to see if he could make any arrangement to pay the judgment sum. The plaintiff gave the defendant seven days to do so. As no arrangement was made, the plaintiff then took steps to enforce the default judgment. Subsequently, the defendant applied to have the default judgment set aside. The application was dismissed by a master, whose decision was reversed by a judge in chambers on appeal. The plaintiff then appealed to the English Court of Appeal, which overturned (by a majority of 2:1) the decision of the judge in chambers and held that the default judgment ought not to have been set aside as "the [defendant] had by his conduct shut himself out of any right to claim to have the judgment set aside" (at 484). The case then went up on further appeal to the House of Lords, which overturned the English Court of Appeal's decision. In his judgment, Lord Atkin advocated a cautious approach in ascertaining whether the defendant had made an irrevocable election not to contest the default judgment (at 479):

> *I find nothing in the facts analogous to cases where a party having obtained and enjoyed material benefit from a judgment has been held [to be] precluded from attacking it while he still*

is in enjoyment of the benefit. I cannot bring myself to think that a judgment debtor who asks for and receives a stay of execution approbates the judgment, so as to preclude him thereafter from seeking to set it aside whether by appeal or otherwise. Nor do I find it possible to apply the doctrine of election. It is a simple answer to say that to infer election it must be shown that the person concerned had full knowledge of the various rights amongst which he elects. There is here no evidence that the defendant at the time he asked for and received time [to make arrangements to pay the judgment sum] had any knowledge of his right to apply to set the judgment aside. I cannot think that there is any presumption that he knew of this remedy either sufficiently for the purposes of the doctrine as to election or at all. [emphasis added]

26 In our view, it was plain that *Evans v Bartlam* did not inexorably support the argument that Canberra advanced in relation to Mercurine's alleged approbation and reprobation. In the present case, Mercurine did not obtain any benefit from deferring the filing of SUM 1843. The truth of the matter was that it did not initially consider a setting-aside application to be necessary because it thought – mistakenly or otherwise – that the parties were negotiating a settlement and that Canberra would not enforce the Default Judgment. Whether Mercurine's belief was well-founded cannot be dealt with separately from the question of how meritorious its defence is. The task of deciding the merits of Mercurine's defence is now within the purview of the trial judge who is to hear the Consolidated Suit (in so far as Mercurine's defence in the present suit – *ie*, Suit 861 – goes towards the basis of its claim in the Consolidated Suit).

27 Turning now to Suit 244, we noted that, pursuant to Belinda Ang J's decision of 29 March 2007 (see [15] above), Mercurine filed its statement of claim in respect of Suit 244 on 24 April 2007. Thereafter, Canberra filed its defence on 30 May 2007. Mercurine seeks, *inter alia*, the following reliefs in Suit 244:

(a) a declaration that Mercurine, by its payment of the Compromise Sum to Canberra on 6 June 2006, had entered into a full and final settlement with Canberra of the disputes which were the subject matter of Suit 861;

(b) a declaration that the Default Judgment had been effectively compromised and fully satisfied by Mercurine's payment of the Compromise Sum on 6 June 2006;

(c) as an alternative to prayer (b) above, a declaration that Mercurine, having paid the Compromise Sum on 6 June 2006, had fully satisfied the Money Judgment;

(d) a declaration that the Lease subsisted and had not been terminated; and

(e) *a declaration that Mercurine was not obliged to deliver vacant possession of the Premises pursuant to the Possession Order*.

It can be seen that, by the time Mercurine applied on 26 April 2007 to set aside the Default Judgment, Suit 244 had already been set in motion. Critically, a determination of whether Mercurine was obliged to deliver vacant possession of the Premises to Canberra as at the date of the Default Judgment (*ie*, 9 January 2006), and no later than 28 February 2007 (see [14] above), is fundamental to both Suit 861 (the underlying action giving rise to this appeal) and Suit 244.

28 Mercurine submitted to this court that its right to apply to set aside the Default Judgment was independent of any rights which it might be able to assert if it succeeded in the Consolidated Suit. If Mercurine prevailed in this appeal, it intended to apply to consolidate Suit 861 with the Consolidated Suit. Canberra, on the other hand, contended that Mercurine's purpose in filing

SUM 1843 was to avoid the risk that it (Mercurine) might fail to persuade the trial judge in the Consolidated Suit of the merits of its case. Canberra also alleged that Mercurine was concerned that if a stay of Suit 861 was ordered pending the outcome of the Consolidated Suit, it would be made on terms given Canberra's doubts about the soundness of Mercurine's financial health.

29 Crucially, Mercurine's delay in filing SUM 1843 was the basis upon which the Judge reinstated the Default Judgment (with a variation to the quantum of the Money Judgment). She was of the view that the time lag before Mercurine made this application was unreasonably excessive (see [19]–[20] above). Before we analyse the facts, it would be apposite to set out the relevant legal principles on the effects of a delay in making a setting-aside application.

The effects of delay on a setting-aside application

30 The starting point is that unreasonable delay could severely prejudice a setting-aside application. As Prof Jeffrey Pinsler SC rightly cautions in his book, *Singapore Court Practice 2006* (LexisNexis, 2006), at para 13/8/4:

> Inordinate delay in making the application may lead the court to believe that [the application] is not bona fide or that the defendant is not serious or that he is irresponsible about the relief he seeks.

Canberra urged this court to adopt the English courts' firm emphasis on the necessity of making a setting-aside application promptly. A case in point that was cited was *Regency Rolls Limited v Murat Anthony Carnall* [2000] EWCA Civ 379 ("*Regency Rolls*"). In that case, the defendant ("Mr Carnall") was absent from the trial on 22 March 1999 because of illness. On that date, judgment was entered against him. Mr Carnall received a copy of the judgment on or about 26 March 1999. He was housebound because of his illness until 30 March 1999. He sought legal advice from a firm of solicitors on either 29 or 30 March 1999, but, by 31 March 1999, it became clear that that firm of solicitors would not be retained. After the Easter holidays (which were from 2 April 1999 to 5 April 1999 that year), Mr Carnall contacted new solicitors and had several meetings with them. Following consultations between the new solicitors and lead counsel on 16 April 1999 and 21 April 1999, Mr Carnall made a setting-aside application on 21 April 1999. On the question of whether Mr Carnall had filed that application with due promptness, the English Court of Appeal ruled in the negative, holding that the former, despite knowing the importance of prompt action, had not "acted with all reasonable celerity in the circumstances" (at [45], *per* Simon Brown LJ). In this regard, Rix LJ pointed out (at [39]) that Mr Carnall could in the first instance have written to the court to ask for a chance to prove his disability and to request for a new trial. We should add that the learned judge also observed (at [40]) that even if Mr Carnall had made his setting-aside application promptly, on the facts of the case, the court was not inclined to set aside the default judgment.

31 We would distinguish the present appeal from *Regency Rolls* on several grounds. As we shall explain at [38] below, the communications that transpired between the parties from the date on which the Default Judgment was entered (*viz*, 9 January 2006) to July 2006 constituted active negotiations for a settlement. Subsequently, Mercurine took further steps to make its position clear to Canberra before filing OS 2374 in December 2006. We were satisfied that Mercurine's conduct in waiting till 26 April 2007 before filing SUM 1843 could not be deemed to amount to unreasonable delay. Whether Mercurine adopted the correct procedure to contest the Default Judgment was, with respect, an altogether different issue.

32 Needless to say, where a defendant delays in making a setting-aside application, the court will in every case have to closely scrutinise the reasons for the delay. Clearly, if Mercurine had

deliberately withheld filing SUM 1843 with the intent or desire to gain some litigation advantage, its late application should *prima facie* be viewed uncharitably. It would, however, be a stretch of the imagination to conclude, on the facts of this case, that Mercurine had deliberately or, indeed, intentionally delayed the filing of SUM 1843.

33 In contrast, delay was fatal to the defendant's setting-aside application in the High Court case of *Ang Kim Soon v Sunray Marine Pte Ltd* [1997] 3 SLR 619 ("*Ang Kim Soon*"). There, the plaintiff, who was injured in an accident while working aboard a vessel, sued his employer for damages. The employer, in the meantime, was pursuing an admiralty action against the vessel owner for an indemnity in respect of the accident. Despite repeated requests by the plaintiff, the employer did not enter a defence, and the plaintiff eventually entered interlocutory judgment. The employer waited for nearly six months, until after the admiralty action had been decided in its favour, before applying to set aside the interlocutory judgment. After assessing the competing considerations, Choo Han Teck JC dismissed the employer's application. Choo JC said (at [16]):

> [Counsel for the employer] explained that the [employer] did not apply to set aside the default judgment because he felt that if the shipowner succeeded in its case, then it would be pointless to set aside the default judgment. If the shipowner failed then, it appears, on the strength of the *Saudi Eagle* case [*ie*, *Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc* [1986] 2 Lloyd's Rep 221], there would be little difficulty in having the default judgment set aside. On the surface this rationalisation appears somewhat attractive and sensible. However, having considered the chronology of this case and the conduct of the parties, I find that it is too late now for the employer to set aside the default judgment. *Once liability [was] disputed, the employer was bound to set aside the interlocutory judgment at the earliest opportunity. It should not play a cat-and-mouse game with the shipowner using the plaintiff as cheese.* [emphasis added]

34 Another case where the defendant's delay in making its setting-aside application was not looked upon kindly by the court was *Lee Theng Wee v Tay Chor Teng* [2003] SGHC 173. In that case, the defendant applied to set aside a default judgment, which was based on a loan given to him by the plaintiff, more than three years after it had been entered against him. Woo Bih Li J considered that the defendant had "some prospect of success" (at [17]) in establishing his allegation that the plaintiff had been engaging in illegal money-lending in extending the loan, but held that the defendant's "very long delay" (*ibid*) before making his setting-aside application, coupled with the absence of a valid reason for the delay, was fatal to the application. Furthermore, Woo J found that the defendant had not been truthful in the supporting affidavit which he filed for his setting-aside application (*ibid*). For these reasons, the learned judge upheld the assistant registrar's dismissal of the defendant's setting-aside application.

35 At the risk of stating the obvious, we would emphasise that procedural rules must not occasion injustice by unfairly depriving a party of an opportunity to argue its case. On the other hand, the indolent cannot as a matter of course be awarded the same measure of justice as the diligent. As Warren L H Khoo J aptly observed in *European Asian Bank v Chia Ngee Thuang* [1995] 3 SLR 171 (at 176, [21]):

> In exercising its discretion [to set aside default judgments], the two important factors which the court considers are the merits of the defendant's case and, if there has been a delay in approaching the court, any explanation which the defendant has proffered for the delay.

36 In the Malaysian case of *Tuan Haji Ahmed Abdul Rahmanv Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 ("*Tuan Haji Ahmed*"), the defendant waited for three years before applying to set

aside a default judgment. The Federal Court of Malaysia took cognisance of this "spectacular delay" (at 42) and also dismissed as "improbable" (*ibid*) the defendant's explanation that the reason for his delay was that he could not afford to engage solicitors. Nevertheless, the court exercised its inherent jurisdiction and set aside the default judgment, which it considered to be irregular for want of certainty. The court took the position (*ibid*) that, despite a long delay before the filing of a setting-aside application, it retained a discretion to set aside an irregular judgment provided it was satisfied that:

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

(b) if such prejudice had been sustained, it could be met by an appropriate order as to costs; or

(c) it would constitute oppression to let the judgment stand.

The principles set out in *Tuan Haji Ahmed* are essentially sound, albeit not necessarily exhaustive. We would add that in respect of point (c) above, we are of the view that the greater the delay on the defendant's part in applying to set aside the default judgment, the more cogent the explanation must be as to why it would be oppressive to let the judgment stand. Perhaps, instead of using the term "oppression" (see *Tuan Haji Ahmed* at 42), it might be preferable to state that where there has been undue delay, the defendant may need to show that a miscarriage of justice would be occasioned if the default judgment were allowed to stand.

Whether there was undue delay on Mercuirne's part

37 Applying the principles outlined above (at [30]–[36]) to the facts of the present case, it appeared to us that, with respect, the Judge placed undue weight on Mercurine's delay in filing SUM 1843. The delay should have been assessed in the context of other prior and ongoing occurrences as well as the plausibility of Mercurine's explanation for its delay. A long delay *per se* may not always be procedurally incurable or fatal to a setting-aside application.

38 Let us now examine the objective facts. It cannot be disputed that after Mercurine was notified by Canberra's solicitors via the letter dated 10 July 2006 (see [14] above) that Canberra intended to enforce the Possession Order, Mercurine unambiguously disputed Canberra's right to enforce that part of the Default Judgment via two letters sent by Ms Goh to Canberra's solicitors on 8 August 2006 and 29 November 2006 respectively. In those letters, Ms Goh firmly underlined Mercurine's position that the Default Judgment had been compromised by the payment of the Compromise Sum on 6 June 2006 and denied that the Lease had been terminated. The letter dated 8 August 2006 set out Mercurine's position that Mr Koh had agreed "sometime on or about May 2006"[note: 4] to "withdraw"[note: 5] the Default Judgment upon full payment of the Compromise Sum. In her letter of 29 November 2006, Ms Goh reiterated this point and added that Mercurine was prepared to meet Canberra to resolve the dispute amicably. Granted that the sending of these letters by Mercurine and its filing of OS 2374 were unilateral acts, they nevertheless provided an eminently reasonable explanation for the delay on Mercurine's part in filing SUM 1843. When the parties failed to resolve their differences by November or December 2006, Mercurine decided to file OS 2374 to protect its position. From then on until the hearing of RA 49 of 2007 on 29 March 2007 (see [15] above), Mercurine did not consider it necessary to apply to set aside the Default Judgment. However, once Belinda Ang J allowed RA 49 of 2007 and ordered that OS 2374 be converted into a writ action, a trial became "inevitable".[note: 6] Mercurine then quite promptly filed SUM 1843 within one month of 29 March 2007. Can it now be fairly said that Mercurine had behaved unreasonably in delaying the filing of this summons?

39 Canberra sought to impress on this court the force of the Judge's finding that Mercurine should have applied to set aside the Default Judgment in July or August 2006 (see [20] above). Canberra argued that between July 2006 and November 2006, the parties had not engaged in any negotiations. Rather, communications between the parties had been restricted to terse exchanges of letters between their respective solicitors. This was not quite accurate in view of the contents of the two letters that Ms Goh wrote to Canberra (see [38] above), the latter of which included an intimation of Mercurine's willingness to hold further negotiations with Canberra. The facts spoke for themselves.

40 On the facts, we were satisfied that Mercurine's conduct was explicable, and that its (apparent) delay in filing SUM 1843 should not be the sole or primary reason for dismissing that application because:

(a) Mercurine's delay was not merely strategic, in that Mercurine did not stand to gain from making a late setting-aside application, and, on this basis, its conduct was readily distinguishable from that of the defendant in *Ang Kim Soon* ([33] *supra*);

(b) Mercurine was under the impression that it had negotiated a compromise with Canberra and it intended to honour that agreement, as evidenced by its payment of the Compromise Sum to Canberra on 6 June 2006 (see [13]–[14] above); and

(c) Mercurine's explanation that it was trying to find an out-of-court settlement in view of the interests of the ultimate shareholders that the parties had in common (namely, Koh Brothers and HH (see [5] above)) was, all said and done, plausible and appeared to dovetail with the objective facts.

Summary of our ruling on the threshold issue of delay

41 To sum up, where Mercurine's delay in filing SUM 1843 was concerned, the Judge erred in holding that Mercurine's failure to file that application by July or August 2006, coupled with the filing of OS 2374 on 21 December 2006, without more, justified the dismissal of SUM 1843. We therefore considered that the just result would be to allow each party the full opportunity to present the merits of its case at the trial of the Consolidated Suit. It is our view that in the proceedings below, the appropriate order would have been a stay of the enforcement of the Default Judgment pending the outcome of the Consolidated Suit. If Canberra had anxieties about Mercurine's allegedly precarious financial position, it could have applied for an expedited hearing of that suit.

42 Having disposed of the threshold issue of delay in Mercurine's favour, we now proceed to give our views on the other pertinent issues raised in this appeal. We shall begin by setting out the legal principles which apply to setting-aside applications. For reasons that will become apparent, it is timely to review the current position in this critical area of civil procedure.

The legal principles relating to setting-aside applications

43 A default judgment is usually entered because the defendant has breached procedural rules. However, there may also be cases where, quite apart from the defendant's non-compliance with procedural rules, the plaintiff itself breaches procedural rules and enters a default judgment when it is not in fact entitled to do so. Case law, quite logically, draws a distinction between *regular* and *irregular* default judgments. This approach reflects the court's concern with the reasons for the defendant's setting-aside application, and rightly so since a default judgment, *properly entered*, confers property rights on the plaintiff. Before exercising its discretion to set aside a default

judgment, the court is entitled to inquire into the parties' conduct and assess where the balance of the equities lie. If the default judgment is regular, there is a presumption that the plaintiff acted correctly and should not be lightly deprived of the fruits of its judgment; conversely, if the default judgment is irregular, there is a presumption that the plaintiff breached the proper procedure and, thus, should not be allowed to take advantage of its own default. (It should, however, be noted that a judgment may be irregular not only because of the plaintiff's intentional failure to comply with procedural rules, but also because of clerical or accidental mistakes made by the plaintiff.) Not surprisingly, the defendant has a heavier burden to discharge when it seeks to set aside a regular default judgment.

Regular default judgments

The orthodox position

44 The court may exercise its discretion pursuant to O 13 r 8 of the Rules of Court to (*inter alia*) set aside a judgment in default of appearance (an "O 13 default judgment") which is regular. This rule states that:

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

(It should be noted that O 19 r 9 contains an identical provision *vis-à-vis* a judgment in default of pleadings (an "O19 default judgment").) In determining whether it is justified to set aside the default judgment in question, the court would consider, first and foremost, the merits of the defence, although the causes of the defendant's default and the timeliness of the setting-aside application would be taken into account as well.

45 For nearly 50 years, until the decision of the English Court of Appeal in *Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc* [1986] 2 Lloyd's Rep 221 ("*The Saudi Eagle*"), *Evans v Bartlam* ([25] *supra*) was considered to be the leading authority on the test for setting aside a regular default judgment. That test, according to Lord Atkin, was whether the defendant had "a prima facie defence" (*id* at 480). Lord Wright echoed this approach in the following terms (*id* at 489):

> The primary consideration is whether [the defendant] has *merits to which the Court should pay heed*; if merits are shown the Court will not prima facie desire to let a judgment pass on which there has been no proper adjudication. [emphasis added]

The opinion of Lord Russell of Killowen could arguably give rise to some semantic debate because he used the expression "serious defence" (*id* at 482). However, the point which Lord Russell was making was that while a judge would inevitably consider the merits of the defence before exercising the court's discretion to set aside a regular default judgment, proof by the defendant of some useful purpose in setting aside the judgment in question or of the existence of a serious defence was *not* a condition precedent to the court's exercise of its setting-aside discretion.

46 The test laid down in *Evans v Bartlam* – which we will refer to interchangeably as the "*Evans v Bartlam* test" and "the 'arguable or triable issue' test" – was subsequently applied in a number of notable cases, including *Burns v Kondel* [1971] 1 Lloyd's Rep 554, a decision of the English Court of Appeal (see especially 555, *per* Lord Denning MR), and, locally, Chao Hick Tin J's decision in *Singapore Gems Co v The Personal Representatives for Akber Ali* [1992] 2 SLR 254.

47 It can still be confidently said that the following *dictum* of Lord Atkin in *Evans v Bartlam* (at

480) continues to be the definitive statement of the rationale and basis for the court's exercise of its discretion when it sets aside a regular default judgment:

> The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

The decision in The Saudi Eagle

48 In *The Saudi Eagle* ([45] *supra*), however, Sir Roger Ormrod, who delivered the judgment of the English Court of Appeal, rather perplexingly opined that all the law lords in *Evans v Bartlam* ([25] *supra*) had "clearly contemplated that a defendant who [was] asking the Court to exercise its discretion [to set aside a regular default judgment] in his favour should show that he ha[d] a defence which ha[d] a *real prospect of success*" [emphasis added] (see *The Saudi Eagle* at 223). Sir Ormrod's judgment continued thus (*ibid*):

> Indeed it would be surprising if the standard required for obtaining leave to defend (... [whereby the defendant] has only to displace the plaintiff's assertion that there is no defence) were the same as that required to displace a regular judgment of the court and with it the rights acquired by the plaintiff. In our opinion, therefore, to arrive at a reasoned assessment of the justice of the case *the Court must form a provisional view of the probable outcome if the judgment were to be set aside and the defence developed. The "arguable" defence must carry some degree of conviction.* [emphasis added]

Since then, *The Saudi Eagle* (an *English Court of Appeal* decision) has apparently, and rather inexplicably, eclipsed *Evans v Bartlam* (a *House of Lords* decision) as the leading authority on the applicable test for determining whether a regular default judgment ought to be set aside. The "real prospect of success" test enunciated by Sir Ormrod (the "*Saudi Eagle* test") – which is generally accepted as laying down a higher and more rigorous standard than that relating to an application for summary judgment under O 14 of the Rules of Court (an "O 14 application"), where the defendant merely needs to show that there are triable issues in order to obtain leave to defend – has become the preferred test for assessing the merits of the defence where a defendant seeks to set aside a regular default judgment. In England, the enactment of the Civil Procedure Rules 1998 (UK) ("CPR") led to the codification of the *Saudi Eagle* test via r 13.3(1), which states:

> [T]he court may set aside or vary a judgment entered [in default] if —
>
> (a) *the defendant has a real prospect of successfully defending the claim*; or
>
> (b) it appears to the court that there is some other good reason why —
>
> (i) the judgment should be set aside or varied; or
>
> (ii) the defendant should be allowed to defend the claim.
>
> [emphasis added]

Hong Kong has also apparently adopted Sir Ormrod's interpretation of *Evans v Bartlam* (as set out above) and now follows the stricter *Saudi Eagle* test. This can be seen from the following passage in *Hong Kong Civil Procedure 2006* (Martin Rogers gen ed) (Sweet & Maxwell Asia, 2006) vol 1 at para 13/9/14:

> It is not sufficient to show a merely "arguable" defence that would justify leave to defend under O.14. The defendant must show that he has "a real prospect of success". To do so, he must satisfy the court that his case and the evidence that he adduces in support of it is potentially credible and carries some degree of conviction. Thus, the court must form a provisional view of the probable outcome of the action (Evans v. Bartlam *[1937] A.C. 473, HL as explained in ...* The Saudi Eagle *[1986] 2 Lloyd's Rep. 221, CA …*). [emphasis added]

49 One of the difficulties with *The Saudi Eagle* is the apparent internal inconsistency between various portions of Sir Ormrod's judgment. As mentioned earlier (at [48] above), Sir Ormrod purported to equate the "arguable or triable issue" test with his "real prospect of success" test (see *The Saudi Eagle* at 223). The following passage in his judgment (*ibid*) provides a stark illustration of his approach (see also the passage quoted earlier at [48] above):

> In our opinion ... to arrive at a reasoned assessment of the justice of the case the Court must form a provisional view of the probable outcome if the judgment were to be set aside and the defence developed. *The "arguable" defence must carry some degree of conviction.* [emphasis added]

We agree with AR Lim that, on a plain reading, the phrase "some degree of conviction" is not synonymous with "real prospect of success" (see the AR's Judgment at [47]). Moreover, requiring a court to "form a provisional view of the probable outcome if the judgment were to be set aside and the defence developed" (*per* Sir Ormrod in *The Saudi Eagle* at 223) appears to go beyond the proper scope of a court's exercise of discretion at such an early stage of the proceedings, and does not accord with the overriding principle enunciated by Lord Atkin in *Evans v Bartlam* at 480 (see the passage reproduced at [47] above).

50 To date, the Singapore courts appear to have uncritically adopted the approach taken by Sir Ormrod in *The Saudi Eagle* without assessing its soundness either as a matter of principle or as a matter of policy. The *Saudi Eagle* test was first applied without any explanation or examination by Rubin JC in *Hong Leong Finance Ltd v Tay Keow Neo* [1992] 1 SLR 205 ("*Hong Leong Finance Ltd*"). Shortly thereafter, it was approved without any analysis by this court in *Abdul Gaffer v Chua Kwang Yong* [1995] 1 SLR 484 ("*Abdul Gaffer*"). For the past decade or so since then, the lower courts in Singapore have considered themselves to be bound by *Abdul Gaffer*. The Judge, for one, interpreted *Abdul Gaffer* as mandating that (see the Judge's Judgment at [24]):

> In the case of a regular judgment, the position is not in doubt. … To persuade a judge to set aside a regular judgment, it is insufficient for the defendant to put forward an arguable defence that would justify leave to defend under O 14.

This court is, however, not so constrained by the decision in *Abdul Gaffer*. We have pointed out that both the High Court in *Hong Leong Finance Ltd* and the Court of Appeal in *Abdul Gaffer* did not elaborate on their respective reasons for adopting the *Saudi Eagle* test in preference to the long-standing *Evans v Bartlam* test. Indeed, in *Abdul Gaffer*, this court simply stated (at 488–489, [18]):

> [T]he principles upon which the court should exercise its discretion under O 13 r 8 [of the Rules of the Subordinate Courts 1993] ... are:
>
> > (i) it is not sufficient to show merely an arguable defence that would justify leave to defend under O 14; [the defence] must both have a real prospect of success and carry some degree of conviction; and

(ii) if proceedings are deliberately ignored, this conduct, although not amounting to an estoppel at law, must be considered 'in justice' before exercising the court's discretion to set aside the default judgment ... (see *The Saudi Eagle ...*).

There was no attempt to explain why the older *Evans v Bartlam* test needed re-assessment in the Singapore context. Furthermore, *prima facie*, the decision in *Abdul Gaffer* seems to suggest (incorrectly) that there is a single test for all types of setting-aside applications, regardless of whether the default judgment in question is regular or irregular. It is time to revisit *Abdul Gaffer* and *The Saudi Eagle*, not least because the latter has been heavily criticised and qualified in, *inter alia*, England and Malaysia (see *Singapore Court Practice 2006* ([30] *supra*) at para 13/8/9).

Criticisms of the Saudi Eagle *test*

51 Not long after *The Saudi Eagle* ([45] *supra*) was decided, Hobhouse J reverted to the *Evans v Bartlam* test in *The "Ruben Martinez Villena"* [1987] 2 Lloyd's Rep 621 ("*The Ruben Martinez*") (see Chia Jin Chong Daniel, "Setting aside a regular default judgment: What is a good defence on the merits – real prospect of success or arguable, triable issue?" (1996) 17 Sing LR 221 at 239–240; see also the judgment of Assistant Registrar Goh Yihan ("AR Goh") in *Lim Quee Choo v David Rasif* [2008] SGHC 36 ("*Lim Quee Choo*") at [74]). In his admirably lucid and comprehensive disquisition in *Lim Quee Choo* of the test currently applicable to the setting aside of regular judgments, AR Goh pointed out (at [74]) that *The Ruben Martinez* has apparently hitherto not been considered by the courts in Singapore. In our view, Hobhouse J's judgment in that case is both highly illuminating and instructive, and merits close attention.

52 In *The Ruben Martinez*, Hobhouse J emphasised the peculiar facts of *The Saudi Eagle*. In the latter case, the plaintiff charterer arrested the defendant's ship, *Saudi Eagle*, in Rotterdam in October 1982 following the defendant shipowner's refusal to load certain cargo onto the ship. A year later, the plaintiff issued a writ against the defendant claiming damages for breach of contract. Initially, the defendant decided not to defend the action because it had no assets and allowed judgment to be entered against it. Subsequently, the defendant realised that the plaintiff had earlier obtained security in Rotterdam and was holding on to the bond, such that the plaintiff's judgment was not as barren as originally supposed. Belatedly, the defendant then applied to set aside the default judgment and sought leave to defend. The three defences which the defendant put forward in support of its setting-aside application were "the wrong defendant, the wrong plaintiff and the wrong contract" (*id* at 223). With regard to the first defence, Sir Ormrod did not think that it had "any reasonable prospect of success" (*id* at 225); likewise, he held, in respect of the latter two defences, that "neither of these suggested defences ha[d] any prospect of success" (*id* at 224).

53 Hobhouse J also alluded to the inconsistencies in Sir Ormrod's judgment that we highlighted earlier (at [49] above). He stressed (at 624 of *The Ruben Martinez*) that in *The Saudi Eagle*, Sir Ormrod had been presented with:

> ... a case in which the suggested defences involved just simple questions of law; they were questions of construction; he considered that they were unarguable and, therefore, there was no reason for setting aside the judgment.

On this basis, Hobhouse J doubted if Sir Ormrod had intended to lay down, at 223 of *The Saudi Eagle* (see the passage quoted at [48] above), the principle that the court should set aside a regular default judgment only if it was satisfied that there was a better than 50% chance that the outcome of the action if the default judgment were set aside would be favourable to the defendant (see *The Ruben Martinez* at 624). Hobhouse J added that if, however, that was indeed the meaning which

Sir Ormrod had in mind, he would regard the latter's statement in *The Saudi Eagle* (at 223) as *obiter dictum* which he was not bound to follow (see *The Ruben Martinez* at 624).

54 In Hobhouse J's view, the decision in *Evans v Bartlam* ([25] *supr*a) was based on the logic that "there [was] no purpose in setting aside a [regular default] judgment if there [was] not going to be something to be gained by having a trial" (see *The Ruben Martinez* at 623). As such, the defendant had to show "*a real prospect that, if the matter [went] to trial, there [would] be some different decision*" [emphasis added] (*ibid*). To achieve this, "an arguable defence" (*ibid*) or, more precisely, "a good arguable defence" (*ibid*) would suffice. At the risk of complicating the analysis, we should point out that Hobhouse J also considered "a defence which has a real prospect of success" (*ibid*) to be another possible description of the standard set in *Evans v Bartlam* – and not *The Saudi Eagle* – *vis-à-vis* the merits of the defence. To place Hobhouse J's judgment in its proper context, we shall reproduce in full the relevant passage (see *The Ruben Martinez* at 623):

> The logic of the decision [in *Evans v Bartlam*] is, as I have said, that there is no purpose in setting aside a judgment if there is not going to be something to be gained by having a trial, so that the defendant must show a real prospect that, if the matter goes to trial, there will be some different decision. One way that that can be expressed is if the defendant can show that he has a "good arguable defence" or, if one prefers it, "an arguable defence", although I think "a good arguable defence" is nearer the right terminology. Similarly, it can be said: "a defence which has a real prospect of success". Those phrases are the phrases which were relied upon before me by the plaintiffs in resisting this [setting-aside] application and I think they are legitimate phrases to use. In other cases the simple phrase "arguable defence" has been used, and that may be more appropriate in certain situations because, as is clear, *all these cases depend upon their own circumstances*; in another situation it has been said, to quote Lord Denning in *Burns v. Kondel*, [the defendant] need only show a defence which discloses an arguable or [a] triable issue. *Those are very similar criteria and the emphasis may just arise from the difference that is presented by the facts in each case.* [emphasis added]

Thus, in *The Ruben Martinez*, Hobhouse J was quick to correctly recognise, not long after *The Saudi Eagle* was decided, that the *Saudi Eagle* test ought not to be read as supplanting the *Evans v Bartlam* test, and that the various formulations of the test which the defendant had to satisfy for the purposes of establishing a defence on the merits were very much a commentary on the facts of the individual cases concerned. However, his guidance went largely unheeded as Sir Ormrod's "real prospect of success" test became fashionable. As a consequence, a standard (in relation to showing a defence on the merits) that was more severe than that applied in O 14 applications (where, as stated earlier at [48] above, the defendant merely has to show the existence of triable issues in order to obtain leave to defend) became entrenched where the setting aside of regular default judgments was concerned.

55 There have been a few noteworthy exceptions, however. In *Allen v Taylor* [1992] PIQR 255, for instance, the English Court of Appeal declined to adopt the *Saudi Eagle* test. Dillon LJ expressed the view that "[i]t [was] impossible to be dogmatic about the extent to which the court must be satisfied of the validity of the suggested defence" (at 259), particularly where each party's case would carry some conviction if it stood alone, such that the court could not say, without conducting a trial, which party would succeed (*ibid*).

56 A similar departure from *The Saudi Eagle* ([45] *supra*) was endorsed by the English Court of Appeal in *Day v Royal Automobile Club Motoring Services Ltd* [1999] 1 WLR 2150 ("*Day v RAC*"). In that case, the plaintiff claimed damages for financial loss and personal injuries which she suffered when she fell from a pickup truck sent by the defendant to deal with a motoring emergency that she

and her husband had encountered. The plaintiff made her claim just one day before the expiry of the relevant limitation period. The respective parties' solicitors agreed to allow a general extension of time for the filing of the defence, which agreement was to be terminable on 14 days' notice. Due to a "muddle" (*id* at 2152) in the office of the defendant's solicitors, the defence was not filed within the extended time frame and default judgment was entered. In dismissing the defendant's setting-aside application, the judge at first instance stated (at 2154):

> What has been demonstrated before me on the defendant's affidavits is an arguable defence. It is on one view a defence which can only be resolved by the trial judge. It is a question of fact.

He went on to say (*ibid*):

> [T]here must be a real likelihood that a defence will succeed. I do not see a real likelihood of [the defendant's] defence, even in its amended form, succeeding.

57 In reversing the judge's decision to dismiss the defendant's setting-aside application, Ward LJ expressed the following reservations about the *Saudi Eagle* test (see *Day v RAC* at 2157):

> [I]t is usually easy to identify the case which is hopeless and say "There is *no* real prospect of success." I add the emphasis to make the point that one is looking at the matter ***negatively***. The approach is distorted if one uses "real prospects of success" as a ***positive*** test. That wrongly encourages a test of judging fact[s] on affidavit[s] and then coming to a provisional view of the probable outcome. I agree ... that ***the arguable case must carry some degree of conviction but judges should be very wary of trying issues of fact on evidence where the facts are apparently credible and are to be set ... against the facts being advanced by the other side. Choosing between them is the function of the trial judge, not the judge on the interlocutory [setting-aside] application***, unless there is some inherent improbability in what is being asserted or some extraneous evidence which would contradict it. I would therefore be a little hesitant to elevate the test into ... "a real likelihood that a defendant will succeed." [emphasis added in bold italics]

58 *Allen v Taylor* ([55] *supra*) and *Day v RAC* quite correctly shifted some of the focus away from the strength of the defendant's case and back to the overriding objective of not unfairly or prematurely shutting a defendant out of the proceedings. We are of the view that this shift was a move in the right direction. As Prof Pinsler shrewdly observes in *Singapore Court Practice 2006* ([30] *supra*) at para 13/8/9:

> The approach in *Saudi Eagle Shipping* [*ie*, *The Saudi Eagle*] is not free from difficulty. In the first place, the higher standard requires the court to enter into an evaluation of the evidence to determine the likely outcome of the case. This task may be compromised by the inconclusiveness of the affidavits, and allegations in the pleadings which have yet to be substantiated by evidence tested on oath. ...
>
> Secondly, it may be unjust to deprive a defendant who can raise a genuinely triable issue (as opposed to a sham defence) of his opportunity to challenge the plaintiff's case at trial. In *Saudi Eagle Shipping*, the [English] Court of Appeal sought to justify the distinction between the standard required to displace a regular judgment in default, and that applicable to resist an application for summary judgment, on the basis that in the former situation an actual judgment of the court has been obtained, and with it, the rights of property acquired by the plaintiff ([1986] 2 Lloyd's Rep 221, at 223). *This distinction may be far less significant when one considers that in both situations the defendant is seeking to avoid early judgment without trial (whether summary*

or by default). Accordingly, if the defendant is able to raise a triable issue which might prevent judgment at trial, the default judgment should not be allowed to stand (in the same way, summary judgment would not be granted in these circumstances). … No doubt, where the defendant is responsible for the default judgment, and seeks to inconvenience the court by applying to set it aside, the court's displeasure may be expressed by penalising him in costs and by imposing appropriate conditions as part of its order.

[emphasis added]

We agree with these observations.

59 In Singapore, the lower courts, burdened (regrettably) by the weight of the authority of this court, have engaged in creative attempts to mitigate the impact and the breadth of the approach prescribed by *Abdul Gaffer* ([50] *supra*). In particular, *Abdul Gaffer* has been distinguished locally on a few occasions when the courts took the view that there were underlying factual disputes that ought to be adjudicated in a full trial (see *Lim Quee Choo* ([51] *supra*) at [87]–[94]). One recent example that AR Goh cited in *Lim Quee Choo* at [87] was *Awyong Shi Peng v Lim Siu Lay* [2007] 2 SLR 225 ("*Awyong Shi Peng*"). In that case, the High Court noted that although judgment had been entered against the defendant in default of defence, the defendant had not deliberately ignored the proceedings. As such, "the merits of the defence [might] not be scrutinised as strictly as propounded in *The Saudi Eagle*" (see *Awyong Shi Peng* at [8]). The court opined that "the merits of the case appear[ed] to be evenly balanced" (*id* at [9]) and concluded that since the defendant "*may* have a defence" [emphasis added] (*ibid*), he should be given an opportunity to present his case to the trial judge. The default judgment was thus set aside. While this particular approach can *prima facie* be aligned with the less ritualistic approach taken in *Allen v Taylor* and *Day v RAC* ([56] *supra*) towards the setting aside of regular default judgments, it is no longer necessary to adopt this stance since this court has now decided that the exercise of judicial discretion in relation to an application to set aside a *regular* default judgment must ultimately be guided by the *Evans v Bartlam* test.

The test presently applicable to the testing aside of regular default judgments

60 It follows then that in deciding whether to set aside a regular default judgment, the question for the court is whether the defendant can establish a *prima facie* defence in the sense of showing that there are triable or arguable issues. It is, in our view, rather illogical to hold that the test for setting aside a regular default judgment should be any stricter than that for obtaining leave to defend in an O 14 application. In both instances, there has been no hearing on the merits. This is not to say that the position in both instances is completely identical or symmetrical. When a regular default judgment has been entered, there would have been a prior default or lapse on the part of the defendant. There are, however, other means of dealing with such procedural default or lapses, including the imposition of adverse costs orders or the making of a setting-aside order which is conditional on appropriate terms being met (see, for example, the order made in *Su Sh-Hsyu v Wee Yue Chew* [2007] 3 SLR 673 ("*Su Sh-Hsyu*") *vis-à-vis* the setting aside of a judgment entered after a trial in the defendant's absence).

61 Our revival of the *Evans v Bartlam* test does not necessarily affect those cases where the defendant's conduct calls for the court to be less than ready to exercise its setting-aside jurisdiction. *Ang Kim Soon* ([33] *supra*) would be a paradigm example of this genre of cases. In such cases, Sir Ormrod's observations in *The Saudi Eagle* ([45] *supra*) on the conduct of the defendant in that case can still provide some useful guidance (at 225):

The conduct of the defendants in ... [*inter alia*] *deliberately deciding not to give notice of*

intention to defend because it suited the interests of the group to let the plaintiffs proceed against these defendants is a matter to be taken into account in assessing the justice of the case. [emphasis added]

However, we would hasten to add that the overarching principle in *Evans v Bartlam* ([25] *supra*), as enunciated by Lord Atkin at 480 (see the passage reproduced at [47] above), must always be accorded higher priority. This is illustrated by the following two English cases.

62 In *Vann v Awford* The Times (23 April 1986), the second defendant did nothing while the plaintiffs entered judgment in default against him and obtained, first, an order for damages to be assessed and, subsequently, an order as to the amount of damages to be paid by the second defendant. The second defendant applied to set aside the default judgment only after the plaintiffs initiated garnishee proceedings and obtained charging orders on his property. He then gave a dishonest reason to the court for his failure to give notice of his intention to defend. The judge at first instance refused to set aside either the default judgment for damages to be assessed or the order eventually made upon an assessment of damages because he considered that the second defendant's setting-aside application had been made too late and no reasonable explanation had been given for the delay. The English Court of Appeal, however, held that the judge's approach was contrary to the principle laid down in *Evans v Bartlam*. Dillon LJ said:

> Even for lying and attempting to deceive the court, a judgment for £53,000 plus [which was the sum that the second defendant was ordered to pay pursuant to the assessment of damages] is an excessive penalty if there are arguable defences on the merits.

Nicholls LJ adopted a similarly pragmatic stance in declining to affirm the judge's decision, pointing out that:

> The court is concerned to do justice between the parties with regard to the plaintiffs' claim, [and] not to punish the defaulting defendant, inexcusable though his conduct may have been.

63 In *J H Rayner (Mincing Lane) Ltd v Cafenorte SA Importadora E Exportadora SA* [1999] 2 Lloyd's Rep 750, the plaintiff, in resisting the defendants' setting-aside application, alleged that the decision by the defendants not to challenge the default judgment was a deliberate and tactical choice and the latter should thus live with the consequences of their decision. The English Court of Appeal stressed that even if the plaintiff's allegations were true (and the court plainly had some doubts in this regard), the key consideration was whether there was a defence on the merits. Waller LJ stated at 764:

> The authorities to which we were referred demonstrated that if the Court concluded that there was a defence on the merits which carried some degree of conviction, *it is the very strong inclination of the Court to allow a default judgment to be set aside even if strong criticism could be made of the defendant's conduct.* [emphasis added]

In such cases, the appropriate response might be to grant the defendant leave to defend on appropriate terms.

64 It is rather unfortunate that the existing case law has caused problems in practice because of the different expressions adopted by judges who were faced with rather different factual matrices. The legal profession (as well as judges) would do well to heed Ward LJ's astute advice in *Day v RAC* ([56] *supra*) at 2157 that:

> [I]t would be better if the differences in language in these cases could be viewed as the emphasis [given] in a particular case to the particular facts of that particular case.

It is apposite to conclude this discussion by reproducing in full the material portion of the salutary principles laid down by Lord Atkin in *Evans v Bartlam* ([25] *supra*) at 480 that have long guided the assessment of setting-aside applications. They continue to encapsulate, in our view, the essence of when, how and why the discretion to set aside a regularly-obtained default judgment ought to be exercised:

> The Courts ... have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a prima facie defence. It was suggested in argument that there is another rule that the applicant must satisfy the Court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment [to be entered] and thereafter applying to set it aside is one of the matters to which the Court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the [court's setting aside jurisdiction] would be deprived of most of [its] efficacy. The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

65 For completeness, we reiterate that the merits of the defence do not constitute the sole consideration that a court takes into account in deciding whether to set aside a regular default judgment. While this factor is certainly highly significant in its own right, it also has to be assessed against other relevant considerations – at the end of the day, a balancing exercise is involved. As this court recently reiterated in *Su Sh-Hsyu* ([60] *supra*) at [43]:

> [T]he question of whether there is a defence on the merits is the dominant feature to be weighed against the applicant's explanation both for the default and for any delay, as well as against prejudice to the other party …

66 We turn now to the legal principles which apply to the setting aside of *irregular* default judgments.

Irregular default judgments

Whether irregular judgments must be set aside as of right

(1) The historical position: *Anlaby v Praetorius*

67 In *Anlaby v Praetorius* (1888) 20 QBD 764, the English Court of Appeal held that a defendant was entitled to set aside an irregular default judgment *ex debito justitiae*, *ie*, as of right (for convenience, we shall refer to this principle as "the *ex debito justitiae* rule"). This strict approach may be attributed to two important features of that case. First, the law as it stood then made a distinction between an order that was void (*ie,* a nullity) and an order that was voidable. The affected party could either ignore an order that was a nullity or ask the court to set it aside; in the latter scenario, he was entitled to have the order set aside *ex debito justitiae* (*id* at 769). As for an order that was voidable, the court had a discretion as to whether to set it aside (*ibid*). Second, the

judgment in *Anlaby v Praetorius* had been entered prematurely. Fry LJ stressed (at 768) that:

> The Court acts upon an obligation; the order to set aside the judgment is made ex debito justitiae, and there are good grounds why that should be so, because the entry of judgment is a serious matter, leading to the issue of execution ...

In essence, the court in *Anlaby v Praetorius* was preoccupied with the prejudice that would be caused to the defendant if a "premature and irregular" (*ibid*) judgment were allowed to stand.

(2) The modern approach: Order 2 rule 1 of the Rules of Court

68 In England, prior to October 1964, O 2 r 1 of the Rules of the Supreme Court (UK) read as follows:

> **Non-compliance with Rules or rule of practice** (O. 2, r. 1).
>
> 1. Subject to Rule 2 [the then English equivalent of O 2 r 1(3) of our Rules of Court], non-compliance with any of these Rules, or with any rule of practice for the time being in force, shall not render any proceedings void *unless the Court so directs*, but *the proceedings may be set aside either wholly or in part as irregular*, or amended, or otherwise dealt with, in such manner and on such terms as the Court thinks fit.
>
> [emphasis added]

69 The introduction of the new O 2 rr 1(1) and 1(2) of the Rules of the Supreme Court (UK) (referred to collectively as "the new English O 2 r 1") in October 1964, which was aimed at "[getting] over the decision of *In re Pritchard, decd* [[1963] Ch 502]" (*per* Lord Denning in *Harkness v Bell's Asbestos and Engineering Ltd* [1966] 2 QB 729 ("*Harkness v Bell*") at 734), eliminated the stark contrast between the legal effect of a void court order and that of a voidable court order. The new English O 2 r 1, which is *in pari materia* with O 2 rr 1(1) and 1(2) of our Rules of Court, states:

> **Non-compliance with Rules** (O. 2, r. 1).
>
> 1.—(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.
>
> (2) Subject to paragraph (3) [which is similar, in substance, to O 2 r 1(3) of our Rules of Court], the Court may, on the ground that there has been such failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.

Lord Denning explained the effect of the new English O 2 r 1 in *Harkness v Bell* as follows (at 735–736):

> This new rule does away with the old distinction between nullities and irregularities. *Every omission or mistake in practice or procedure is henceforward to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice.* It can at last be asserted that "it is not possible for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation." [emphasis added]

70 The flexible approach permitted under the new English O 2 r 1 (and likewise under O 2 r 1 of our Rules of Court) is well-illustrated by *Harkness v Bell* itself. In that case, the plaintiff applied for leave to claim damages from his employer for a work-related illness that he had contracted (leave of court was required as the relevant limitation period had already expired). The district registrar made the order granting leave. Subsequently, there were lengthy settlement negotiations between the plaintiff and the defendant employer. Some years later, the defendant learnt that there were two serious flaws in the proceedings that had resulted in the district registrar's order, namely, the district registrar had no jurisdiction to give leave and no power to make the order in the particular form in which it was made. The defendant applied to set aside the deputy registrar's order, but the judge in chambers held that since that order was a nullity, there was nothing to set aside. This created hardship for the plaintiff, for it meant that the district registrar's order had not been effective at all to grant him leave to commence his action outside the limitation period. As it was too late by then for the plaintiff to file a fresh application for leave to bring his claim, he applied instead to have the deputy registrar's order rectified. His application was dismissed at first instance on the same ground as that given for the dismissal of the defendant's setting-aside application, *ie*, the deputy registrar's order was a nullity and there was nothing that the court could do about it. The plaintiff, however, succeeded on appeal to the English Court of Appeal. Instead of setting aside the district registrar's (irregular) order, the court "put the matter right under the new provisions [*ie*, the new English O 2 r 1] and … treated [the leave] as granted properly" (*id* at 736, *per* Lord Denning).

71 Notwithstanding the flexibility allowed under the new English O 2 r 1, the *ex debito justitiae* rule remains relevant. This can be seen from two cases decided by the English Court of Appeal after this provision was introduced, *viz*, *White v Weston* [1968] 2 QB 647 and *Willowgreen Ltd v Smithers* [1994] 1 WLR 832. In both of these cases, it was held that the default judgment entered against the defendant was irregular, and therefore ought to be set aside *ex debito justitiae*, as proper service of the proceedings had not been effected (see Camille Cameron, "Irregular Default Judgments: Should Hong Kong Discard the 'As of Right' Rule?" (2000) 30 Hong Kong LJ 245 ("Cameron's article") at 248–249 for a helpful commentary on these two cases). As the English Court of Appeal explained in *Ban Hin Lee Bank Berhad v Sonali Bank* (9 November 1998) (unreported):

> [I]f the judgment is irregular ... [t]he older authorities seem to show that it must then be set aside ex debito justitiae. And *in principle that must be right, but it is always subject to the power of the court to amend in appropriate cases.* In not all cases will it be appropriate to allow an amendment; for example, if the judgment was entered before the time for service of notice of intention to defend had expired, but in other cases it may be appropriate. [emphasis added]

(3) The symmetry between Order 2 rule 1 and Order 13 rule 8 as well as Order 19 rule 9

72 Specifically in the context of irregular O 13 default judgments and irregular O 19 default judgments, O 2 r 1 of our Rules of Court dovetails neatly with the court's wide jurisdiction under O 13 r 8 and O 19 r 9 respectively to set aside or vary such irregular judgments "on such terms as it thinks just". An example of the breadth of the court's power under these provisions can be seen from the Hong Kong Court of Appeal's decision in *Po Kwong Marble Factory Ltd v Wah Yee Decoration Co Ltd* [1996] 4 HKC 157 ("*Po Kwong Marble Factory*") (see Cameron's article ([71] *supra*) for an insightful analysis of the case).

73 In *Po Kwong Marble Factory*, the process server left the writ at the unit which adjoined the defendant's registered office, thinking that the former was the correct office. Judgment in default of defence was subsequently entered against the defendant. The defendant's setting-aside application was dismissed at first instance, but was allowed on appeal subject to a term imposed by the Hong Kong Court of Appeal (namely, the payment of money into court by the defendant). Both Bokhary JA and Sears J considered that the court was justified in attaching that term to the setting aside of the default judgment (Nazareth VP had reservations about it, but ultimately concurred with the majority's order since the plaintiff had no objection). Bokhary JA, in particular, opined that the layout of the defendant's office – which was "of the defendant company's making" (*id* at 161) and "a highly confusing one" (*ibid*) – had contributed to the process server's error in service. He pointed out that (see *Po Kwong Marble Factory* at 162):

> 'Ex debito justitiae' or as of right means without going into the actual merits of the defence. It does not mean shutting one's eyes [to] the circumstances surrounding the question of service and why things went wrong in that regard. *The court's statutory jurisdiction is unfettered*. [emphasis added]

In a similar vein, Sears J commented on how the court could exercise its wide discretion under the Hong Kong equivalent of O 13 r 8 of our Rules of Court to achieve a just overall outcome in individual cases, as follows (*id* at 161):

> The provisions of [the Hong Kong equivalent of O 13 r 8] as I have said, are wide in their context. In my judgment, whilst it can be rightly said that a judgment which has been obtained irregularly ought to be set aside as of right, in other words that the merits of the particular defence to the claim do not have to be entered into by the court, nevertheless, *there is always a residual discretion in the court to have regard to the conduct of the parties.* For example, if a judgment has been obtained irregularly and the writ comes to the notice of the defendant, he may delay for a certain period of time before taking any action on the writ. *In my judgment, the court still has a discretion – having regard to what the defendant himself has done – to deprive [the plaintiff], if necessary, of that judgment or alternatively, to impose terms upon the setting aside of the judgment which accord with justice having regard to the facts of the particular case.* [emphasis added]

The test for determining whether or not the ex debito justitiae *rule should be applied*

74 As we alluded to earlier (at [71] above), the *ex debito justitiae* rule remains relevant despite the wide discretion conferred on the courts to uphold or vary irregular default judgments. In our view, this rule should continue to be the starting point *vis-à-vis* setting-aside applications involving irregular default judgments as the expectation that litigants should observe procedural rules cannot be lightly compromised.

75 How then should the court decide whether to apply or depart from the *ex debito justitiae* rule? The English statutory provisions serve as a helpful guide in this regard. Under r 13.2 of the CPR, the English courts *must* set aside a default judgment which is irregular because of one or more of the following reasons:

(a) the time limit for filing an acknowledgement of service or a defence (as the case may be) had not expired at the time the default judgment was entered (see r 13.2(a) read with r 12.3(1), as well as r 13.2(b) read with r 12.3(2));

(b) an application by the defendant for summary judgment against the claimant or for the

striking out of the claimant's statement of case was pending when the default judgment was entered (see rr 13.2(a) and 13.2(b) read with r 12.3(3)(a));

(c) the defendant had satisfied the whole claim before the default judgment was entered (see r 13.2(c)); and

(d) where judgment on a claim for money is concerned, the defendant had filed or served on the claimant an admission of liability to pay all of the money claimed together with a request for time to pay (see rr 13.2(a) and 13.2(b) read with r 12.3(3)(c)).

In our view, although our Rules of Court do not contain similar express provisions, the factors set out in r 13.2 of the CPR, which underline the importance of ensuring that the requirements of procedural justice are observed where default judgment is entered against the defendant, can be adopted by our courts *mutatis mutandis*.

76 Thus, the key question for the court, when it decides whether to adhere to or depart from the *ex debito justitiae* rule, is whether there has been such an egregious breach of the rules of procedural justice as to warrant the setting aside of the irregular default judgment as of right. 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 the majority of irregular default judgments), whether the breach was committed in bad faith.

The court will be particularly ready to set aside an irregular default judgment where the judgment was entered prematurely or where the defendant had no notice of the proceedings against him (see item (a) above), as these are plain instances of injustice that offend the essence of due process. In contrast, where the procedural injustice occasioned to the defendant is not egregious, the court will generally be less inclined to adhere strictly to the *ex debito justitiae* rule, especially if the defendant has taken a fresh step in the proceedings after becoming aware of the irregular default judgment (see item (b) above), for instance, by admitting its liability under that judgment (see, *eg*, the decision of the English High Court in *BCCI v Habib Bank* [1999] 1 WLR 42). With regard to the defendant's undue delay (if any) in filing its setting-aside application (see item (c) above), we would reiterate that such delay, although potentially prejudicial to the defendant's chances of having the irregular default judgment set aside, is not invariably fatal (see [30]–[36] above). We would also emphasise that the factors listed above are by no means exhaustive – it is open to the court to consider, for the purposes of deciding whether or not to adhere to the *ex debito justitiae* rule, any other factor which may be relevant given the particular factual matrix of the case at hand (see, *eg*, the factors listed at [96] below). Ultimately, in deciding whether there are proper grounds for departing from the *ex debito*

justitiae rule, the overriding principle laid down in *Evans v Bartlam* ([25] *supra*) – *ie*, the court must be guided by the (procedural) justice of the case in hand – prevails.

The legal position where the ex debito justitiae *rule is not applied: Whether the court may consider the merits of the defence*

77 In those cases where the court arrives at the view that the *ex debito justitiae* rule should not be followed, could there nonetheless be some other sufficient reason which justifies the setting aside of the default judgment? In particular, should the court, at this stage of the analysis, take into account *the merits of the defence* that the defendant may or intends to put forward if its setting-aside application is allowed? In this regard, the English Court of Appeal's decision in *Faircharm Investments Ltd v Citibank International Plc* [1998] EWCA Civ 171 ("*Faircharm*"), which has created quite a stir in judicial circles, merits close consideration.

(1) The decision in *Faircharm*

78 The facts in *Faircharm* were as follows. In June 1983, a Mr Frost mortgaged a property ("the Property") to Citibank International Plc ("Citibank") as security for repayment of a loan of £23,000. He also assigned to Citibank, as further security, a life insurance policy which he had obtained from an insurer ("Norwich Union"). (Although there was a suggestion in *Faircharm* that there might have been more than one insurance policy involved, we shall, for ease of discussion, use the term "the Life Policy" to denote the specific policy and/or all the policies which Mr Frost assigned to Citibank.) About ten years later, in April 1993, Faircharm Investments Ltd ("Faircharm") obtained judgment against Mr Frost for the sum of £39,119.40. Faircharm also obtained a charging order on the Property and an order for its sale. Before Faircharm could sell the Property free of encumbrances, it had to pay off the amount due to Citibank (which then came up to £30,858). Faircharm's solicitors wrote to Citibank suggesting that, since Faircharm would be effecting payment of the outstanding sum due under the mortgage on the Property, the mortgage over the Life Policy should be assigned to Faircharm upon its redemption of the mortgage on the Property. According to Faircharm's solicitors, Citibank agreed to this proposal.

79 The sale of the Property on 20 October 1994 fetched a gross sum of £66,000, which, after paying off the amount due to Citibank (*ie*, £30,858), still left Faircharm with a significant shortfall. The latter hoped to recoup part of this shortfall from the surrender proceeds of the Life Policy, which eventually amounted to £7,788.99. On the same day that the Property was sold (*ie*, 20 October 1994), Faircharm's solicitors wrote to Citibank stating that Faircharm was paying the redemption moneys due in respect of the Property on the basis that Citibank would pay the surrender proceeds of the Life Policy to it (Faircharm) and requesting that Citibank send those proceeds to it as soon as possible. Faircharm did not get any response to the letter of 20 October 1994. Its solicitors wrote to Citibank again on 22 November 1994, 2 December 1994 and 21 December 1994 concerning the surrender proceeds of the Life Policy, which were alleged to be "due to [Faircharm]" (*ibid*). Again, no response was received from Citibank.

80 On 11 January 1995, a writ was issued on behalf of Faircharm against Citibank. Faircharm pleaded that it had paid the sum of £30,858 to Citibank on the basis that the latter would, *inter alia*, remit to Faircharm the surrender proceeds of the Life Policy; Citibank, however, had not done so. Prior to the issue of the writ, Citibank had on 21 November 1994 written to Norwich Union to inform the latter that the mortgage on the Life Policy had been redeemed and that it (Citibank) had no further interest in that policy. On 6 February 1995, Citibank informed Mr Frost's solicitors that the Life Policy had been sent to Norwich Union for surrender and that the original policy documents were no longer in Citibank's possession. (It appeared that Citibank, in stating thus, had forgotten that the Life Policy

had been sent to Faircharm as long ago as 20 October 1994 or thereabouts, and that Faircharm and/or its solicitors had likewise forgotten this; this point was not, however, critical to the reasoning of the English Court of Appeal.) Citibank's letter of 6 February 1995 was forwarded by Mr Frost's solicitors to Norwich Union on 27 March 1995. Consequently, the surrender proceeds of the Life Policy were paid to Mr Frost, instead of Faircharm, on 29 March 1995.

81 On 20 February 1995, before the payment of the surrender proceeds of the Life Policy to Mr Frost and unaware that such payment to Mr Frost was imminent, Faircharm applied by summons under O 14 and O 86 of the Rules of the Supreme Court (UK) for, *inter alia*, an order that Citibank hand over to Faircharm the surrender proceeds of the Life Policy, the benefit of which had been assigned to Citibank on 13 June 1993. The summons ("Faircharm's summary judgment application") was heard sometime in April 1995 by Deputy Master Wall, who made, *inter alia*, an order that Citibank execute an assignment in Faircharm's favour of all of its (Citibank's) beneficial interest in the Life Policy. The specific performance ordered, therefore, was a variation of the order that Faircharm had sought. At the time Faircharm's summary judgment application was heard, neither party seemed to be aware of the earlier payment of the surrender proceeds to Mr Frost on 29 March 1995. As noted by the English Court of Appeal in *Faircharm*, there was no record of the deputy master's reasons for his decision, but he was reported to have said on a later occasion (*ibid*):

> My recollection is that I decided that [Faircharm] was entitled to its order on the agreement [by Citibank to, *inter alia*, remit the proceeds of the Life Policy to Faircharm], but if that was wrong [Faircharm] would win anyway on subrogation.

82 After it emerged that the surrender proceeds of the Life Policy had been paid to Mr Frost, Faircharm claimed damages against Citibank, and entered a default judgment on 18 January 1996 after Citibank failed to serve its defence. This was a procedural irregularity because no leave to defend had been given to Citibank (leave should have been granted because Faircharm's summary judgment application had succeeded only in part) and, thus, Citibank could not be in default of defence. Citibank applied to set aside the default judgment, but was unsuccessful both at first instance (before Deputy Master Wall) as well as on appeal to a judge in chambers of the English High Court. When the setting-aside application came before the English Court of Appeal, Sir Christopher Staughton was keen to put an end to the "tortured misunderstanding on both sides" (*ibid*) over the relatively small sum of £7,788.99 (*ie*, the quantum of the surrender proceeds of the Life Policy). The learned judge reiterated that procedural rules were not meant to punish litigants for their mistakes, but to do justice. He held that, although the default judgment against Citibank was irregular (*ibid*):

> *... Citibank would be bound to lose on an application for summary judgment based on the true facts and properly argued, on two grounds.* First, *it has now been held by [a deputy] master in a decision from which there is no longer any attempt to appeal that Citibank contracted to remit the proceeds of the [L]ife [P]olicy to Faircharm.* It must be an implied term of that agreement that Citibank would not destroy [Faircharm's] right to those proceeds by writing as [it] did to Mr Frost's solicitors, a letter which was passed to Norwich Union. That was the [reason] why the proceeds of the policy were paid to Mr Frost and not made available to Faircharm.
>
> Secondly, even in the absence of such agreement *Faircharm would be subrogated to the rights of Citibank in the [Life] [P]olicy if [Faircharm] chose to call for [the policy], as [it] did.* It is a feature of the doctrine of subrogation in insurance law that the subrogator is under a duty not to destroy or prejudice any right or remedy to which the subrogatee becomes entitled; or at any rate, he will be liable to compensate the subrogatee if he does so ... The same principle must apply to [the] conduct of a prior encumbrancer [*viz*, Citibank] who is paid off by a subsequent encumbrancer [*viz*, Faircharm].

[emphasis added]

As such, the lower courts' decisions to dismiss Citibank's setting-aside application were affirmed and the default judgment was ordered to stand as a judgment for damages in the amount of the proceeds of the Life Policy. Significantly, Sir Staughton also endorsed the view (expressed by the lower courts) that "if Citibank [were] bound to lose on a subsequent application [by Faircharm] for summary judgment, it would be pointless to set aside the existing judgment" (*ibid*).

(2) The Significance of *Faircharm*

8 3 *Faircharm* ([77] *supra*) is noteworthy not so much because the English Court of Appeal allowed an irregular default judgment to stand, but more because the court identified a class of situations where such an outcome would be appropriate – namely, cases where the defendant was "bound to lose" (*ibid*, *per* Sir Staughton) if the irregular default judgment were set aside and the matter re-litigated. Indeed, the former aspect of the English Court of Appeal's decision is not as radical a departure from the *ex debito justitiae* rule as it may *prima facie* appear to be, given that the English courts clearly have the power to uphold an irregular judgment (notwithstanding the *ex debito justitiae* rule) under the new English O 2 r 1. The latter aspect of the decision in *Faircharm*, however, marks a significant departure from the principles hitherto applied to the setting aside of *irregular* judgments. As stated pragmatically in *The Supreme Court Practice 1999* (Sir Richard Scott chief ed) (Sweet & Maxwell, 1998) vol 1 at para 13/9/9, the effect of *Faircharm* is that in an application to set aside an irregular judgment, "an affidavit in support will now almost always be needed, as in the case of a regular judgment". From this perspective, *Faircharm* has narrowed the distinction between *regular* and *irregular* default judgments where setting-aside applications are concerned.

84 To date, the approach taken in *Faircharm* (which we will refer to interchangeably as "the 'bound to lose' test" and "the *Faircharm* approach") does not seem to have been widely embraced in jurisdictions outside England. For instance, the Hong Kong judiciary has expressed reservations about and refrained from adopting *Faircharm* (see, for example, the Hong Kong Court of Appeal's decision in *Chu Kam Lun v Yap Lisa Susanto* [1999] 3 HKC 378 at 384–385). The Hong Kong Chief Justice's Working Party on Civil Justice Reform, in its final report published on 3 March 2004 <http://www.civiljustice.gov.hk/fr/index.html> (accessed 22 July 2008), stated in a footnote to para 287 (which falls under the section headed "Summary Disposal of Proceedings") that it considered the orthodox position (*ie*, the *ex debito justitiae* rule) "preferable and correct in principle" compared to the *Faircharm* approach. In Australia, however, the Court of Appeal of the Supreme Court of Queensland made some positive comments about *Faircharm* in the recent case of *Marjorie Joyce Cusack v Agostino De Angelis* [2007] QCA 313 (at [33], *per* Muir JA) as follows:

> More recently, the English Court of Appeal has held [in *Faircharm*] that it may be inappropriate to set aside an irregularly entered judgment if a subsequent application for summary judgment is bound to succeed*. That decision is consistent with the contemporary approach of applying rules of practice and procedure, whether statutory or developed under the common law, not rigidly and with undue technicality, but with regard to considerations of cost, expedition, utility and justice.* [emphasis added]

That said, it does not appear that the other Australian jurisdictions have unequivocally embraced the *Faircharm* approach (see BC Cairns*, Australian Civil Procedure* (Lawbook Co, 7th Ed, 2007) at pp 371–372).

85 The main concern that has been expressed about *Faircharm* is the possible erosion of the defendant's right to raise its defence. Of particular concern is the risk that the plaintiff may get away

with entering a default judgment prematurely and thereby obtain judgment in its favour earlier than it could have done if it had taken out an O 14 application against the defendant. Under the Rules of Court, an O 13 default judgment can be properly entered only "after the time limited for appearing" (see O 13 rr 1–6), while an O 19 default judgment can be properly entered only "after the expiration of the period fixed under [the] Rules [of Court] for service of the defence" (see O 19 rr 2–7). In the event that (a) the plaintiff enters an O 13 default judgment or an O 19 default judgment prematurely (*ie*, before the relevant timeline stipulated in O 13 or O 19, as the case may be, has expired) *and* (b) the defendant's application to set aside that irregular default judgment is dismissed on the basis of the "bound to lose" test, judgment would effectively be entered against the defendant without its having been given a chance to exercise, to the full extent, its rights, as set out in the Rules of Court, to present its defence. (In contrast, this scenario would not arise where the plaintiff obtains summary judgment against the defendant as O 14 r 1 states that an O 14 application can only be made after the defendant has filed its defence.) Although we do not think that it would be easy for the plaintiff in this scenario – *viz*, where the defendant applies to set aside a default judgment which is irregular because it was entered prematurely – to satisfy the requirement of showing that the defendant is "bound to lose" (*per* Sir Staughton in *Faircharm*) given that the defence has not even been filed yet, the court should nevertheless be alert to this avenue for potential abuse of the default judgment procedure. This is also why, as mentioned earlier (at [76] above), the court will be particularly ready to set aside as of right a prematurely-entered default judgment. In this regard, the timely caution sounded in *The Supreme Court Practice 1999* ([83] *supra*) vol 1 at para 13/9/8 merits careful consideration:

> It is submitted that the freedom, now apparently given to the Court [following the decision in *Faircharm*] to condone obtaining irregular judgments, should be exercised with great caution[;] if not it could become the subject of deliberate misuse. If a plaintiff enters judgment prematurely it will be almost impossible to prove that this has been done deliberately rather than through a mere miscalculation. Unless firm guidelines develop a plaintiff who enters a premature judgment could be put in an advantageous position. *Thus ... a distinction should continue to be drawn between setting aside a regular and an irregular judgment. If this is not done a defendant will be faced with a more difficult test in applying to set aside a wrongly entered judgment than if he was responding to an application for judgment under O.14 in a regularly conducted action. If no distinction is made a defendant will be forced to invoke the discretionary powers of the Court ... and satisfy the high test imposed. ... [It is suggested] that only if faced with a situation where judgment would inevitably be given for the plaintiff should* Faircharm *be applied. To discourage abuse denying a successful [p]laintiff his costs might be considered.* [emphasis added]

86 We should also point out that, in England, any uncertainty and potential abuse created by the *Faircharm* approach has been greatly ameliorated by the enactment of r 13.2 of the CPR, which sets out specific circumstances in which the English courts *must* set aside an irregular default judgment (see [75] above). Thus, England, where the *Faircharm* approach originated, has statutorily mitigated, if not eliminated, some of the potential difficulties which that approach could give rise to.

(3) Should *Faircharm* be adopted in Singapore?

87 In the proceedings below, both AR Lim and the Judge were favourably disposed towards the rather unconventional approach taken in *Faircharm* ([77] *supra*) (see [14] of the AR's Judgment and [26]–[29] of the Judge's Judgment respectively). We agree that, in a case where the *ex debito justitiae* rule is not applied, the merits of the defence is a highly important (but not necessarily determinative) factor which the court should consider in deciding whether the irregular default judgment should nonetheless be set aside on some other ground (apart from the *ex debito justitiae* rule). The *Faircharm* approach provides a useful touchstone in this regard. Indeed, its practical

benefits cannot be ignored especially where:

(a) the plaintiff did not enter the default judgment prematurely or in bad faith; and/or

(b) the defendant was not prejudiced by the irregularity.

In this narrower respect, we fully agree with the Judge that the *Faircharm* approach is in line with the goal of efficient case and resource management that our courts continuously strive towards (see the Judge's Judgment at [26] and [28]). As astutely observed in Cameron's article ([71] *supra*) at 263:

> If we accept, as we surely must, that the goals of justice on the merits, fairness and ensuring compliance will occasionally conflict with the goal of efficient, expedient and proportionate management of cases, the next question is how that conflict can be resolved. *The answer is by the prudent exercise of judicial discretion.* This might be criticized as less certain and predictable than an absolute rule [*ie*, the *ex debito justitiae* rule] that precludes any discretion if a judgment is irregular, but it has a better chance of achieving the desired balance between these competing goals (and it is consistent with the fact that such a discretion exists). [emphasis added]

88 The local decision of *Standard Chartered Bank v Chip Hong Machinery (S) Pte Ltd* [1990] SLR 1230 is a good example of the type of situation where the *Faircharm* approach would be apposite. In that case, the first defendants mortgaged a property to the plaintiff bank to secure overdraft facilities. The second defendants had occupied the upper floor of the property since 1947 and had been paying rent to the first defendants as well as the latter's predecessors in title. The plaintiff knew of the existence of the second defendants, but might not have been aware of their identity. When the first defendants defaulted on payment, the plaintiff obtained a writ of possession in respect of the property. Subsequently, the second defendants applied to be joined as a party to the proceedings. They then sought to set aside the writ of possession on two grounds: first, the writ of possession had been obtained irregularly because a notice of the proceedings under O 83 of the Rules of the Supreme Court 1970 had not been given to them; and, second, there was merit in their defence to the plaintiff's claim for possession.

89 Punch Coomaraswamy J accepted that the writ of possession had been irregularly obtained. However, he dismissed the second defendants' application for the writ of possession to be set aside as he was of the view that there was no merit in the second defendants' defence. This was because the second defendants, being an unincorporated society, could not hold a tenancy. As for the contention that the second defendants were "licensees coupled with an equity" (*id* at 1232, [17]) since one of the first defendants' predecessors in title ("Tan") had given them the express assurance that they could occupy the premises for as long as they wished, the court dismissed this argument as "wholly untenable" (*id* at 1233, [18]) on the basis that, *inter alia*, the assurance allegedly given by Tan did not bind the first defendants. Since no caveat had been lodged against the property, the plaintiff was entitled to treat the property as unencumbered. For these reasons, the judge held that the second defendants "had from the outset absolutely no defence to the [plaintiff's] claim" (*id* at 1233, [22]). The judge also observed (*id* at 1232, [12]):

> I agree that, as a rule, writs of possession obtained irregularly ought to be set aside almost, if not altogether, as of right. However, in *very exceptional cases* where it is clear that setting aside the writ of possession would be an *exercise in futility*, the court ought not to act in vain. [emphasis added]

90 At this juncture, we should emphasise that there are three important caveats to our

(qualified) endorsement of *Faircharm* ([77] *supra*). *First*, the *Faircharm* approach *does not* hereafter represent the starting point for all applications to set aside irregular default judgments; instead, the *ex debito justitiae* rule remains the starting point (see [74] above). The *Faircharm* approach is applied *only where* the *ex debito justitiae* rule is not followed, such that the court has to consider whether the irregular default judgment in question should nonetheless be set aside on some other ground – specifically, on the basis of the merits of the defence. *Second*, in most cases where an irregular default judgment is entered, the plaintiff would have been in default of some procedural rule. *Prima facie*, it should not be allowed to take advantage of its own non-compliance with the rules; correspondingly, the defendant should not be placed in the same position as, or in a more disadvantageous position than, a defendant whose default resulted in the plaintiff properly obtaining a regular default judgment. An undesirable outcome (where the plaintiff is not penalised and, in fact, gains an advantage from entering an irregular default judgment) could result if the *Faircharm* approach is rigidly applied regardless of the nature of the irregularity and the overall justice of the case. As such, it is essential that the courts adopt a nuanced approach when applying the "bound to lose" test. *Third*, the decision in *Faircharm* must be viewed against the particular factual matrix of that case, especially Faircharm's summary judgment application, which resulted in the order that Citibank assign to Faircharm all of Citibank's beneficial interest in the Life Policy (see [81] above). In particular, the court should be wary of interpreting Sir Staughton's statement in *Faircharm* that "Citibank would be bound to lose on an application for summary judgment" as intimating that the "bound to lose" test is synonymous with the test for determining whether summary judgment should be entered in an O 14 application (as to which, see [48] above). The two tests are *not* the same.

How an application to set aside an irregular default judgment should henceforth be assessed

91 In view of our (qualified) endorsement of *Faircharm*, an application to set aside an irregular default judgment should now be assessed as follows. The *ex debito justitiae* rule remains, as stated earlier, the starting point (see [74] and [90] above). In this regard, the court will be particularly ready to set aside an irregular default judgment if egregious procedural injustice has been occasioned to the defendant (*eg*, where the judgment was entered prematurely or where the defendant had no notice of the proceedings against it (see [76] above)). In these instances, given that the essence of due process has not been observed, the court is *not* minded, on policy grounds, to depart from the *ex debito justitiae* rule.

92 Where an irregular default judgment is not set aside as of right, the court will then have to consider whether there is sufficient reason to nonetheless set aside the irregular judgment on some other basis (apart from the *ex debito justitiae* rule). At this juncture, one of the most crucial factors to be considered is the merits of the defence (see [87] above). The burden lies on the plaintiff to show that the defendant is "bound to lose" (*per* Sir Staughton in *Faircharm* ([77] *supra*)) even if the irregular default judgment is set aside and the matter re-litigated (see further [98] below). In this regard, the *Faircharm* approach, which is pegged at a *lower* standard than that embodied in the "arguable or triable issue" test *vis-à-vis* the setting aside of regular default judgments, is a fair and just one. In our view, the "bound to lose" test properly reflects the different policy considerations which feature where the defendant seeks to set aside an *irregular* default judgment as opposed to a *regular* default judgment – in the former, there would (in most cases) have been procedural injustice occasioned by an act of the plaintiff, whereas this is absent in the latter scenario (see also [43] above). As such, to avoid prejudice to the defendant, the less exacting "bound to lose" standard ought to apply when the defendant is seeking to set aside an irregular default judgment in this scenario (*ie*, in a case where the *ex debito justitiae* rule is not followed, such that the court has to go on to assess whether to nonetheless set aside the irregular default judgment in view of, *inter alia*, the merits of the defence).

93 Should the court ultimately decide, after taking into account (*inter alia*) the merits of the defence as assessed based on the *Faircharm* approach, not to set aside the irregular default judgment, the judgment will be upheld, subject to:

(a) any variation which the court may make pursuant to its discretion under O 2 r 1(2), O 13 r 8 (*vis-à-vis* irregular O 13 default judgments), O 19 r 9 (*vis-à-vis* irregular O 19 default judgments) or O 20 r 11 (*vis-à-vis* "[c]lerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission") to cure the irregularity; and/or

(b) any terms which the court may impose pursuant to its discretion under O 2 r 1(2).

In this regard, we should point out that where the court decides to uphold an irregular default judgment while, at the same time, amending the judgment so as to rectify the irregularity therein, the court may invoke O 20 r 11 only if the irregularity consists *specifically* of a clerical mistake or an accidental slip or omission in the judgment (*eg*, misstatement of the quantum of the judgment sum due to an inadvertent typographical error; see also *Philip Securities (Pte) v Yong Tet Miaw* [1988] SLR 594). Where the irregularity is not occasioned by an accidental or a clerical error, O 20 r 11 is not applicable (see, *eg*, *Malayan United Bank Bhd v Mohammed Salleh bin Mohammed Yusoff* [1988] 3 MLJ 165); the court would then have to invoke O 2 r 1(2) or, alternatively, depending on whether the irregular default judgment is an O 13 default judgment or an O 19 default judgment, either O 13 r 8 or O 19 r 9 respectively.

94 In our view, *BCCI v Habib Bank* ([76] *supra*) is a good illustration of when it would be apt to uphold an irregular default judgment – which is not set aside *ex debito justitiae* – on the ground that the defendant would be "bound to lose" as stated in *Faircharm* ([77] *supra*) even if the irregular default judgment were set aside. In that case, the plaintiff issued a writ claiming, *inter alia*, a sum of US$683,062.10 against the defendant, and subsequently obtained an O 13 default judgment for that sum. By the time the default judgment was entered, the plaintiff was aware that the correct figure was US$613,756 instead, but it nonetheless proceeded to obtain judgment for the higher (and incorrect) amount of US$683,062.10. Park J dismissed the defendant's setting-aside application, pointing out (see *BCCI v Habib Bank* at 47) that the defendant, via the affidavits which it filed for its setting-aside application, had tacitly conceded that it owed the plaintiff US$613,756. He thus upheld the default judgment, albeit with the sum of US$683,062.10 varied to US$613,756. Although *Faircharm* was apparently neither brought to the attention of nor considered by Park J, his comments (see *BCCI v Habib Bank* at 46), which are set out below, echo the position taken by the English Court of Appeal in *Faircharm*:

> *If*, from the affidavits and exhibits, *the court concludes that, even though there were irregularities in the writ or the judgment or both, the substantive content of the judgment is right, the court will not set the judgment aside. The only effect if it did would be to put the parties to further expense and delay to reach a regular judgment for the same amount.* Further, it is the same in principle *if* the court is satisfied from the affidavits and exhibits that, *although the amount in the default judgment was wrong, it (the court) knows what the correct amount was*. The court will not set the incorrect judgment aside and make the plaintiff start again. It will vary the judgment to the correct amount. [emphasis added]

Synopsis of the legal principles applicable to setting-aside applications

95 To summarise, where the default judgment sought to be set aside is a *regular* one, the *Evans v Bartlam* test (*ie*, whether the defendant can show a *prima facie* defence that raises triable or arguable issues) is preferable to the *Saudi Eagle* test both in principle and as a matter of practical

application.

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

(a) the blameworthiness of the respective parties (*eg*, whether there has been undue delay on the defendant's part in making its setting-aside application);

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

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

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

97 In both types of setting-aside applications – *ie*, relating to regular and irregular default judgments respectively – the defendant's delay in making the application is a relevant consideration and may be determinative where there has been undue delay (see [30]–[36] above). As a rule of thumb, the longer the delay, the more cogent the merits of the setting-aside application have to be.

98 Although the issue of whether the defendant has a defence on the merits is now a crucial factor with regard to both the setting aside of regular default judgments and (where the *ex debito justitiae* rule is not followed) the setting aside of irregular default judgments, an important distinction remains between these two types of setting-aside applications. Where the default judgment has been *regularly* obtained, the legal burden rests on the defendant to show that its defence raises triable issues so that, notwithstanding its default which resulted in judgment being properly entered against it, the court should exercise its discretion to deprive the plaintiff of its rights under the (regular) default judgment. In contrast, where it is alleged that the default judgment was *irregularly* obtained, the defendant only needs to establish the irregularity, whether factual or legal (see, *eg*, *Purwadi v Ung Hooi Leng* [2003] 4 SLR 292). Once the defendant discharges this burden and the court finds that the alleged irregular judgment is indeed irregular, the legal burden falls on the plaintiff to show (based on the factors outlined at [76] and [96] above) why the judgment should not be set aside. Even if the plaintiff succeeds in persuading the court that the *ex debito justitiae* rule should not be followed, the court may nonetheless still set aside the irregular default judgment in view of (*inter alia*) the apparent merits of the defence. As such, where the plaintiff has established that the irregular default judgment should not be set aside as of right, the plaintiff will *also* have to go on to show that the defendant is "bound to lose" (*per* Sir Staughton in *Faircharm* ([77] *supra*)) in the event that the judgment in question is set aside and the matter re-litigated. The defendant's setting-aside

application will ordinarily be dismissed only if the plaintiff manages to convince the court *both* that, first, the *ex debito justitiae* rule should not be followed *and*, second, the defence is bound to fail. In other words, where the defendant seeks to set aside a *regular* default judgment, it is for the *defendant* to establish the merits of its defence (based on *the* Evans v Bartlam *test*). In contrast, 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 debito 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.

99 At the end of the day, given the court's wide discretion as to whether to set aside, uphold or vary a default judgment, the list of factors which the court may take into account when ruling on a setting-aside application is open-ended. We do not wish to lay down determinative guidelines as to which of these factors ought to prevail so as not to impose any fetters on the court's discretion (for instance, a case could conceivably arise where the plaintiff's procedural default offends the essence of due process, but, at the same time, the defendant's defence is bound to fail). As this court stated in *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR 537 at [82] apropos the nexus between procedural and substantive justice:

> The rules of court practice and procedure exist to provide a convenient framework to facilitate dispute resolution and to serve the ultimate and overriding objective of justice. Such an objective must never be eclipsed by blind or pretended fealty to rules of procedure. On the other hand, a pragmatic approach governed by justice as its overarching aim should not be viewed as a charter to ignore procedural requirements. *In the ultimate analysis, each case involving procedural lapses or mishaps must be assessed in its proper factual matrix and calibrated by reference to the paramount rationale of dispensing even[-]handed justice*. [emphasis added]

Unnecessary fetters should not be judicially created when the Rules of Court have themselves conferred on the court an extraordinarily wide discretion to deal with procedural irregularities. In the ultimate analysis, it must be the factual matrix itself that determines the appropriate outcome of each setting-aside application.

Whether the Default Judgment should have been set aside

100 Having set out the relevant legal principles applicable to setting-aside applications, we now consider how these principles should have been applied to SUM 1843 had we not made the order which we eventually did (*viz*, that the Default Judgment be deemed to be set aside if Mercurine succeeds in the Consolidated Suit, inclusive of any appeals therefrom).

101 As mentioned earlier (at [91] and [96] above), we would have first considered whether the Default Judgment (which was irregular) ought to be set aside as of right. The Default Judgment consisted of, *inter alia*, two discrete parts – the Possession Order and the Money Judgment. It was not disputed that there were flaws in both parts of the Default Judgment: the former, because the requisite certificate under O 13 r 4(1) of the Rules of Court had not been obtained, and, the latter, because the quantum stated therein was excessive. In our view, neither of these irregularities resulted in such egregious procedural injustice to Mercurine as to warrant the setting aside of the Possession Order and the Money Judgment as of right. As far as the defect in the Possession Order was concerned, Mercurine admitted that it had not been prejudiced by Canberra's failure to produce the certificate required under O 13 r 4(1). As for the Money Judgment, Mercurine did not dispute that it was liable to Canberra for the sum of $725,116.81 at the time that the Default Judgment was entered. As such, Mercurine would not be unduly prejudiced if the Money Judgment were allowed to stand.

102 Having decided that the *ex debito justitiae* rule should not be applied, we would then have considered, *inter alia*, the merits of Mercurine's defence (as evaluated based on the "bound to lose" test laid down in *Faircharm* ([77] *supra*)) so as to decide whether the Default Judgment should be set aside on some other basis apart from the *ex debito justitiae* rule (see [92] and [96] above). In view of the pending trial of the Consolidated Suit, it is not appropriate for us to comment on the merits of Mercurine's defence in the present suit (*ie*, Suit 861) as that could have an impact on the outcome of the Consolidated Suit. Suffice it to say that, in our view, if Mercurine's defence to Canberra's claim for possession of the Premises is not bound to fail under the *Faircharm* approach, the *Possession Order* would ordinarily have been set aside. The position is different, however, where the *Money Judgment* is concerned. In view of the position taken by the parties to date *vis-à-vis* Canberra's claim for unpaid rent (see [101] above), it was patently clear that Mercurine would be bound to lose in respect of Canberra's claim for the undisputed sum of $725,116.81. In this regard, we also note that it was common ground that the Money Judgment had been satisfied by Mercurine's payment of the Compromise Sum; what was disputed was whether the payment of this sum had satisfied the rest of the Default Judgment as well. As such, no useful purpose would be served if the Money Judgment were set aside. In the light of the approach taken in *BCCI v Habib Bank* ([76] *supra*), which we concur with, we would ordinarily have upheld the Money Judgment (albeit as amended by the Judge so as to reflect the correct quantum due to Canberra (see [19] above)). However, as the Judge rightly pointed out (see [19] above), the Possession Order and the Money Judgment were not severable from each other since Mercurine intended to rely on the same defence against Canberra's claims for both unpaid rent and possession of the Premises. Therefore, we ordered that the Default Judgment *as a whole* would be deemed to be set aside if Mercurine succeeds in the Consolidated Suit.

103 At this juncture, we must emphasise that the decision which we would have made in respect of the Money Judgment (had we not made the order which we ultimately did) should not be read as endorsing a pro-amendment approach towards every default judgment entered for an excessive amount which the plaintiff later attempts to amend by substituting the correct sum. In the instant case, had the Money Judgment not already been satisfied by Mercurine's payment of the Compromise Sum *before* SUM 1843 was heard by AR Lim (see [14] above), a less accommodating stance towards Canberra's conscious delay in applying to amend the Default Judgment might have been justified.

An aside on the question of costs in setting-aside applications

104 Although the question of the appropriate costs order to make in a setting-aside application was not a live issue before this court, we take this opportunity to set out our views on it, especially since, in the light of the more nuanced approach which we have laid down *vis-à-vis* the setting aside of irregular default judgments, additional questions could arise as to which party is liable for costs (*eg*, where the court allows an irregular default judgment to stand because the defendant would be bound to lose if the matter were re-litigated).

105 Typically, if a *regular* default judgment is set aside because the defence has sufficient merit, the *defendant* bears the costs of the setting-aside application. Conversely, the *plaintiff* would usually be liable for costs when an *irregular* default judgment is set aside.

106 If an irregular default judgment is not set aside, however, it does not follow that the defendant must therefore bear the costs of the failed setting-aside application. Without wishing to set inflexible guidelines that could stymie the discretion of the lower courts, we would suggest that, as a general principle, the usual rule that costs follow the event should *not* be the starting point in an application to set aside an *irregular* default judgment. Depending on the nature of and the reasons for the irregularity, it may well be appropriate to order the plaintiff to bear the costs of the setting-aside

application – or, perhaps, even to make no order as to costs where, *inter alia*, the court upholds the irregular judgment because the defendant has not been prejudiced by the plaintiff's procedural breach (if any) and is "bound to lose" (*per* Sir Staughton in *Faircharm* ([77] *supra*)) if the matter is re-litigated (a similar position obtains where an irregular default judgment is upheld because the defendant has acknowledged liability notwithstanding the plaintiff's procedural breach).

Conclusion

107 To recapitulate, we allowed this appeal because we were of the view that Mercurine's delay in filing SUM 1843 was not fatal. However, instead of setting aside the Default Judgment outright, we ordered that it be deemed to be set aside if Mercurine succeeds in the Consolidated Suit, inclusive of any appeals therefrom. We also endorsed the Judge's decision to amend the Default Judgment so as to reflect the correct quantum due to Canberra (see [19] above). Thus, if the Default Judgment ultimately stands, it will be for the reduced sum of $725,116.81 only. We would further underline that we have not expressed any definitive views on the actual merits of Mercurine's defence (see item (d) at [21] above) as it was not necessary for us to consider this particular issue given the analysis which we adopted. We note, however, that it is plain and, indeed, undisputed that there are a good number of issues meriting further and more acute scrutiny in the Consolidated Suit.

[note: 1]See para 46 of Ms Goh's Suit 861 affidavit (at Record of Appeal vol 3(A), p 71).

[note: 2]See Canberra's letter dated 17 April 2006 (at Record of Appeal vol 3(A), p 316).

[note: 3]See para 60 of Ms Goh's affidavit filed on 22 December 2006 in Originating Summons No 2374 of 2006 ("Ms Goh's OS affidavit") (at Record of Appeal vol 3(A), p 95).

[note: 4]See para 5 of Ms Goh's letter to Canberra's solicitors dated 8 August 2006 (at vol 2, p 57 of the Appellant's Core Bundle).

[note: 5]*Ibid*.

[note: 6]See para 38 of the Appellant's Case.

Copyright © Government of Singapore.