Chen Chun Kang *v* Zhao Meirong
[2011] SGHC 263

Case Number : Suit No 312 of 2008 (Summons No 1000 of 2011)

Decision Date : 14 December 2011

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : David Chan and Koh Junxiang (Shook Lin & Bok LLP)for the plaintiff; Sean Say (Keystone Law Corporation) for the defendant.

Parties : Chen Chun Kang — Zhao Meirong

Civil Procedure – Judgments and Orders – Enforcement

14 December 2011

Andrew Ang J:

Introduction

1 Summons No 1000 of 2010 ("the Summons") concerns an application taken out by Chen Chun Kang ("the Plaintiff") to enforce default judgment obtained against his former mistress, Zhao Meirong ("the Defendant"). The Plaintiff had brought an action against the Defendant, alleging that he had transferred substantial sums of money to her in reliance on her false representations. On 29 July 2011, I ordered that the hearing of the Summons be adjourned to 30 November 2012. This was to allow the Defendant a final opportunity to apply to set aside the Default Judgment as she has been incarcerated in Taiwan since proceedings commenced in Singapore. The Plaintiff has appealed against my decision to adjourn the hearing of the Summons.

Background Facts

2 The Plaintiff is a wealthy retired businessman, aged 79, and a national of Taiwan. He was formerly a director of General Textile Mill Corporation, a listed company in Taiwan. The Defendant is a national of the People's Republic of China who resided in Taiwan. The Plaintiff and the Defendant met in Taipei in early 2000 and, in time, entered into an intimate relationship. Over the course of their relationship, the Plaintiff transferred substantial sums of money to the Defendant. The Plaintiff later sought to recover these moneys, arguing that he transferred these moneys in reliance on various false representations made to him by the Defendant, that:

(a) she was 23 years of age at the time she first met the Defendant;

(b) she was a Singapore citizen;

(c) she was studying medicine at the National Taiwan University;

(d) she was single;

(e) she had been abandoned by her father;

(f) her parents were suffering from terminal illnesses and were in urgent need of financial aid for their medical treatment and surgery;

(g) her brother was indebted to the National Cheng-Chi University in the sum of New Taiwan Dollars ("NT$")16 million;

(h) she was suffering from leukaemia and required money for medical treatment and bone marrow transplants; and

(i) she had given birth to a set of twins fathered by the Plaintiff.

3 The Plaintiff subsequently discovered, in August 2007, that the Defendant was in fact 35 years old when he first met her and that she was a Chinese national. She was not a student and had never read medicine. The Defendant was also married to one Fan Li Wei ("Fan"). Her parents were not ill or in need of any medical treatment and she never had a brother. The Defendant was also not suffering from leukaemia. In addition, the child that she presented to the Plaintiff on two separate occasions was her own child with Fan. She had never conceived twins with the Plaintiff. (The Defendant had presented a baby boy to the Plaintiff on the two occasions. However, she brought only one child with her to visit the Defendant each time. She explained that different nannies cared for each twin and it was difficult to bring both to visit the Plaintiff at the same time. This, as it turned out, was in fact untrue.)

Proceedings in Taiwan

4 The Plaintiff, accompanied by his daughter, Chen Ying Hwa, lodged a complaint against the Defendant with the Taiwan Criminal Investigation Bureau ("the Taiwan CIB") on 13 November 2007. The Defendant was arrested on 25 December 2007 and was detained pursuant to a Writ of Detention issued by the Taiwan Taipei District Court. The Taipei District Prosecutor's Office later informed the Plaintiff in January 2008 that the Defendant could be guilty of fraud and other criminal offences, including (peculiarly) money laundering. The Defendant was formally indicted for fraud on 20 February 2008.

5 The Plaintiff also initiated a Supplementary Civil Action Incidental to Criminal Proceedings with the Taiwan Taipei District Court, Criminal Tribunal on 3 March 2008, as he was advised that a victim of a crime could institute a civil action for compensation under Taiwanese law. The Plaintiff succeeded in his claim in tort and was awarded NT$458,525,966 by the Taiwan Taipei District Court.

6 The Taiwan Taipei District Court delivered judgment in the criminal proceedings against the Defendant in Taiwan ("the Taiwanese Criminal Proceedings") on 19 August 2008. She was sentenced

to six years' imprisonment. The allegations against the Defendant in the Taiwanese Criminal Proceedings included, but were not limited to, the same series of acts that formed the basis of the Plaintiff's claim in Singapore against the Defendant. On appeal, her sentence was reduced to four years and ten months, and ordered to run from 26 December 2007.

7 The Defendant is due to be released on 26 October 2012.

Proceedings in Singapore

8 Suit No 312 of 2008 arose because the Plaintiff wanted to recover moneys and securities transferred to an account he opened in Singapore in the Defendant's name. The Plaintiff had two banking accounts with Citibank Singapore, NA, Singapore Branch ("the Citibank Singapore Branch"): Account 1 and Account 2 ("Chen's Citibank Singapore Accounts"). In 2005, the Plaintiff opened Account 3 in the Defendant's name ("Zhao's Citibank Singapore Account") with the Citibank Singapore Branch. He alleged that he had transferred the following sums from Chen's Citibank Singapore Accounts to Zhao's Citibank Singapore Account in reliance on the Defendant's false representations:

(a) Pound Sterling ("GBP") 1,949,622.30;

(b) Canadian Dollars ("CAD") 1,222,080; and

(c) Australian Dollars ("AUD") 4,557,365.

9 He also transferred certain Ontario government bonds ("the Ontario Bonds"), amounting to an estimated market value of CAD2,584,800, from Account No 2 to Zhao's Citibank Singapore Account.

10 The Plaintiff alleged that he had transferred about NT$113,338,960 from his bank accounts in Taiwan to four accounts held by the Defendant and/or her nominees:

(a) The Shanghai Branch of the China Merchants Bank (Account 4);

(b) The Nan-Shih-Chiao Branch of the Hua Nan Bank (Account 5) ("Zhao's Hua Nan Account");

(c) The Wai-Tan Sub-Branch of the Shanghai Branch of the China Merchants Bank (Account 6); and

(d) The Chung-He Branch of the Chinatrust Commercial Bank (Account 7).

11 Out of the NT$113.338.960, the Plaintiff alleged that the Defendant transferred approximately NT$67,150,495 to Zhao's Citibank Singapore Account from her and/or her nominees' bank accounts. In particular:

(a) An aggregate sum of NT$49,513,810 was transferred from Zhao's Hua Nan Account to Zhao's Citibank Singapore Account; and

(b) A sum of USD542,667.24 was transferred from Fan's account with the Nan-Shih-Chiao

Branch of the Hua Nan Bank to Zhao's Citibank Singapore Account.

12 The Plaintiff alleged that the sum of NT$67,150,495 was in fact moneys that he transferred to the Defendant over the course of their relationship. In all, the Plaintiff claimed (a) GBP1,949,622.30; (b) CAD1,222,080; (c) AUD4,557,365; and (d) NT$67,150,495 ("the Advances") from the Defendant and also sought an order that the Ontario Bonds be delivered to him, and/or damages.

13 The Plaintiff obtained an interim injunction on 23 June 2008 pursuant to an *ex parte* application to prohibit the Defendant from disposing of her assets in Singapore. The Memorandum of Service of the Writ of Summons (which was generally endorsed) was filed on 20 August 2008. The Plaintiff then served the Statement of Claim on the Defendant's appointed agent for service, one Lu Gwo Shiun ("Lu") in Taiwan on 24 October 2008. The Defendant did not enter appearance or file her defence.

14 On 28 November 2008, the Plaintiff applied (in Summons No 5271 of 2008) for judgment in default of Defence ("the Default Judgment") under O 19 r 7 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("Rules of Court"). The Plaintiff obtained judgment on 17 December 2008 in which it was ordered, *inter alia*, that:

(a) the Defendant [was] to pay the Plaintiff the sums of: (i) GBP1,949,622.30; (ii) CAD1,222,080; (iii) AUD4,557,365; and (iv) NT$67,150,495;

(b) the Defendant [was] to deliver the Ontario Bonds to the Plaintiff;

(c) the Advances were procured by the Defendant's exercise of undue influence over the Plaintiff;

(d) the Defendant [held] on trust all assets in whole or in part acquired with or representing the Advances and income arising from those assets;

(e) all other assets of the Defendant in Singapore [were] subject to an equitable charge or equitable lien to the value of the Advances;

(f) the interim injunction granted on 23 June 2008 be discharged;

(g) the Plaintiff [was] granted an injunction to restrain the Defendant from removing, disposing, dealing or diminishing the value of her assets in Singapore, including the moneys in Zhao's Citibank Singapore Account up to the aggregate of the Advances and the Ontario government bonds.

15 The Plaintiff recovered a significant portion of the Default Judgment debt in a series of enforcement proceedings. Pursuant to garnishee orders granted on 11 May 2009, 19 November 2009 and 10 February 2010, the Citibank Singapore Branch transferred to the Plaintiff the following sums from Zhao's Citibank Singapore Account:

(a) GBP856,039.40

(b) CAD487,725.63

(c) AUD4,913,934.49

(d) EUR1,003,940.21

(e) HKD0.58

(f) USD996.76

16 However, the Plaintiff found that there was still a shortfall on the Default Judgment debt amounting to approximately S$3,982,023.80. The Plaintiff also discovered that the Defendant had transferred moneys from Zhao's Citibank Singapore Account to her account with FBO Salomon Smith Barney ("the SSB Account") pursuant to a Global Managed Portfolios Investment Management Agreement ("the Agreement") dated 30 May 2006 with the Citibank Singapore Branch.

17 The Plaintiff therefore took out the Summons and sought the following orders:

(a) That the Defendant execute, sign or indorse a written instruction to the Citibank Singapore Branch instructing it to:

(i) terminate the Agreement;

(ii) liquidate all securities and other investments in all investment management accounts established under the Agreement, including, without limitation, the SSB Account; and

(iii) transfer all assets in all investment management accounts established under the Agreement to Citibank NA Account 8 or such other account as the Plaintiff and/or his solicitors may notify in writing to the Citibank Singapore Branch.

(b) That if the Defendant fails to comply with the abovementioned order within seven days of being served with a copy of the Order to be made, the Registrar of the Supreme Court of Singapore shall be empowered to execute the written instruction on the Defendant's behalf.

My decision to adjourn the hearing of the Summons

18 On 29 July 2011, I ordered that the hearing of the Summons be adjourned ("the Adjournment") to 30 November 2012. It should be noted that the Defendant has been prevented from participating or instructing her solicitors effectively since proceedings commenced in Singapore. This is because she was and remains incarcerated in Taiwan. In fact, she only managed to appoint a solicitor in Singapore as late as 14 August 2009. I adjourned the Summons to allow the Defendant a month from her expected release date to apply to set aside the Default Judgment if she so wished. The Defendant had sent a letter dated 15 July 2011 to the Registry of the Supreme Court pleading that she be allowed to appear in proceedings once her prison term was complete.

19 I would like to emphasise from the outset that I made no order regarding the merits of the Summons. The hearing of the Summons was adjourned a number of times because the parties were unable to ascertain when the Defendant would be released from prison and be able to contest proceedings in Singapore. On 6 April 2010, I had adjourned the matter for the parties to ascertain

when the Defendant would be released if she was granted parole. The Defendant's solicitor had then been informed by Fan that the Defendant could be released in four months' time.

20 During the next hearing on 20 April 2010, the Plaintiff's solicitors advised (wrongly, as it turned out) that the Defendant would complete her sentence on 26 May 2011. Although the Defendant was entitled to apply for parole around May 2010, the Plaintiff's solicitors admitted that the Plaintiff would be opposing parole in order to keep the Defendant in jail up to 26 May 2011. (It should be noted that the Plaintiff's Taiwanese solicitors had advised that the victim's views as to the Defendant's remorse would be a crucial factor in her application for parole). I adjourned the hearing for four months to 20 August 2010 based on the Defendant's expected release date should her application for parole be granted despite the Plaintiff's threatened opposition thereto.

21 At the next hearing, the Plaintiff's solicitors informed me that the Defendant's application for parole on 2 July 2010 was rejected within a day. On the basis (as wrongly informed by the Plaintiff's solicitors) that the Defendant would be released on 26 May 2011, I adjourned the hearing to 30 June 2011 for further directions. The Plaintiff's solicitors subsequently informed the court in a letter to the Supreme Court Registry dated 7 December 2010 that the Defendant would only be released on 26 October 2012. The Defendant's second application for parole on 6 October 2010 had also been rejected and so was her third application for parole in January 2011.

22 The Defendant's solicitor discharged himself on 29 June 2011, one day before the scheduled hearing date of 30 June 2011, citing difficulties in obtaining instructions from the Defendant. Given that I had been informed meanwhile that the Defendant would only be released on 26 October 2012 and not 26 May 2011, I was minded to extend the adjournment until November 2012 (allowing the Defendant about a month after her release to seek a setting aside of the Default Judgment). However, at the request of the Plaintiff's solicitors, I adjourned the hearing to 29 July 2011 for the Plaintiff's solicitors meanwhile to inform the Defendant that she was to appoint another solicitor in Singapore within a month. This was more in the hope than in the expectation that it would expedite matters. I therefore also made it clear to the Plaintiff's solicitors that if the Defendant was unable to obtain effective representation, I would have to allow further time. The Defendant wrote on 18 July 2011 to the Singapore court pleading for proceedings to be stayed in Singapore to enable her to appear in person once she was released from prison. She also expressed that she "[would] not be able to discuss the case with her lawyer even if she does engage one in Singapore". She claimed that she was not allowed to communicate by telephone while in prison, and that "correspondence by letter to and from Singapore [could take up to] a month".

23 I hence decided to adjourn the hearing to 30 November 2012, directing the Supreme Court Registry to inform her that she had to seek leave to apply to set aside the Default Judgment if she intended to oppose the Summons by 30 November 2012. I also ordered that the Plaintiff be at liberty to apply for an earlier hearing date should the Defendant be released on parole.

Issues

24 The following issues are relevant to the Plaintiff's appeal against the Adjournment:

(a) Whether the Adjournment is an "order" to which an appeal may be made to the Court of Appeal in accordance with s 29A of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA").

(b) If the Adjournment is an "order", is it one that was made in the course of an "interlocutory application" for which leave to appeal must be obtained under s 34(2)(*d*) and the Fifth Schedule

of the SCJA?

(c) Whether it was appropriate to grant the Adjournment in the interests of justice.

Analysis

Whether the Adjournment was an "order" under s 29A(1) of the SCJA

25 Section 29A(1) of the SCJA provides that:

> The civil jurisdiction of the Court of Appeal shall consist of appeals from *any judgment or order* of the High Court in any civil cause or matter whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to the provisions of this Act or any other written law regulating the terms and conditions upon which such appeals may be brought. [emphasis added]

26 The Court of Appeal in *Bank Austria Creditanstalt AG v Go Dante Yap* [2007] 4 SLR(R) 667 ("*Bank Austria*") considered the meaning of "order" in s 29A(1) of the SCJA. It observed at [17]:

> In our view, the word 'order' in s 29A(1) of the SCJA connotes a decision of some kind or other. *The decision may require that something should be done or a party to the proceedings to do something, but it need not*. A court may make a decision or ruling on a disputed point or issue without the need for any consequential action by any party. *It may simply be a ruling that affects the legal rights (substantive or procedural) of a party*. In our view, an order under s 29A(1) of the SCJA includes a decision or finding that a fact exists or does not exist, an event has occurred or has not occurred, or an act may be done or may not be done, which affects the legal rights of a party. [emphasis added]

27 I am satisfied that a decision to adjourn the hearing of an application can be regarded as an "order", even if the merits of the Summons were not dealt with and the parties' legal rights have not been determined. This view has been implicitly accepted in a number of cases. In *Insas Bhd v Ayer Molek Rubber Co Bhd* [1995] 2 MLJ 833 ("*Insas*"), the defendants appealed against the lower court's decision to adjourn the hearing of a summons. The Malaysian Federal Court observed (at 839) that:

> ... As we know it, a court has power to adjourn a hearing as is given to it under O 35 r 3 of the Rules of the High Court 1980. Mr SC Loh did not produce any authority to show us that a party may appeal against the *order* of a judge to adjourn the hearing of any matter before him. We ourselves are not aware of any case in which an appeal had been allowed to be made against *an order of adjournment* for decision or further arguments of a case by even a magistrate. ... [emphasis added]

28 Similarly, in *Maxwell v Keun* [1928] 1 KB 645 ("*Maxwell*"), the plaintiff appealed against the lower court's refusal to grant an adjournment of a hearing. It was argued that the adjournment was not of the same nature as an order which is subject to appeal under s 27(1) of the Supreme Court of Judicature (Consolidation) Act 1925 in England. The appellate court however found that the lower court's refusal to grant an adjournment with an order on costs was considered an order that may be appealed (*Maxwell* at 649). Having decided that the Adjournment can be regarded as an "order", the next issue to be considered is whether the Plaintiff must seek leave to appeal against the Adjournment.

Whether the Adjournment is an order for which leave to appeal must be sought

29 Section 34 of the SCJA must be considered. It provides:

Matters that are non-appealable or appealable only with leave

34. — (1) No appeal shall be brought to the Court of Appeal in any of the following cases:

(*a*) where a Judge makes an order specified in the Fourth Schedule, except in such circumstances as may be specified in that Schedule;

(*b*) (Deleted by Act 30/2010 wef 1.1.2011)

(*c*) (Deleted by Act 30/2010 wef 1.1.2011)

(*d*) where the judgment or order is made by consent of the parties; or

(*e*) where, by any written law for the time being in force, the judgment or order of the High Court is expressly declared to be final.

(2) Except with the leave of a Judge, no appeal shall be brought to the Court of Appeal in any of the following cases:

(*a*) where the amount in dispute, or the value of the subject-matter, at the hearing before the High Court (excluding interest and costs) does not exceed $250,000 or such other amount as may be specified by an order made under subsection (3);

(*b*) where the only issue in the appeal relates to costs or fees for hearing dates;

(*c*) where a Judge in chambers makes a decision in a summary way on an interpleader summons where the facts are not in dispute;

(*d*) *where a Judge makes an order specified in the Fifth Schedule, except in such circumstances as may be specified in that Schedule*; or

(*e*) where the High Court makes an order in the exercise of its appellate jurisdiction with respect to any proceedings under the Adoption of Children Act (Cap 4) or under Part VII, VIII or IX of the Women's Charter (Cap 353).

...

[emphasis added in italics]

30 The new Fifth Schedule of the SCJA relates to orders that are appealable to the Court of Appeal with leave. The Fifth Schedule provides as follows:

ORDERS MADE BY JUDGE THAT ARE APPEALABLE ONLY WITH LEAVE

Except with the leave of a Judge, no appeal shall be brought to the Court of Appeal in any of the following cases:

(*a*) where a Judge makes an order refusing leave to amend a pleading, except if —

(i) the application for such leave is made after the expiry of any relevant period of limitation current at the date of issue of the writ of summons; and

(ii) the amendment is an amendment to correct the name of a party or to alter the capacity in which a party sues, or the effect of the amendment will be to add or substitute a new cause of action;

(*b*) where a Judge makes an order giving security for costs;

(*c*) where a Judge makes an order giving or refusing discovery or inspection of documents;

(*d*) where a Judge makes an order refusing a stay of proceedings;

(*e*) where a Judge makes an order at the hearing of any interlocutory application other than an application for any of the following matters:

(i) for summary judgment;

(ii) to set aside a default judgment;

(iii) to strike out an action or a matter commenced by a writ of summons or by any other originating process, a pleading or a part of a pleading;

(iv) to dismiss an action or a matter commenced by a writ of summons or by any other originating process;

(v) for further and better particulars;

(vi) for leave to amend a pleading;

(vii) for security for costs;

(viii) for discovery or inspection of documents;

(ix) for interrogatories to be varied or withdrawn, or for leave to serve interrogatories;

(x) for a stay of proceedings.

31 It would be noted that s 34 and the Fifth Schedule of the SCJA do not specify whether the Adjournment, which was granted in the course of enforcement proceedings, would be one for which leave to appeal must be sought. It is relevant to consider whether the Adjournment would fall under para (*e*) of the Fifth Schedule of the SCJA, *viz*, an "order [made] at the hearing of any interlocutory application" for which leave to appeal must be sought. On the one hand, the requirement of leave to appeal the Adjournment would be in line with the legislative intent behind the amendments to the SCJA which came into effect from 1 January 2011 to restrict appeals to the Court of Appeal on interlocutory matters (see: Teo Guan Siew, "Recent Amendments to the Supreme Court of Judicature Act and the Subordinate Courts Act", *Law Gazette*, January 2011) at pp 16–21). During the second reading of the Supreme Court of Judicature (Amendment) Bill (*Singapore Parliamentary Debates Official Report* (18 October 2010) vol 87 at col 1368, Associate Professor Ho Peng Kee explained that:

> ... this Bill [to amend s 34 of the SCJA] contains two key changes. First, it streamlines appeals to the Court of Appeal arising from interlocutory applications. Second, it expands the types of

hearings which a two-judge Court of Appeal can hear. ...

Clause 9 [of the Bill] therefore amends section 34 [of the SCJA] to *streamline and restrict appeals to the Court of Appeal on interlocutory matters*. Interlocutory applications will now be categorised based on their importance to the substantive outcome of the case. With this calibrated approach, some interlocutory orders will not be allowed to go to the Court of Appeal, whilst others can only go to the Court of Appeal with the permission of the High Court. The decision of the High Court whether to grant permission is final. The right to appeal all the way to the Court of Appeal will, however, remain for interlocutory applications that could affect the final outcome of the case. The types of orders in the three categories are set out in the Fourth and Fifth Schedules to the Bill.

[emphasis added]

32 A decision to adjourn the hearing of an application would generally not affect the parties' substantive rights and, as such, it would be consistent with the legislative intent behind the amendments to require that leave to appeal an adjournment must be sought. The Malaysian Federal Court in *Insas* thus observed that no appeal in general lies against a decision to adjourn proceedings and that "at the most, frequent adjournments of a case for no good reason may be made as one of the grounds in an appeal proper". However, the specific provisions in s 34 of the SCJA must be considered, and the question is whether the Summons can be regarded as an "interlocutory application" within para (*e*) of the Fifth Schedule of the SCJA. The determination of when an application or order would be regarded as "interlocutory" or "final" is one of considerable difficulty (see: *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR(R) 525 ("*Wellmix Organics*") on the interpretation of "interlocutory orders" in the former s 34(1)(*c*) of the SCJA, now repealed). Chao JA in *Wellmix Organics* observed at [10] that:

The question of whether an order is truly interlocutory or final has troubled the courts here, as well as in England, for a long time. However, in England, they have resolved the problem by adopting a listing approach. What kind of *applications or orders* are to be treated as interlocutory are distinctly listed out. Singapore has not yet adopted that approach and still has to grapple with the problem from time to time.

33 The court in *Wellmix Organics* then considered the meaning of "interlocutory order" and affirmed that the test of whether a judgment or order is interlocutory or final depends on whether it finally disposes of the rights of the parties (*Wellmix Organics* at [10] affirming *Bozson v Altrincham Urban District Council* [1903] 1 KB 547 ("*Bozson*")). Chao JA explained at [14] that:

14 ... The word 'rights' has been construed in Rank Xerox (at [8]) to mean the substantive 'rights' in the action or proceeding. A little more problematic are the other two words. The word 'dispose' has a spectrum of meanings ranging from 'to throw away', 'to make final arrangement', 'to deal' to 'to determine the outcome'. It seems to us that in the context of the Bozson test, the word 'dispose' must mean making a determination on the substantive rights and, as a matter of common sense, the court can only make a determination on the substantive rights after hearing the parties on the merits. ...

15 As regards the word 'finally', its ordinary meaning is clear. It means either 'the last' or 'completely'. ... There is much force in the argument that a determination as to liability does not finally or fully dispose of the rights of the parties where damages are also claimed in the action. That will only be a partial determination of the rights.

In the present case, the Summons was an application taken out to enforce the Default Judgment. The Plaintiff took out the Summons seeking that the Defendant be ordered to execute written instructions to the Citibank Singapore Branch to terminate the Agreement and to liquidate all securities and other investments under the Agreement including those in the SSB Account. In contrast to the legislative scheme then in effect when *Wellmix Organics* was decided, the issue that must now be considered is whether the Summons is an "interlocutory application". I find that the Summons would not fall comfortably within the meaning of an "interlocutory application". The Summons is an application to enforce a judgment rather than an interlocutory application which is typically sought in the course of obtaining final judgment. In the absence of specific legislative provision, I would prefer to proceed on the basis that leave to appeal the Adjournment is not required under the SCJA and, in particular, para (*e*) of the Fifth Schedule.

Reasons for the Adjournment

34 I now turn to the reasons for my decision to adjourn the hearing of the Summons to 30 November 2012.

35 It is established that the court has the inherent jurisdiction to adjourn a hearing in the interests of justice, as required by the facts of each case (*Wong Phila Mae v Harold Shaw* [1991] 2 MLJ 147 at 149 ("*Wong Phila Mae*")). A court would thus be justified in adjourning a hearing if there are adequate reasons for doing so. A decision to grant or refuse an adjournment of a hearing may be reviewed where it would cause manifest injustice to one of the parties (*MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun & other appeals* [1995] 2 MLJ 493 at 513). Manifest injustice may result where a judge fails to consider all necessary matters or exercised his discretion arbitrarily (*Lee Ah Tee v Ong Tiow Pheng & Others* [1984] 1 MLJ 107 affirming *Dick v Piller* [1943] 1 All ER 627 ("*Piller*")).

36 The court would have to consider whether the party requesting the adjournment would be unable to argue its case effectively otherwise, while having in mind the need for cases to be dealt with in an expedient manner (*Lee Hsien Loong v Singapore Democratic Party and another suit* [2007] 1 SLR(R) 675; *Tan Pak v Cham Boon San and other actions* [1992] 2 MLJ 271). The English Court of Appeal in *Boyle v Ford Motor Co Ltd* [1992] 2 All ER 228 ("*Boyle*") gave some guidance as to the appropriate balance to be struck. Lord Donaldson MR affirmed that the court should exercise rigorous control in cases to ensure that there are no *avoidable* delays. A delay is unavoidable if justice cannot be done in absence of adjournment (*Boyle* at 233–234).

37 Several factors go towards the determination of whether an adjournment would be just and fair (*Albon (trading as NA Carriage Co) v Naza Motor Trading Sdn Bhd and another (No 5)* [2008] 1 WLR 2380 affirming *Piller* ([43] *supra*) and R *v General Commissioners of Income Tax for Sevenoaks ex parte Thorne* [1989] STC 560). These include:

(a) whether a witness was unable to attend the hearing on grounds of ill-health or other valid reasons which are supported by proof;

(b) whether a witness's evidence was reasonably necessary for the party's case to be properly presented;

(c) whether there was a reasonable prospect that a witness would be able to attend court at a specific and reasonable future date;

(d) whether the other party would suffer injustice which cannot be remedied by an award of costs or otherwise; and

(e) the merits of the case of the party who is seeking or requires the adjournment.

38 I am persuaded that an adjournment would be necessary in the present case to enable the Defendant to present her case effectively and that no irremediable prejudice would be caused to the Plaintiff.

The Defendant is unable to effectively argue her case due to incarceration

39 One compelling factor is that the Defendant has been prevented from presenting her case since proceedings commenced in Singapore. This is not a case where the Defendant merely refused to participate in the proceedings. The Defendant has attempted, though without much success, to convey her instructions to her solicitors. However, she faces significant difficulties instructing her solicitors because she is incarcerated in Taiwan.

40 The fact that the Defendant is incarcerated in Taiwan and unable to participate in proceedings in Singapore would be one important factor in the court's consideration of whether to grant an adjournment. The Malaysian court in *Hup San Timber Trading Co Sdn Bhd v Tan Ah Lan* [1979] 1 MLJ 238, found that the lower court should have granted an adjournment where a party was unable to enter the country because he ran into difficulties with the immigration authorities. In *Piller*, the trial judge was also found to have exercised his discretion wrongly when he refused an application for adjournment where the defendant was too ill to attend. A party who has valid reason for being unable to attend a hearing supported by proof should not be deprived of the right to be heard.

41 The Defendant had been detained in Taiwan since 25 December 2007. She has not been able to appear in person nor was she represented in proceedings till to 14 August 2009. Her solicitor, Mr Sean Say ("Mr Say") who was appointed by Fan (through a power of attorney) has since discharged himself. He was unable to receive instructions from the Defendant or contact Fan and Fan's lawyer, one Mr Liu.

42 The Plaintiff's solicitors maintain that the Defendant's right of access to counsel is unrestricted. They submit that:

(a) under the Taiwan Criminal Procedure Act, unless restrictions are imposed by a judge, a detainee is entitled to receive visitors;

(b) the Taiwan Detention Enforcement Act provides that a visitor may apply to visit the detainee once a day for thirty minutes; and

(c) the detainee is entitled to send and receive mail subject to censorship by the supervisor of the Taipei Detention Centre.

43 However, I am doubtful of the Defendant's ability to communicate with visitors, let alone instruct her solicitors:

(a) First, the Writ of Detention issued against her stated that she was to be prohibited from interview or correspondence because of her "recidivist behaviour [which increased] the possibility of recommitting such acts of fraud". She was thereafter sentenced to imprisonment of six years (reduced to four years and ten months on appeal) by the Taiwan Taipei District Court on 19 August 2008. It is uncertain whether such conditions continue to be imposed in any form on the Defendant.

(b) Second, the Plaintiff himself experienced significant difficulties communicating and serving court documents on the Defendant. The Plaintiff's Taiwanese solicitors made several unsuccessful attempts to serve the Writ of Summons and the certified Chinese translation of the Writ of Summons on the Defendant personally at the Taipei Detention Centre and her residence on 22 and 29 July 2008 respectively. It was not until 13 August 2008 that a copy of the Writ of Summons could be served on Lu, the Defendant's appointed agent for service. The Plaintiff experienced similar problems notifying the Defendant of his application (in Summons No 3973 of 2008) to replace the banker's guarantee furnished in conjunction with the interim injunction. The Plaintiff sent letters notifying the Defendant of the date of the hearing, receipt of which was acknowledged by the Taipei Detention Centre on 19 November 2008. Letters were also sent to Lu. However, the Plaintiff did not receive any response from the Defendant or any official receipt evidencing service on Lu. The Plaintiff's Taiwanese solicitors simply sent an e-mail stating that "the post office has confirmed that the letter was successfully served to Lu". Belinda Ang J, however, who heard Summons No 3973 of 2008) was not persuaded that service had been effected and she refused to grant an order for replacement of the banker's guarantee.

(c) Mr Say, the Defendant's former solicitor, had encountered difficulties obtaining instructions from the Defendant from the time of his appointment. He also could not contact Fan and was thus unable to file an affidavit in reply to the Plaintiff's summons for inspection of the Defendant's accounts with the Citibank Singapore Branch.

(d) The Defendant, in a letter to the court dated 18 July 2011, stated that she would not be able to discuss her case with a lawyer, even if another solicitor was appointed to replace Mr Say. She is not allowed to communicate through telephone and correspondence by letter is not expedient.

44 In light of the difficulties faced by the Defendant in contesting the Plaintiff's claim, I was of the view that an adjournment till her release from prison would be necessary to allow her to be heard.

The Defendant's evidence is material to the case

45 I note further that the Defendant's evidence is material and necessary for the just and fair disposition of the case. The Court of Appeal in *Wong Phila Mae* ([35] *supra*) affirmed that an adjournment should be granted where it is necessary to obtain additional material evidence, such as affidavits by other relevant witnesses or to secure the presence of a crucial witness. The court observed that (at 149):

> ... It seemed to us that the point was not whether there was sufficient evidence before the court but whether both sides had been given a fair opportunity of putting forth all the facts before the court to enable it to make up its mind.

46 The Defendant's testimony is material because it remains uncertain whether the Advances were truly obtained by the exercise of undue influence. It may well be that the Advances, though amounting to substantial sums, could be explicable on account of the parties' relationship. However, the court only has the benefit of the Plaintiff's evidence thus far. It should be noted that two affidavits sent by the Defendant to the Plaintiff dated 18 and 25 July 2008 were rejected for failing to comply with the Rules of Court.

47 Furthermore, the veracity of the Plaintiff's evidence and his competency to testify are in doubt. The Plaintiff underwent surgery for a brain tumour on 8 August 2000 and subsequently suffered partial loss of memory and a degeneration of cognitive abilities. He was diagnosed with Alzheimer's disease

and a psychological disorder around 20 August 2000.

48 The Plaintiff and Chen Ying Hwa have adopted inherently inconsistent positions on the Plaintiff's mental competency. On one hand, the Plaintiff alleged that his doctors have confirmed that he has sufficient cognitive ability to make his affidavit, understand the contents of the affidavit and is fit and competent to give evidence in court. Chen Ying Hwa also stated in her affidavit dated 2 May 2008 that the Taiwan CIB was satisfied that the Plaintiff was able to give reliable statements during police investigations. However, this contradicts her statement given during interrogation conducted at the Taipei District Prosecutor's Office on 29 February 2008 ("the Interrogation Records") where she testified that:

> Chen, Chun-Kung had a brain tumour operation on August 8, 2000. After that, he was unable to identify objects. ... He could not identify family members either. ... At that moment, the physicians asked Chen, Chun-Kung some basic questions for identification, but he could not answer those questions.

Furthermore, Chen Ying Hwa stated in her second affidavit dated 27 August 2010 that the Plaintiff's judgment declined tremendously after the operation and onset of Alzheimer's disease and, as a result, he was easily taken in by the Defendant's misrepresentations.

49 The fact that the Defendant suffers from Alzheimer's disease is of course not conclusive of his competence (or lack thereof) to give oral evidence in court. Section 120 of the Evidence Act (Cap 97, 1997 Rev Ed) provides that:

> All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by tender years, extreme old age, disease, or any cause of the same kind.

50 Competency to testify depends on a witness's ability to understand the questions put to him and to give rational answers to questions at trial (*Public Prosecutor v Chan Wai Heng* [2008] 5 MLJ 798 ("*Chan Wai Heng*") affirming *Kabiraj Tudu v State of Assam* 1994 Cri LJ 432 ("*Kabiraj*")). The court proceeds on the presumption that a witness is competent to testify unless it is shown that he falls under any of the qualifying exceptions. However, the court in *Chan Wai Heng* at [32] affirmed observations in *Kabiraj* that a witness' competency should be tested where he suffers from disease or other abnormality of the body or mind that could affect his ability to answer questions. In *Kee Lik Tian v Public Prosecutor* [1984] 1 MLJ 306, the judge erred when he refused to permit the defence counsel to test whether a prosecution witness who was found to be mentally retarded had the competency to testify.

51 I find that in light of the Plaintiff's inconsistent statements on his mental condition, the court must be satisfied of his competency to testify. The Plaintiff maintains on the one hand that his mental condition made him vulnerable to the Defendant's conduct, but insists on the other hand that he was not so incapacitated as to be unable to testify in court. However, there are allegations that he did not testify at trial in Taiwan, possibly because of his mental condition (see *infra*[56]). The Plaintiff has not adduced any medical report to prove that he is competent to testify. In fact, the medical report dated 21 January 2008 annexed to the Plaintiff's first affidavit discloses that he "provided irrelevant answers to the interview questions and was found to have impaired calculative abilities and other cognitive impairments". A report dated 14 January 2007 by the Plaintiff's attending doctor, Wang PN, also described the Plaintiff as suffering from "cognitive decline with symptoms of forgetful [*sic*], disorientation to time, impaired judgment and executive function was noted for 2 years".

52 It would be unjust to disallow the Defendant an opportunity to present her case and to rely solely on the Plaintiff's evidence when his ability to recall facts and respond to questions is in doubt. Even if the Plaintiff is assumed to be competent to testify in court, the Defendant's evidence is necessary on the issue of whether the Advances were explicable on account of her relationship with the Plaintiff. It appears that moneys were transferred to the Defendant on 6 September 2007 even after the Defendant's "fraud" was allegedly discovered by the Plaintiff in August 2007. In any event, details of when and who discovered the Defendant's "fraud" remain uncertain. The Plaintiff stated in his first affidavit that:

> 5.1.1 In or around August 2007, a friend of mine, who has declined to be named, contacted the Defendant and discovered that the Defendant was actually from Shanghai, China. He further discovered that she was in fact married. He subsequently informed me of his findings.
>
> ...
>
> 5.1.3 Further, when I subsequently applied for a Household Registration Transcript in or around October 2007, I discovered that there was no registration information for 'my' 'twins'.

This is inconsistent with Chen Ying Hwa's testimony that she was the one who discovered the fraud when the Defendant went to the Plaintiff's house to take a remittance confirmation note from him in September 2007. Given the numerous inconsistencies and doubts surrounding the veracity of the Plaintiff's and Chen Ying Hwa's evidence, it would only be fair to give the Defendant an opportunity to be heard.

53 The fact that the Defendant was convicted of fraud in Taiwan is not determinative of whether the Advances were obtained as a result of undue influence.

The Defendant should be given the opportunity to set aside the Default Judgment for lack of full and frank disclosure

54 It is established that the court may set aside an order granted *ex parte* under O 32 r 6 of the Rules of Court. A party may apply for the order to be set aside if the plaintiff did not make full and frank disclosure in his *ex parte* application. The plaintiff in *ex parte* proceedings has the duty to make full and frank disclosure of all material facts, even if they are prejudicial to the plaintiff's claim (*The "Vasiliy Golovnin"* [2008] 4 SLR(R) 994 ("*The Vasiliy*") affirming *The King v The General Commissioners of the Purposes of the Income Tax Acts for the District of Kensington* [1917] 1 KB 486 at 504 and *Tay Long Kee Impex Pte Ltd v Tan Beng Huwah* [2000] 1 SLR(R) 786). Rajah JA in *The Vasiliy* at [85] affirmed that: "the onus of ensuring that the judge is given a balanced view of the matter rests squarely and uncompromisingly on every applicant in an *ex parte* application". He observed at [87] that:

> The test for materiality is always an objective one. In the words of Prakash J in *The Rainbow Spring*, the test is to simply ask 'how *relevant* the fact is' [emphasis added] (at [33]). However, the duty imposed on the applicant requires him to ask what might be relevant to the court in its assessment of whether or not the remedy should be granted, and not what the applicant alone might think is relevant. **This inevitably embraces matters, both factual and legal, which may be prejudicial or disadvantageous to the successful outcome of the applicant's application. It extends to all material facts that could be reasonably ascertained and defences that might be reasonably raised by the defendant.** It is important to stress, however, that the duty extends only to plausible, and not all conceivable or theoretical, defences. For example, if there have been unsuccessful prior proceedings, the context as well as

> the reasons for the dismissal must be adequately disclosed. **In short, the material facts are those which are material to enable the judge to make an informed decision** (see *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350 *per* Ralph Gibson LJ at 1356). [emphasis in original in italics; emphasis added in bold]

55 Rajah JA further observed that the "mere disclosure of material facts without more or devoid of the proper context is in itself plainly insufficient to constitute full and frank disclosure" (*The Vasiliy* at [91]). The manner of disclosure of material facts to the court is also important. Baker J in *Intergraph Corporation v Solid Systems CAD Services Limited* [1993] FSR 617 at 625 observed that:

> ... To present a judge with 600 pages of material on an *ex parte* application is coming a bit near abuse, unless he is firmly and carefully guided, through the material. ... *it is of no use putting it in if the judge either cannot or does not read it*. It is just as much not disclosed as if it had not been put in at all. Unless the document is presented to the eyes and/or the ears of the judge, it is not disclosed. ... [emphasis added]

56 The Plaintiff in seeking the Default Judgment did not disclose that he did not give oral evidence nor was he cross-examined in the Taiwanese Criminal Proceedings. There are suspicions as to whether the Plaintiff relied on dementia to avoid testifying in the Taiwanese Criminal Proceedings. The Defendant, in an affidavit dated 25 July 2008 (which was sent to the Plaintiff), stated that "in Taiwan, Chen [the Plaintiff] refused to attend the court to testify and lied that he had dementia and could not attend court to testify", and that "his daughter [Chen Ying Hwa] also clearly expressed to the judge that his [*sic*] father had dementia and could not attend court to testify". Only Chen Ying Hwa's evidence was set out in the record of proceedings in the Taiwan Taipei District Court on 6 May 2008. There is no evidence that the Plaintiff testified and was competent to do so in the Taiwanese Criminal Proceedings. It was later stated in the judgment of the Taiwan High Court (when the case went on appeal) that the Plaintiff simply confirmed his statement made during investigation and signed it. This casts further doubt on the Plaintiff's assertions on his competency to testify. If the Plaintiff indeed relied on his dementia to avoid giving oral evidence in the Taiwanese Criminal Proceedings, this would be a material fact that should have been drawn to the judge's attention when the Default Judgment was sought. However, this fact was not disclosed to the learned judge when the Plaintiff applied to obtain the Default Judgment.

57 In light of the factors set out above, I was persuaded that the Adjournment would be necessary to allow the Defendant a fair opportunity of contesting the Plaintiff's claims.

No substantial prejudice to the Plaintiff from the Adjournment

58 In granting the Adjournment, I was also satisfied that the Plaintiff would not suffer substantial prejudice. It may be said that the Plaintiff should not be prevented from realising the fruits of the Default Judgment. However, it should be noted that the Plaintiff has already recovered a substantial portion of the Default Judgment debt (see above at [14]). In addition, the Plaintiff obtained an interim injunction on 13 July 2010 to restrain the Defendant from giving any instruction to the Citibank Singapore Branch to terminate or liquidate the securities under the Agreement, including moneys in the SSB Account. There is no risk of dissipation of the Defendant's assets if the hearing is adjourned.

59 It may also be argued that the Adjournment may result in the Plaintiff becoming incompetent (if he was not already so) to give oral evidence in court, given that the Plaintiff's mental condition is said to be deteriorating. However, considering that the Plaintiff's competency to testify was allegedly in doubt from the time proceedings were commenced in Singapore, I am not persuaded that the Adjournment would be as great an injustice to the Plaintiff as a refusal of such Adjournment would

clearly be to the Defendant.

60 I am also mindful of the fact that the Defendant has attempted but has been prevented from presenting her case in these proceedings. She clearly intends to contest the Plaintiff's claims, although her attempts to put forth a defence have largely been unsuccessful. In addition, the Defendant's application for parole has been refused time and again. The Plaintiff's counsel admitted that the Plaintiff would oppose any application by the Defendant to obtain early release on parole.

61 In light of these considerations, I considered that it would only be just and fair to grant the Adjournment till the Defendant is released from prison or, at the very least, till she is able to instruct solicitors in Singapore. The Plaintiff is at liberty to apply for an early hearing date should the Defendant's application for parole be granted.