IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 73

Civil Appeal No 176 of 2020

Between

U Myo Nyunt @
Michael Nyunt

… *Appellant*

And

First Property Holdings
Pte Ltd

… *Respondent*

In the matter of Suit No 601 of 2015

Between

First Property Holdings
Pte Ltd

… *Plaintiff*

And

U Myo Nyunt @
Michael Nyunt

… *Defendant*

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GROUNDS OF DECISION

[Civil Procedure] — [Judgments and orders]
[Civil Procedure] — [Delay] — [Setting aside]

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U Myo Nyunt @ Michael Nyunt
v
First Property Holdings Pte Ltd

[2021] SGCA 73

Court of Appeal — Civil Appeal No 176 of 2020
Sundaresh Menon CJ, Judith Prakash JCA and Belinda Ang Saw Ean JAD
17 May 2021

2 August 2021

Belinda Ang Saw Ean JAD (delivering the grounds of decision of the court):

Introduction

1 The respondent, First Property Holdings Pte Ltd, entered judgment in default of appearance on 14 January 2016 against the appellant, U Myo Nyunt ("the January default judgment"), and thereafter obtained a further judgment on assessment of damages in the absence of the appellant on 7 November 2016 ("the Assessment Judgment"). The January default judgment was for (a) a specified amount of a loan from the respondent to the appellant; and (b) damages to be assessed. For convenience, the part of the January default judgment providing for damages to be assessed is hereinafter referred to as the "O13 Interlocutory Judgment" (the "O13" being a reference to O 13 r 2 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC")).

2 The High Court judge ("Judge") in *First Property Holdings Pte Ltd v U Myo Nyunt @ Michael Nyunt* [2020] SGHC 276 (the "HC/GD") dismissed the appellant's application to set aside the O13 Interlocutory Judgment and the Assessment Judgment. The Judge also refused to set aside the order granting leave to serve out of jurisdiction ("the Service Order") a sealed copy of the writ of summons in Suit No 601 of 2015 ("the Singapore proceedings"). The Judge, however, set aside the part of the January default judgment for the loan amount. The respondent did not cross-appeal.

3 The appellant's appeal was against the Judge's refusal to set aside the Service Order, the O13 Interlocutory Judgment and the Assessment Judgment. The appellant filed his setting aside application on 26 August 2019, which was: (a) more than three and a half years after the O13 Interlocutory Judgment; (b) more than three years after the damages had been assessed and a final judgment entered in the respondent's favour; and (c) more than five months after the appellant unsuccessfully resisted the registration of the January default judgment and the Assessment Judgment in Australia.

4 We heard the appeal on 17 May 2021 and dismissed the appeal. We ordered the appellant to pay the respondent costs of the appeal fixed at the sum of $40,000 inclusive of disbursements. There were to be the usual consequential orders.

5 We now set out the full grounds of our decision.

Facts and background

6 The full facts are set out in the HC/GD. We summarise the background to indicate the nature of dispute and the events leading to this appeal. The

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appellant is a national of Myanmar and a citizen and resident of Australia. The respondent is a Singapore company.

7 In September 1996, the appellant, his brother and the respondent entered into a joint venture agreement ("JVA") for the development of property projects in Myanmar through a Myanmar company ("Company") that was to be incorporated. The Company was incorporated in October 1996 and not in June 1996 as misstated in the JVA. The Company was placed in liquidation in August 2005 (HC/GD at [6], [9] and [14]).

8 At all material times, the shares in the Company were held beneficially by the appellant on account of a prohibition on foreign ownership of real property in Myanmar. The respondent's interest was, in turn, to be protected by a debenture contemplated by cl 3.2 of the JVA. Accordingly, pursuant to a debenture ("Debenture") made between the respondent and the Company, the former agreed to make a loan of US$7.6m to the Company. The JVA and Debenture provided for the following, among other things (HC/GD at [8]):

> (a) The respondent's loan of US$7.6m would be converted into a 95% shareholding in the Company at the earliest possible time that the respondent would be legally entitled under Myanmar law to become a shareholder of the Company.
>
> (b) Until the US$7.6m loan and all other amounts payable under the Debenture had been paid in full, the Company:
>
> > (i) would (unless otherwise agreed to by the respondent) maintain its existence as a limited liability company, and deposit original title deeds to all its assets and properties with the

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respondent and any other documents and security which the respondent may require;

(ii) would not (without the respondent's prior written consent) merge or consolidate with any other company or dispose of or sell any of its assets; and

(iii) would not voluntarily dissolve itself or liquidate its assets without the respondent's prior written consent.

9 In March 1998, the respondent and the appellant entered into a loan agreement ("Loan Agreement") by which the respondent agreed to extend a loan of up to US$850,000 to the Company, subject to the approval of the Central Bank of Myanmar (HC/GD at [10]). According to the respondent, the actual loan amount extended to the appellant was about US$585,000 ("the US$585,000 Payment").

10 The JVA,[1] Debenture[2] and Loan Agreement[3] were all governed by the laws of Singapore and provided for the non-exclusive jurisdiction of the Singapore courts (HC/GD at [11]).

11 The respondent claimed that it invested the sum of US$7.6m pursuant to the Debenture ("the US$7.6m Payment"), and the US$585,000 Payment pursuant to the Loan Agreement (collectively, "the Investment Money"). The appellant refuted the claim and argued that no such funds ever came from the respondent. In addition, the Central Bank of Myanmar had rejected the

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1 ROA III(G): 73, cl 14.

2 ROA III(G): 102, cl 15.5.

3 ROA III(D): 193, cl 7.6.

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Company's application for approval to receive and pay back (up to the maximum) loan amount of US$850,000 (HC/GD at [12]).

12 The dispute between the parties arose out of two property projects in Yangon, Myanmar. One of the projects was in Natmauk Lane ("Natmauk Property") and the other was in Tamwe Township ("Tarmway Plaza") (HC/GD at [13]).

Natmauk Property

13 Natmauk Property was purchased by the Company from a third-party vendor in December 1996. The respondent claimed that the Company spent some US$3m on the acquisition and development of Natmauk Property, and that such funds came from the Investment Money (HC/GD at [15]). In November 2000, the appellant caused the Company to transfer the Natmauk Property to himself and his wife. The respondent claimed that the transfer was made dishonestly and fraudulently, without its consent. In reply, the appellant claimed that the Natmauk Property had been purchased by another of his companies from a third party back in April 1996 and subsequently transferred to the Company, representing his contributions to the paid-up capital of the Company. On the transfer of the Natmauk Property to himself and his wife, the appellant's stance was that the respondent did not provide the Company with any funds, and that he financed the purchase of the Natmauk Property himself (HC/GD at [16]).

14 The respondent sued the appellant in Myanmar in respect of the Natmauk Property in one civil action and in one private criminal prosecution. Both proceedings failed:

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(a) The civil proceeding, Major Civil Case No 330 of 2003 ("Civil Case 330"), was commenced in May 2003 in the Yangon Division Court.[4] Civil Case 330 was a claim against the appellant, his wife and the Company (amongst others) for the transfer of the Natmauk Property to the appellant and wife to be annulled, and/or for the Natmauk Property to be returned to the Company. The basis of this claim was that the Natmauk Property was purchased using funds provided by the respondent,[5] and that the purported transfer of the Natmauk Property was in breach of fiduciary duty and/or breach of trust.[6]

Civil Case 330 was dismissed in January 2015 by the Yangon Western District Court.[7] The ground for the dismissal was that the respondent's counsel was present at the hearing but did not have the requisite power of attorney.[8] By reason of steps taken by the respondent, Civil Case 330 was put up for review before the High Court of Yangon. The review appears to be still pending.[9]

(b) The criminal proceeding, Regular Criminal Case No 102/2003 ("Criminal Case 102"), was a private criminal prosecution commenced in February 2003 against the appellant (and another) for alleged violations of the Myanmar Companies Act and Myanmar Penal Code. The respondent complained, amongst other accusations, that the

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4 ROA III(E): 10.

5 ACB II: 127, para 7; ROA III(E): 11.

6 ACB II: 129, para 8(e)(5); ROA III(E): 13.

7 *NB*: Civil Case 330 was was subsequently converted to Major Civil Case 97 of 2011.

8 ACB II: 132 – 134; ROA III(E): 24 – 26.

9 SCB: 18, paras 24 – 26; ROA III(G): 15.

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appellant had made a false statement claiming that the Natmauk Property was purchased by his family with their own money (GD at [17]).

The Yangon Northern District Court acquitted the appellant in April 2008. The main ground for the court's finding was the lack of evidence that the respondent had permission from the Central Bank of Myanmar to remit funds to the Company.[10] An appeal against the acquittal was dismissed in January 2009 by the Supreme Court of Myanmar, for largely the same reasons.[11]

Tarmway Plaza

15 Tarmway Plaza was constructed and owned by an intermediary, which was in turn owned by the Company and another Myanmar company. The Company owned 80% of the intermediary. The respondent claimed that the Company acquired 80% of the intermediary by funding the construction of Tarmway Plaza with the Investment Money. The appellant disagreed and claimed that the Company did not use the Investment Money in acquiring the intermediary (HC/GD at [23] – [24]).

16 The respondent was given possession and management of the Tarmway Plaza until February 2004, when the appellant caused the intermediary to remove the respondent from the management of the Tarmway Plaza. The respondent claimed that the removal was without cause and wrongful (HC/GD at [[25]).

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10 ACB II: 118; ROA III(D): 279

11 ACB II: 123; ROA III(D): 291.

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17 In August 2004, the respondent commenced Major Civil Case No 2275 of 2004 ("Civil Case 2275") against the appellant and his wife (amongst others), seeking orders to recover possession and management of Tarmway Plaza. The respondent argued that it had contributed US$5.1m towards the construction of Tarmway Plaza.[12] The judgment for Civil Case 2275 was rendered in October 2017 in favour of the appellant. The appellant produced an English translation of the judgment stating that the court "dealt with [the issue of the US$5.1m payment] by dismissing it on 19.1.2005".[13] The respondent, in turn, produced its own English translation of the judgment, to support its position that the Myanmar court did *not* deal with the issue of the US$5.1m payment on 19 January 2005.[14] The respondent's subsequent application for revision of the October 2017 judgment was dismissed by the Yangon Regional High Court in December 2019.[15] It appears that Civil Case 2275 was decided, on a technicality, in favour of the appellant.

The Singapore proceedings

18 In June 2015, the respondent sued the appellant in Singapore. Briefly, the salient claims pleaded in the Singapore proceedings are as follows (HC/GD at [28]):

> (a) the appellant had acted, and continued to act, in fraudulent breach of trust and breach of fiduciary duties by, amongst other things, fraudulently causing the Company to transfer Natmauk Property to

12 ACB II: 137, para 9; ROA III(E): 36.

13 ACB II: 144; ROA III(E): 44.

14 ROA III(G): 16 – 17, 177 – 178.

15 ROA III(M): 47, para 4(a).

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himself and his wife, as well as fraudulently causing the intermediary to remove the respondent from possession and management of Tarmway Plaza;

(b) the appellant wrongfully induced the Company to breach the terms of the Debenture by liquidating the Company before the US$7.6m Payment was repaid to the respondent; and

(c) the appellant breached the Loan Agreement by failing to return the US$585,000 Payment to the respondent.

19 The respondent sought the following reliefs (HC/GD at [29]):

(a) damages, or alternatively an account of profits, in respect of the appellant's breach of trust and breach of fiduciary duties;

(b) damages in respect of the inducement of breach of the Debenture; and

(c) repayment of the US$585,000 Payment provided under the Loan Agreement.

20 Notice of the Singapore proceedings was served on the appellant in Australia in December 2015 pursuant to the Service Order made in July 2015 (HC/GD at [30]).

21 The appellant did not enter appearance within the time allowed in the writ of summons. In January 2016, the respondent entered default judgment for (HC/GD at [31]):

(a) the liquidated sum of approximately US$585,000 with interest;

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(b) damages to be assessed, or alternatively an account of profits, in respect of the appellant's breach of fiduciary duties and breach of trust; and

(c) damages to be assessed in respect of the appellant's wrongful inducement of the Company's breach of the Debenture.

22 The respondent did not proceed with an assessment of damages for inducement of breach of the Debenture. The assessment hearing in August and November 2016 focused on damages in respect of the claim for breach of trust and breach of fiduciary duties. In November 2016, the Judge gave judgment for damages in the sum of US$66,243,572.84. The Judge referred to that judgment as the Assessment Judgment (HC/GD at [32]–[37]).

The Australian proceedings

23 In March 2017, the January default judgment and the Assessment Judgment were registered in the Supreme Court of New South Wales, Australia ("NSWSC") as a judgment of the NSWSC. In the same month, the appellant applied to set aside the registration order. On 13 March 2019, the NSWSC dismissed the appellant's application (HC/GD at [38]–[39]).

24 The appellant appealed against the NSWSC's decision. However, before the appeal was heard in Australia, the appellant applied to set aside the Service Order, the January default judgment and the Assessment Judgment. In September 2019, the appellant also applied for leave to enter appearance in the Singapore proceedings. The hearing date of the appeal against the NSWSC's decision was vacated pending the outcome of the setting aside application in Singapore (HC/GD at [40]–[42]).

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Decision below

25 The appellant did not succeed before the assistant registrar who disallowed the applications for leave to enter appearance and to set aside the Service Order and the January default judgment (HC/GD at [41]–[43]). As for the application to set aside the Assessment Judgment, it was adjourned to be heard by a judge.

26 The Judge heard the appellant's appeal against the assistant registrar's decision and the application to set aside the Assessment Judgment (HC/GD at [43]–[44]). As mentioned earlier, the Judge set aside the judgment for the loan amount but not the rest. The key reasons of the Judge in refusing to set aside the Service Order, the O13 Interlocutory Judgment, and the Assessment Judgment were aligned with the three issues identified by the Judge (HC/GD at [45]):

(a) What were the reasons for the delay by the defendant in filing his applications?

(b) What are the legal principles on the effect of delay?

(c) How should the legal principles apply to the present case?

Reasons for the appellant's delay and effect of delay

27 The Judge found that the predominant, if not sole, reason for the appellant's decision not to participate in the Singapore proceedings was based on advice that the respondent would not be able to enforce a judgment of the Singapore courts against him in Myanmar. It was after he failed in his challenge of the registration of the January default judgment and the Assessment Judgment in Australia that he decided to defend the Singapore proceedings. The

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Judge described the appellant's earlier decision not to participate in the Singapore proceedings as "deliberate", and his delay as "inordinate … deliberate and contumelious." (HC/GD at [57]). The Judge held that the appellant's undue and inexcusable delay in applying to set aside a default judgment: (a) outweighed the fact that there were triable issues; and (b) was determinative especially in the absence of cogent explanation as to why a miscarriage of justice would be occasioned if the default judgment was allowed to stand.

January default judgment and Assessment Judgment

28 The Judge set aside the part of the January default judgment for a liquidated sum of US$585,143.67. He accepted the time bar defence and found it compelling after taking on board the respondent's concession that it would be difficult to argue against the time bar (HC/GD at [62]).

29 However, the Judge did not set aside the O13 Interlocutory Judgment and the Assessment Judgment. The Judge noted that the Assessment Judgment was entered after a trial and that the reason for the appellant's absence at the assessment hearing was the predominant consideration. He also noted that the countervailing factors had to be very compelling to tilt the balance in favour of setting aside the judgment (HC/GD at [63]). The Judge opined that he would adopt the same approach in considering the application to set aside the O13 Interlocutory Judgment even though it was entered in default of appearance (*ie*, without a trial) (HC/GD at [64]). If there had been deliberate, contumelious and inexcusable delay on the appellant's part in applying to set aside, such delay could be determinative.

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30 The Judge addressed the four defences raised by the appellant to oppose the two judgments and noted that the defences were all concerned with the issue of *liability*. The appellant did not challenge the actual *quantum* awarded, having not raised any issue relating to the assessment (HC/GD at [84]). The Judge found whilst the defences raised triable issues, they were not compelling as a countervailing factor to tilt the balance in favour of setting aside (HC/GD at [81]):

(a) First, on the issue of whether the Company had received the Investment Money. The Judge noted that the same defence was raised by the appellant in the Australian proceedings. Before the NSWSC, the respondent had adduced evidence of 66 payments that were made by the respondent and its representatives to payees associated with the appellant. The appellant ultimately abandoned his contention that the US$7.6m Payment was not made. As to the US$585,000 Payment, whilst the appellant asserted that the respondent was lying in saying that this payment was made, the NSWSC disbelieved him and rejected his assertion (HC/GD at [68]–[71]).

(b) Second, on the issue of illegality under Myanmar law, the Judge found that the appellant did not properly articulate this point and that the claims in breach of trust and breach of fiduciary duties would not necessarily be defeated just because there was no approval from the Central Bank of Myanmar for the respondent to lend money to the Company (HC/GD at [72]).

(c) Third, on the issue of whether the doctrines of *res judicata* and abuse of process applied:

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(i) In relation to Natmauk Property, the Judge found that Criminal Case 102 concerned *criminal proceedings*. That did not mean that *civil proceedings* would likewise fail (HC/GD at [75]).

(ii) In relation to Tarmway Plaza, the Judge found that the judgment issued in relation to Civil Case 2275 did not clearly state what the Myanmar court had decided as regards the respondent's alleged contribution of US$5.1m towards the construction of Tarmway Plaza. Nor did the Judge accept that there was a final and conclusive finding that the Company did not receive the Investment Money (HC/GD at [75]).

(d) Fourth, on the issue of the defence of time bar and laches:

(i) In relation to the time bar defence, the Judge found that the respondent's claims against the appellant for breach of trust and breach of fiduciary duties involved fraud, and thus there was no fixed limitation period for these claims by virtue of s 22(1) of the Limitation Act (Cap 163, 1996 Rev Ed). In any event, the appellant was in *continuing* breach of his fiduciary duties (HC/GD at [77] and [80]).

(ii) In relation to the doctrine of laches, the respondent sought different reliefs in the Myanmar proceedings. As such, nothing in the respondent's conduct could be regarded to be a waiver of the claims pursued in Singapore. Nor was there any evidence showing that the appellant would be prejudiced by the respondent's pursuit of the Singapore proceedings (HC/GD at [79]).

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31 After considering the evidence and arguments, the Judge agreed that the appellant had raised triable issues in defence of liability. However, in his view, the triable issues alone were not compelling enough to tilt the balance considering the appellant's contumelious conduct, amongst other things. The Judge found that it was inexcusable that the appellant only filed the setting aside application after he had failed in his challenge to the registration of the judgments in Australia (HC/GD at [81]–[83]).

Service Order

32 Before the appellant could challenge the Service Order, he was required to cross two procedural hurdles, namely obtain leave to enter an appearance and be granted an extension of time to apply to set aside the Service Order. These preliminary orders were granted by the Judge. The respondent did not take any issue with the Judge's exercise of discretion in this appeal.

33 The appellant challenged the Service Order on two grounds, namely (a) the respondent had not satisfied the requirements for the grant of leave for service out of jurisdiction; and (b) the respondent's failure to make full and frank disclosure in its application for the Service Order. The Judge dismissed both grounds.

34 The Judge found that the requirements for grant of leave for service out of jurisdiction were satisfied:

> (a) There was a good arguable case that the respondent's claims fell within one of the limbs of O 11 r 1 of the ROC, specifically, O 11 rr 1(d)(*i*), (d)(*iii*), (d)(*iv*), (f), (o) and (r).

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(b) On the requirement of merits of the respondent's claim, the appellant's main argument was that the respondent could not show that it had paid the Investment Money to the appellant. This argument was rejected by the Judge (see [30] above) (HC/GD at [91]).

(c) Singapore was the *forum conveniens*. The JVA and the Loan Agreement contained non-exclusive jurisdiction clauses in favour of the Singapore courts, and the appellant had not shown any strong cause to justify his release from the non-exclusive jurisdiction clauses. Further, as the Myanmar proceedings concerned different reliefs, the respondent could not be estopped from asserting that Singapore was the proper forum for the present action (HC/GD at [97]).

(d) The respondent did not fail to make full and frank disclosure. The appellant complained that the respondent did not disclose the fact that the Myanmar proceedings were decided against the respondent, that the Myanmar courts found that the Investment Money was not paid out by the respondent, or that the last instalment repayment under the Loan Agreement was due in 1999. The Judge found that those facts were not sufficiently material as to warrant disclosure by the respondent (HC/GD at [98]–[99]).

Summary of parties' arguments in the appeal

35 The parties' arguments in the appeal were substantially the same as below. It suffices here to outline the positions taken by the parties.

36 The appellant's main plank was to set aside the O13 Interlocutory Judgment and the Assessment Judgment. His counsel, Mr Abraham Vergis SC

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("Mr Vergis"), highlighted the difference in the standards governing the situation of setting aside of default judgments entered *without* trial on the one hand, and that of setting aside judgments entered *after* trial in the defendant's absence on the other. To the appellant, the Judge ought to have applied the former standard rather than the latter in the circumstances of this particular case.[16] For a default judgment entered without trial, a defendant need only show triable issues and the court would be slow to refuse a setting aside application on the ground of delay, even if that delay was deliberate and contumelious. In other words, the predominant consideration would be the merits of his defence.

37 The respondent disagreed that the Judge had applied the wrong threshold test in the two situations. The appellant's delay was to be weighed in both cases, and delay might prove fatal in both types of application. To the respondent, the starting consideration in the setting aside both of default judgments entered after trial and judgments entered without trial was the appellant's delay in the filing of the setting-aside application. As the appellant had not justified his delay of three and a half years, the appeal ought to be dismissed on that basis alone. Further, the appellant's purported defences were completely unmeritorious.

38 On the application to set aside the Service Order, the appellant contended that the Judge had erred in finding that the principles for setting aside the Assessment Judgment should apply to the application to set aside the Service Order. The respondent disagreed, and argued that the Judge had simply applied established principles of law based on the merits of the respondent's claims. Leave for service out of jurisdiction was therefore properly granted.

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16 AC at para 35.

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Our decision

Challenge to Service Order

39 We propose to first deal with the setting aside of the Service Order which is a jurisdictional challenge that must necessarily *precede* the topic of setting aside the two judgments.

40 At the hearing, Mr Vergis was reminded that the challenge to the Service Order was a jurisdictional challenge that must necessarily *precede* his arguments on the setting aside of the two judgments. He, however, informed this court that he would not be making any oral submissions in relation to the setting aside of the Service Order. Instead, he preferred to advance the appellant's case on the setting aside of the two judgments.[17] Since the challenge against the Service Order was not vigorously pursued and parties were content to rely on their written submissions, we say no more about the challenge save to note the following.

41 The Judge noted the three established requirements to be satisfied in order to obtain leave to serve out of jurisdiction (see [87] of the HC/GD citing the three requirements in *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500) ("*Zoom Communications*"). Further, the Judge considered the respondent's claims in the light of these three requirements, and in doing so he was similarly following the settled jurisprudence of this court. To that extent and in the final analysis, the Judge's finding that the three requirements for service out of jurisdiction were satisfied was correct.

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17 Certified Transcript (17.05.2021) ("Transcript") at p 3, lns 17 – 23.

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42 There was no reason to interfere with the Judge's holding that there was a good arguable case that the respondent's claims were within O 11 r 1(*r*) of the ROC by virtue of the non-exclusive jurisdiction clause in the JVA. We also agreed that Singapore was the *forum conveniens.* The appellant could not point to any strong cause justifying his release from the non-exclusive jurisdiction clause in the JVA in favour of the Singapore courts (HC/GD at [97]). We further agreed that Criminal Case 102 and Civil Cases 330 and 2275 were not sufficiently material to warrant disclosure to the court making the order for service out (HC/GD at [99]–[100]).

43 One aspect of the Judge's reasoning concerned us (HC/GD at [85]):

> Setting aside the Service Order would also have resulted in the Assessment Judgment being set aside. Accordingly, in my view, *the same approach taken with respect to the application to set aside the Assessment Judgment applied to the application to set aside the Service Order.* The defendant had to show compelling countervailing factors to tilt the balance in favour of setting aside the Service Order.
>
> [emphasis added]

44 The Judge dealt with the question of merits in the following manner (HC/GD at [91]):

> However, at the end of the day, the above distinction between the various limbs under O 11 r 1 did not really matter in this case because the defendant's case was that the plaintiff could not show an arguable case on the merits of its claims in respect of all the limbs relied upon by the plaintiff. The defendant submitted that the plaintiff did not have any good prospect of success in respect of its claims because it could not show that it had paid the Plaintiff's Investment Moneys. The defendant's arguments were the same as those made in connection with his application to set aside the Assessment and Default Judgments. These arguments have been dealt with earlier …

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According to the Judge, the findings on the merits in relation to the setting aside application of two judgments could be extended to the Service Order. The appellant pointed to the same passage quoted in [43] above to show where the Judge had "erred in finding that the principles for setting aside the Assessment Judgment should apply to the setting aside of the Service Order".

45 Whilst we appreciate that the Judge was dealing with the question of merits in a practical manner, we nevertheless had some reservations with his approach that tended to equate the question of merits in relation to the January default judgment with that of the Service Order. As regards the first two requirements set out in *Zoom Communications*, the question of merits in relation to the Service Order looks at the *respondent's* perspective, *ie*, whether the *claims* were sufficiently meritorious. The burden was on the respondent-plaintiff to satisfy the first two requirements of O 11 r 1 of the ROC. In contrast, the question of merits in relation to the setting aside of the default judgment obtained in January 2016 looks at the *appellant's* perspective, *ie*, whether the *defences* were sufficiently meritorious. The Judge's approach shifted the burden of proving the first two requirements of *Zoom Communications* to the appellant-defendant.

46 As it turned out, despite the Judge's observations, the Judge did actually apply the established principles concerning the grant of leave. We agree with the Judge that the respondent had sufficiently meritorious claims to justify the grant of the Service Order.

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O13 Interlocutory Judgment and Assessment Judgment

Preliminary comments

47 There is no dispute that the O13 Interlocutory Judgment, entered in default of appearance, was a regular default judgment under O 13 r 2 of the ROC. In this case, damages were at large, and the default judgment directed that damages be assessed at a further hearing at which the respondent would prove its loss. While such a default judgment stands, a defendant cannot dispute liability at the assessment hearing (see *Strachan v The Gleaner Co Ltd and another* [2005] 1 WLR 3204 ("*Strachan*") at [16]). Further, where a plaintiff proves his loss or damage by evidence, the assessment is not made by default despite the defendant's absence at the assessment hearing (see *Strachan* at [16]).

48 The appellant applied to set aside not one, but *two* judgments in the same application (*ie*, the O13 Interlocutory Judgment *and* the Assessment Judgment). Two procedural rules are engaged, one for each judgment. The procedural rules are *separate* and *distinct* in that a judgment in default of O 13 (*ie*, the O13 Interlocutory Judgment) is set aside pursuant to O 13 r 8 of the ROC and a judgment obtained in the absence of one party at trial (*ie*, the Assessment Judgment) can only be set aside pursuant to O 35 r 2 of the ROC. The discretionary power under each procedural rule requires an application to be made in accordance with that particular procedural rule. In considering both procedures, the court must look at the entirety of the evidence. How these procedural rules co-exist, their relationship and interaction with each other provide a useful framework to consider the factors relevant to the issues that arise in relation to the setting aside of the two judgments.

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49 The court's discretionary power to set aside a default judgment entered pursuant to O 13 is found in O 13 r 8 of the ROC, which reads as follows:

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

50 The Assessment Judgment was a judgment given after trial, albeit in the appellant's absence, and thus falls within the ambit of O 35 r 1 of the ROC. The court's discretionary power to set aside is found in O 35 r 2 of the ROC, which reads as follows:

> 2(1) Any judgment or order made under Rule 1 may be set aside by the Court on the application of any party on such terms as the Court thinks just.
>
> (2) Any application under this Rule must be made within 14 days after the date of the judgment or order.

51 There is a 14-day time limit to file an application to set aside under O 35 r 2. However, the court has power to extend time under O 3 r 4 in appropriate circumstances and on such terms as the court thinks just. In contrast, there is no formal time limit to applications to set aside default judgments under O 13 r 8, but this does not mean that there would be little or no consequence if the application is late. Therefore, applications to set aside O 13 judgments should also be made as promptly as possible (see generally Jeffery Pinsler SC, "Last Flight of the Eagle – New Principles Governing the Setting Aside of Judgments in Default" (2009) SAcLJ 161 at [25], see especially footnote 76).

52 It is clear from the foregoing comments that an *application* to set aside a default interlocutory judgment for damages *may be made* notwithstanding the fact that damages have been assessed and final judgment has been entered for the amount of damages assessed (see also *Strachan* at [14]–[22]). The crucial question is whether the court would exercise its power to grant the relief sought

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and, if so, under what circumstances. From this perspective, it would be incomplete and artificial to focus on the O 13 judgment without looking at the subsequent events that led to the O 35 judgment, and *vice versa*, because the court's discretionary power is to be exercised by reference to all the circumstances of the case (see also *Strachan* at [23], where the Privy Council opined that a relevant factor in the application to set aside an O 13 judgment is the fact that damages have been assessed and a final judgment on damages (*ie*, the O 35 judgment) has been entered).

53 This is a convenient juncture to put aside the English authorities relied upon by the appellant. They do not assist him. As mentioned, the appellant's case is that English authorities relating to applications setting aside of default judgments laid considerable emphasis on the desirability of doing justice between the parties on the merits. Delay in making an application was not a decisive factor if the defendant-applicant could show that he had a *prima facie* defence in the sense of showing that there were triable or arguable issues (for convenience, we adopt the shortened expression "*prima facie* defence"). The appellant cited *Vann & Another v Awford & Others* The Times (23 April 1986) ("*Vann*") and *J H Rayner (Mincing Lane) Ltd and others v Caférnorte SA Importadora and others* [1999] 2 All ER (Comm) 577 ("*Rayner*"), in support of his proposition. Although these two cases were mentioned in this court's decision of *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR(R) 907 ("*Mercurine*") at [62]–[63], they were decided prior to the enactment of the Civil Procedure Rules 1998 (UK) ("CPR").

54 In *Vann*, the second defendant decided not to give notice of intention to defend and judgment in default of appearance was entered against him. Damages were then assessed. He did nothing until the plaintiff began

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enforcement proceedings. He then applied to set aside the judgment and the assessment. The English High Court dismissed the application to set aside the judgment and the assessment on account of the defendant's dishonesty in explaining his failure to give notice of intention to defend, his inability to justify the delay in making his application, and because it was too late for such relief to be granted. The English Court of Appeal disagreed. Dillon LJ said: "Even for lying and attempting to deceive the court, a judgment for £53,000 plus is an excessive penalty if there are arguable defences on the merits." Nicholls LJ agreed: "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." Accordingly, the judgment was set aside.

55 In *Rayner*, an application to set aside a judgment in default of notice of intention to defend was made seven years after its entry. The English Court of Appeal concluded that the defence had a real prospect of success and that the long delay should not be a sufficient reason to set aside the judgment. Although the plaintiff alleged that the defendant's decision not to file a notice of intention to defend and to allow the default judgment to be entered amounted to a deliberate strategy which should disqualify the defendant from any relief, the English Court of Appeal concluded that such a factor, even if true, could not defeat the defendant's application to set aside the judgment. Waller LJ, in delivering the judgment of the English Court of Appeal, commented that if "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".

56 *Vann* and *Rayner* are no longer good authority in England, *after* the introduction of the CPR. In particular, r 13.3(2) of the CPR gives added

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emphasis to the need for a defendant to show that he has acted "promptly" in seeking to set aside a default judgment. The question as to whether the application has been made promptly is now a mandatory, and therefore an important, consideration (see *Regione Piemonte v Dexia Crediop Spa* [2014] EWCA Civ 1298 at [34]). The observations of Moore-Bick LJ in *Standard Bank plc and another v Agrinvest International Inc and others* [2009] EWHC 1692 (Comm)at [22] are instructive:

> The Civil Procedure Rules were intended to introduce a *new era in civil litigation*, in which both *the parties and the courts were expected to pay more attention to promoting efficiency and avoiding delay*. The overriding objective expressly recognised for the first time the importance of ensuring that cases are dealt with expeditiously and fairly and it is in that context that one finds for the first time in rule 13.3(2) an explicit requirement for the court to have regard on an application of this kind to whether the application was made promptly. No other factor is specifically identified for consideration, which suggests that promptness now carries much greater weight than before. It is not a condition that must be satisfied before the court can grant relief, because other factors may carry sufficient weight to persuade the court that relief should be granted, even though the application was not made promptly. The strength of the defence may well be one. However, promptness will always be a factor of considerable significance …and *if there has been a marked failure to make the application promptly, the court may well be justified in refusing relief, notwithstanding the possibility that the defendant might succeed at trial.*
>
> [emphasis added]

57 In the same vein, at the time *Vann and Rayner* were decided, the practice of the Singapore courts already placed emphasis on judicial case management and the judicial philosophy then and now is the promotion of expedition, economy, and avoiding delay in litigation.

58 Drawing the threads from the foregoing discussion, any argument that O13 r 8 will take *precedence* over O35 r 2 of the ROC because a plaintiff's right

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to damages is derived from the O 13 judgment on liability is incorrect. Thus, an approach that focuses purely on O 13 r 8 to the exclusion of O 35 r 2 is wrong. Whether the judgments should be set aside must be decided by applying the respective procedural rules on how each setting-aside application is to be made and the circumstances in which each of the judgments were obtained. We elaborate on this approach at [74] below.

Order 13 and Order 35

59 Before turning to the facts of the case, we begin with some observations on O 13 judgments and O 35 judgments in general.

O 13 judgments

60 Judgments falling under O 13 of the ROC can be classified broadly, into two types: those entered regularly, and those entered irregularly (see *Mercurine* at [43]). Our discussion is confined to setting aside of regular judgments which is the case in the present appeal.

61 For a judgment regularly entered, the first and foremost consideration (*ie*, the threshold requirement) in setting aside is whether the defendant can establish a *prima facie* defence. Whilst this threshold requirement is significant in its own right, the power to set aside is discretionary and therefore other factors may need to be taken into account (*Mercurine* at [65]).

62 *Mercurine* involved claims by the plaintiff landlord for rental arrears and possession of the premises which had been leased to the defendant. A judgment was entered in default of appearance against the defendant who only took out an application to set aside the judgment more than 15 months later. The judgment was irregular because it was entered for an excessive sum in respect

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of rental arrears and in respect of the claim for possession, the plaintiff had entered judgment without producing a certificate required by O 13 r 4(1) of the ROC.

63 In addition, the default judgment was for a liquidated sum and an order for possession. It also included judgment for damages to be assessed (*Mercurine* at [10]). Unlike the case in this appeal, there was no hearing to assess damages in *Mercurine*, as the parties in *Mercurine* subsequently entered into discussions for a settlement. Thus, the discussion in *Mercurine* dealt with setting aside the default judgment for a liquidated sum based on the applicable principles for setting aside a default judgment under O 13.

64 Next, contrary to the appellant's contention, the test for a *prima facie* defence (which is the same as an application to obtain leave to defend in an application for summary judgment) is only a *threshold* requirement that needs to be taken in consideration alongside other factors. More importantly, the assessment of whether there is a *prima facie* defence is *not* an exercise of discretion, but rather an evaluative assessment of the merits of the defence based on the evidence, albeit on a preliminary basis. If the answer is that a *prima facie* defence exists, there then arises a question of discretion. In exercising this discretion, the court will balance the existence of a *prima facie* defence against other factors such as period of and reason for any delay in applying to set aside including the prejudice that the plaintiff would suffer if judgment were to be set aside (see *Mercurine* at [65]). In the two English authorities cited by the appellant, the English court, in exercising its discretion, did not give much weight to the factor of delay. As we have already explained, this is not the prevailing attitude, either in England or Singapore (see [53]–[57] above).

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65 In summary, if there are strong grounds for refusing the relief sought, including but not limited to delay, the defendant might need to demonstrate a commensurately strong defence, such that it would be in the interests of justice to grant the application. This court in *Mercurine* set out the relevant legal principles on the effects of a delay in making a setting aside application and observed at [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... As a rule of thumb, the longer the delay, the more cogent the merits of the setting-aside application have to be.

On the facts of *Mercurine,* the defendant's length and reason for delay in bringing the setting-aside application were not fatal (*Mercurine* at [37]).

66 Normally, the court will in every case scrutinise the reasons for the delay. A deliberate choice on the part of a defendant to stay away from the proceedings because of his litigation strategy, would be a very strong factor which weighs against the court's discretion to set aside a regular O 13 judgment. We were referred to the case of *Ang Kim Soon v Sunray Marine Pte Ltd* [1997] 1 SLR(R) 714. In that case, the plaintiff sued his employer in respect of injuries he sustained from an explosion while he was carrying out work on board a ship. Meanwhile, the employer had brought proceedings for an indemnity against the shipowner (in respect of liability for the accident). The employer ignored repeated requests by the plaintiff to file its defence. Eventually, the plaintiff entered an O 13 judgment. The employer did not apply to set aside the O 13 judgment until the proceedings against the shipowner had been concluded in the employer's favour (almost six months after the judgment had been entered). Therefore, the employer, having been exonerated for the explosion, had a real

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prospect of success against the plaintiff. The employer's explanation that it was inappropriate to apply to set aside the judgment until the conclusion of its action against the shipowner was not accepted by the court. The High Court took into account the chronology of the events and the conduct of the parties and opined: "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." In other words, the employer, having decided on its strategy of ignoring the plaintiff's claim, should not now be allowed to come back and set the O 13 judgment aside just because its action with the shipowner ended in its favour.

67 In the same vein, a deliberate or extended delay on the part of the defendant in applying to set aside a judgment is a factor that weighs against setting aside. In *Zhao Feng Guo v Tan Hong Soon (trading as Intense Engineering Construction)* [2003] 2 SLR(R) 417 ("*Zhao Feng Guo*"), the plaintiff commenced action against the defendant in September 2001, and an O 13 judgment was entered in October 2001. The assessment was fixed for hearing in March 2003. The defendant only applied to set aside the O 13 judgment three days before the assessment was to begin, after it learnt that the plaintiff was deported for lying about his qualifications a few days before the writ of summons was issued. However, it appears that the assessment hearing was not stayed, and by the time the setting aside application was listed for hearing, the assessment had almost been completed. The High Court found that it was too late to set aside the O 13 judgment, on the ground that the O 13 judgment was on the verge of perfection because the assessment was almost over.

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O 35 judgments

68 O 35 judgments may concern situations where the parties had participated throughout the course of the proceedings leading to action being set down for trial and on the date fixed for trial, *only one party* appeared for trial. Order 35 r 2(2) of the ROC provides that when the defendant does not appear for trial, the trial judge may either proceed with trial and then enter judgment in favour of the plaintiff or enter judgment in favour of the plaintiff *without* trial. If the plaintiff failed to attend the trial, the plaintiff's claim might be struck out or judgment might be entered in the defendant's favour. As in this case, O 35 judgments may concern situations where a default judgment for damages to be assessed was obtained and, at a subsequent hearing *only one party* appeared for trial. In these situations, damages would be assessed on the evidence and a final judgment would be entered for the amount of the damages.

69 In this case, the Judge gave a reasoned assessment. What mattered was that there was a trial held in the appellant's absence, as required by the plain wording of O 35 r 1 of the ROC. The assessment hearing went on for two days. Factual and expert witnesses testified and the Judge called for written submissions from the respondent. The Judge thereafter gave reasons for his decision to award the respondent US$66m in damages.

70 The conditions in O 35 r 2(2) of the ROC reflect the requirement of promptness in their imposition of the 14 days' time limit from the judgment date to make a setting aside application. The appellant did not apply to extend time to apply to set aside the Assessment Judgment under O 35 r 2(2). Arguably, O 35 r 2(2) operates to preclude the appellant from challenging the Assessment Judgment unless leave is sought and granted. Assuming leave is granted, a party

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who cannot provide a good reason for non-attendance at the trial will face difficulty overturning a decision given in his absence.

71 The main authority on O 35 r 2 is *Su Sh-Hsyu v Wee Yue Chew* [2007] 3 SLR(R) 673 ("*Su*"). In *Su*, the defendant agreed to purchase shares from the plaintiff. The plaintiff sued the defendant for non-payment of the shares. The defendant in turn explained that she had made payment according to the plaintiff's instructions. On the day of the trial, the defendant and her two witnesses who assisted with the transaction did not show up. The defendant's late application for adjournment was rejected, and the trial proceeded in the defendant's absence, culminating in an O 35 judgment being entered against her. The defendant's application to set aside the O 35 judgment failed at first instance. However, her appeal against the High Court's decision to refuse the setting aside of the O 35 judgment was allowed by this court. This court placed emphasis on four exceptional features:

(a) First, the defendant's late application to adduce new evidence was allowed partly because the plaintiff had not disputed or challenged the authenticity or credibility of the new evidence and had not produced an independent report to counter the impact of new evidence. That there was a real possibility that the plaintiff had obtained the judgment through fraud featured strongly in this court's consideration to set aside the judgment.

(b) Second, the defendant had acted promptly in hiring new solicitors and applied to set aside the judgment within the 14-day period set out by O 35 r 2 of the ROC.

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(c) Third, the defendant had already paid the judgment sum into court as a show of her good faith in pursuing the setting aside application.

(d) Fourth, there was no real or irremediable prejudice to the plaintiff should the judgment be set aside and a new trial ordered.

72 It is clear that the four exceptional features in *Su* had tilted the balance in the defendant's favour. Where judgment has been entered after a trial in the defendant's absence, a defendant who seeks to set aside a judgment under O 35 r 2 must be able to discharge the predominant condition which is *the reason for the defendant's absence*: *Su* at [44]. As explained in *Su* (at [45]), while other factors are also to be considered in a balancing exercise, the reasons for the defendant's absence are nevertheless given added weight. Further, the reasons for the defendant's absence may be evaluated on a spectrum, and the court would only absolve the defendant of his lapses if there are cogent reasons for absence (*Su* at [47]). This important consideration in *Su* is redolent of the judicial philosophy that emphasises efficient and proper conduct of litigation and of the importance of public interest in litigants abiding by the court's orders and procedures. The need to enforce the court's orders and rules, and to encourage compliance, means that a party should not lightly be relieved of the consequences of a deliberate decision to flout the court's orders and to ignore its procedures. In the context of this appeal, the appellant's conduct engaged another aspect of the public interest, which is the efficient conduct of litigation – hard pressed judicial time and resources were devoted to the assessment of damages hearing, to the exclusion of other court users. Again, this consideration, while significant, must be *balanced* against other countervailing factors. Put simply, as the jurisdiction to set aside is discretionary, the court

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undertakes a *balancing exercise* by taking into account the reason for the defendant's absence at the trial together with other relevant factors. Further, where the defendant's absence was deliberate and not due to mistake or accident, the court's discretion would generally weigh heavily against setting aside the O 35 judgment even though there may be persuasive countervailing factors (at [45]).

73 To illustrate, in *Vallipuram Gireesa Venkit Eswaran v Scanply International Wood Product (S) Ltd (Kim Yew Trading Co, third party)* [1995] 2 SLR(R) 507, judgment was entered and damages assessed against a third party who had failed to attend trial. It was only when the plaintiff sought to register the judgment in Malaysia that the third party applied, two years after the conclusion of the trial, to set aside the judgment alleging that it was under the mistaken impression that a Singapore judgment could not be enforced in Malaysia. That explanation was not acceptable to the High Court (at [16]):

> In my opinion, the third party would not have succeeded in an application for an extension of time in which to apply to set aside the judgment against it. …In the present instance, …[t]he third party cannot come back to court and insist that the court examines the merits of the third party's case and gives it leave to proceed because it has a meritorious defence without giving any explanation for the course of conduct which led to the judgment against it being given.

Interplay between Order 13 and Order 35

74 From the foregoing review of the two procedural rules, it is clear that where the application is to set aside two judgments, the court's discretionary power to set aside under both procedural rules would be considered concurrently. This means embarking on a two-stage balancing exercise: (a) identify and assess the seriousness and significance of the defaults and reasons behind the procedural breaches; and (b) balance the considerations in (a) against

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all the other relevant factors, keeping in mind two competing interests, namely finality in litigation on the one hand, and the interest of justice to prevent a miscarriage of justice that may be occasioned if the relief sought is not granted on the other. An example of the latter occurrence is where the judgment in question was procured by fraud.

Application of the two-stage balancing exercise

75 We now consider the exercise of discretion by applying the two-stage balancing exercise to the facts of this case.

Seriousness and significance of the appellant's defaults

76 The appellant did not dispute that his decision to stay away and to leave the Singapore proceedings undefended (*ie*, by not entering an appearance and not showing up for the assessment hearing) stemmed from the advice of his lawyers in Myanmar that a Singapore judgment could not be enforced in Myanmar. The appellant raised a potpourri of arguments to justify his deliberate inaction in the Singapore proceedings, which in effect was a litigation strategy. It was, definitely, much too late to attempt to reverse a litigation strategy consciously undertaken by the appellant.

77 First, the appellant claimed that he believed the Singapore proceedings were oppressive, brought to harass him, an elderly retired individual, by embroiling him in protracted and costly litigation.[18] He was entitled to take that view, but the correct response would have been to apply to stay the Singapore proceedings as an abuse instead of deliberately ignoring the same.

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[18] AC at para 110.

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78 Second, the appellant said that his financial resources were stretched in defending the various claims in Myanmar and being the subject of wrongful injunctions, and thus he had to pick and choose his battles. However, the appellant did not address the Judge's observation that the appellant had the wherewithal to commence Civil Cases 266 and 341 (see [22] above) after the Singapore proceedings were commenced. Further, he clearly had the means to challenge the registration of the Judgments in Australia (HC/GD at [52]). We agreed with the Judge that the appellant was not nearly as impecunious as he would like us to believe.

79 Third, the appellant submitted that had he known the respondent was seeking a large amount of damages at the assessment hearing, he would have participated in the Singapore proceedings earlier.[19] He complained that he did not know the respondent was seeking more than US$66m in damages until March 2017, when the Singapore judgments were registered in Australia. Although he was aware that the respondent sought damages to be assessed beyond the loan amount, the amount of damages was "concealed" from him until March 2017.[20]

80 It is useful at this juncture to set out the background to the appellant's contention. In early March 2016, an order was made directing that the list of documents be "filed and served" by end-March 2016, and Affidavits of Evidence-in-Chief ("AEICs") be "filed and exchanged" by mid-April 2016.[21] In the same month of March 2016, the respondent informed the appellant of these

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19 AC at para 120.

20 AC at para 112.

21 See HC/ORC 3074/2016 at para 3.

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directions, and also sent him copies of the documents disclosed in the respondent's list of documents.[22]

81 The respondent was granted extensions of time to file its affidavits and informed the appellant accordingly. The respondent filed its AEICs in mid-May 2016, and informed the appellant one day after its AEICs were filed.[23] Significantly, the AEIC of the respondent's representative quantified the damages sought at some US$66m,[24] and the AEIC of the respondent's experts put the quantum in roughly the same range.[25] Also significantly, it appears that the respondent only informed the appellant that the AEICs were filed, but did not send the AEICs to the appellant (in contrast, the copies of the documents in the respondent's list of documents were sent to the appellant).

82 In August 2016, the respondent applied to the Judge for leave to amend its statement of claim and adduce two supplemental AEICs. The respondent informed the appellant of its application for leave three days after it was made.[26] The respondent also sent copies of the summons and the draft amended statement of claim.[27] Significantly, the draft amended statement of claim (as well as the eventual amended statement of claim) did *not* specify the amount of damages sought at US$66m.[28]

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22 ROA III(K): 1181.

23 ROA III(K): 1201.

24 ROA III(B): 89, para 75.

25 ROA III(A): 142 and 228.

26 ROA III(K): 99.

27 ROA III(K): 100 – 139.

28 ROA III(K): 135, para 44(1).

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83 It was on the basis of the aforesaid that the appellant accused the respondent of being surreptitious. The appellant's position was that the respondent had sent him copies of *every document except the relevant AEICs which contained the quantification of US$66m*.[29]

84 We found the appellant's contention untenable and self-serving. The respondent's stance is that there was nothing surreptitious in not sending the AEICs to the appellant. The court order only required AEICs to be "filed and exchanged", and respondent clearly informed the appellant that AEICs were filed. There were no AEICs to be exchanged with the appellant. The appellant was aware that the AEICs were for assessment of damages. The appellant clearly could have examined the AEICs if he was minded to. There was no inclination to do so given his litigation strategy, that is, Singapore judgments are not enforceable in Myanmar. Ultimately, it was the appellant's own deliberate inaction that caused his current dilemma, and not any surreptitiousness on the part of the respondent (HC/GD at [55]).

85 Fourth, as regards his attempt to resist registration of the Singapore judgments in Australia in March 2017, the appellant's explanation was that he did what he perceived was "the need of the hour", and it was only after the challenge failed that he realised the proper course of action was to apply to set aside the Judgments.[30] This claim was again self-serving. The appellant had always had the benefit of legal advice.

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29 AC at para 119.

30 AC at para 121.

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86 From the above analysis, the appellant's procedural breaches in failing to enter appearance and participate at the assessment hearing, were deliberate and part of his litigation strategy. This alone would be a strong factor for the court not to exercise its discretion to set aside the judgments.

87 However, the appellant's conduct did not stop there. His procedural breaches must also be viewed in the context of the steps he took *in Myanmar*. We refer specifically to the appellant's two attempts to get the two declarations in Civil Cases 266 and 341 that he had no liability to the respondent. Civil Case 266 was commenced *after* the default judgment was obtained in January 2016 but before the appellant received notice of the assessment hearing. After he had received the notice of the assessment hearing, and before the assessment hearing started, he commenced Civil Case 341. More significantly, at all material times, it was always open to him to protect his interest if he had wanted to. The appellant was not merely *ignoring* the Singapore proceedings; rather, he was running *parallel proceedings* in Myanmar to undermine the Singapore proceedings. Civil Case 266 was an attempt at *contradicting* the default judgments obtained in Singapore, while Civil Case 341 was an attempt at *pre-empting* the Assessment Judgment. The appellant's overall conduct was completely inexcusable.

Explanation for the delay

88 The discussions above provide background for the delay and the appellant's explanation for the delay and for the appellant's absence at the assessment hearing. A number of observations may be made about his explanation.

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89 The application to set aside was brought *three and a half years* after the January default judgment was obtained in January 2016, and *three years* after the Assessment Judgment was obtained in November 2016. The passage of time was lengthy. The Judge described the length of delay as "inordinate" and the appellant's decision to stay away from the Singapore proceedings as "deliberate". It was throughout the period of delay that the respondent acted on the default judgment and acquired rights.

90 It is the explanation for the delay that is most important. The factor of delay is exacerbated when one considers the appellant's *reason* behind the delay: the appellant only came to Singapore to apply to set aside the judgments after his attempts to challenge the registration of the judgments in Australia failed. The appellant's reasons to justify his delay are the same as those he used to justify his failure to enter appearance and attend the assessment hearing, which we have analysed and dismissed at [76]–[87] above.

91 We would also like to focus on the appellant's conduct in Australia once the appellant had notice that the respondent had registered the judgments. The appellant could have applied for his application to oppose the registration to be adjourned or stayed, pending an appeal against the Assessment Judgment in Singapore (which was expressly provided in Australia, under s 8 of the 1991 Foreign Judgments Act (Cth)). It was significant that the appellant did not choose to do so but instead challenged the registration first, because it showed that he perceived Singapore as a forum of last resort. He held out from litigating in Singapore *as long as possible*, and this was another factor which operated against him.

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92 In all the circumstances, it was difficult not to conclude that the delay in applying to set aside the judgments was the result of a conscious decision by the appellant: to stay away from the Singapore proceedings and the judgments for as long as possible. He knew the risk of enforcement in Australia and he chose to resist the registration first before coming to Singapore.

All the circumstances of the case

93 Turning to other aspects of the interests of justice in the particular circumstances of the case, it was argued on behalf of the appellant that the following factors militated in favour of setting aside the judgments:

(a) The appellant raised more than a *prima facie* defence on the merits. In fact, he demonstrated a defence that would likely succeed. The appellant would be required to pay a very large sum for which he was not liable. It was submitted that the merits of his defence was by far the most important factor to be taken into account.

(b) The prejudice to the respondent in setting aside the judgments could be met by an award of costs in relation to the steps taken to enter judgment and to have damages assessed.

(c) Little if any weight should be attached to any delay caused by setting aside the judgments.

(d) The conduct of the respondent was itself to be criticised.

94 On behalf of the respondent, a number of points were made which had considerable force in pointing to the opposite conclusion:

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(a) The appellant's failure to enter appearance was a serious and significant default resulting from a deliberate decision not to engage in the Singapore proceedings.

(b) There would be significant prejudice to the respondent if the judgments were set aside including loss of the benefits of those judgments, over four years of delay and the wasted costs of seeking to register the judgments in Australia.

95 We have earlier considered the delay and the reasons for the delay. The appellant's submission that little weight should be given to the delay was ill-founded. We now turn to merits of the defence.

96 The appellant's arguments in relation to the merits of his defence were, in our view, a rehash of his arguments before the Judge. We agree with the Judge (GD at [83]) that while the appellant's defence raised triable issues, they could not outweigh the factors pointing against grant of the relief sought.

97 An argument not raised in the Appellant's Case was canvassed during the hearing. Mr Vergis initially submitted that the appellant had a strong defence, in that the respondent's claims for breach of trust and/or fiduciary duties, when properly analysed, were time-barred. However, our view is that the time bar point, while arguable, could not be said to be a strong defence.

98 After further questioning, Mr Vergis' argument shifted. He argued that even if the time-bar argument was not strong, the respondent's claims in breach of trust and/or fiduciary duty were still so unmeritorious that they ought to have been struck out. This was because the facts, as pleaded in the statement of claim, showed that the appellant owed fiduciary duties to *the Company*, and not to the

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respondent. The respondent chose to dress its claims against the appellant as claims in breach of trust and/or fiduciary duties, instead of breach of contract, to avoid the time bar that would have applied, had the contractual avenue been pursued.[31]

99 We did not think that Mr Vergis could be allowed to make this argument at this late juncture. This was a new argument on appeal. A new argument on appeal would not be entertained if further findings of fact are required (see *Abhilash s/o Kunchian Krishnan v Yeo Hock Huat and another* [2019] 1 SLR 873 at [41]). In our judgment, the new point raised by Mr Vergis could not be said to be a simple point of law. The respondent's case, as pleaded in the statement of claim, was that the Company was merely the *vehicle* through which the parties' joint venture would be carried out. The respondent stated that it was the one who financed the Company. The JVA and Debenture also provided that the respondent was to be be entitled to 95% of the shareholding in the Company (as soon as restrictions on foreign ownership of Myanmar companies are lifted) and to liquidate the Company. To that extent, it certainly could be said that the appellant was managing the Company *for the appellant's benefit*, and therefore the appellant's fiduciary duties ought to be owed to the ultimate investor which was the respondent. Mr Vergis' argument would thus, in our view, necessitate a close examination of the commercial relationship between the parties, to determine whether the parties intended the appellant to owe duties only to the Company of which he was a director, or also to the respondent which was the ultimate investor. This would in turn require more evidence in relation to (a) discussions between the appellant and the respondent relating to the incorporation of the Company and the drafting of the JVA; (b) any trust and

[31] Transcript at p 43, lns 1 – 14.

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confidence reposed by the respondent in the appellant; and (c) any assumption of responsibility on the part of the appellant. No such evidence was available, nor did we have the benefit of any findings from the Judge in relation to the three points. Accordingly, we did not find it appropriate for the appellant to raise this fresh argument at this late juncture.

100 For completeness, we also do not accept the argument from counsel for the respondent, Mr Jason Chan SC ("Mr Chan"), that the appellant should have raised this argument on the proper plaintiff in NSWSC. The proceedings in Australia related to the recognition and enforcement of judgments, and Australia would not have been an appropriate *forum* for the appellant to make this proper plaintiff argument, which was an argument on the *merits*.

101 In any event, if the merits of his defence were as strong as claimed, the appellant ought to have canvassed the merits in accordance with the rules of the court and not at his whim and preference as to timing. The appellant had consciously allowed so much more water to flow under the bridge that it would be wrong to let him ignore reality and come back to make his case to this court that he should be viewed as someone who just happened to let a procedural failure get past him. Procedural justice must be observed in a coherent and systematic way, otherwise there will be procedural chaos.

102 In all the circumstances, the establishing of a defence on the merits was not sufficient to justify setting aside the judgments notwithstanding that the sums involved were large.

103 We have considered the appellant's criticism of the alleged conduct of the respondent at [84] in connection with the AEICs for assessment of damages.

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We would add that after obtaining the January default judgment, the respondent rightly pressed on with assessment of damages. The respondent was obliged to continue with the Singapore proceedings expeditiously and more so in the light of the automatic discontinuance regime in O 21 r 2 of the ROC that applies to a judgment for assessment of damages. In *Tan Kim Seng v Ibrahim Victor Adam* [2003] 1 SLR(R) 181, this court held that a plaintiff who obtained an interlocutory judgment was required to proceed towards the assessment stage within a year to avoid loss of his rights to any damages. By obtaining final judgment after assessment, the rights acquired were highly relevant to the exercise of discretion. Lord Millett (as he then was) in *Strachan* observed (at [23]):

> Their Lordships would add this. *Although the fact that damages have been assessed and a final judgment entered does not deprive the court of jurisdiction to set aside a default judgment, it is highly relevant to the exercise of discretion. It is an aspect of, but separate from, the question of delay.* It cannot be assumed in every case that any prejudice to the plaintiff can be met by putting the defendant on terms to pay the costs thrown away by the assessment hearing. There can be no rigid rule either way, it depends on the facts of the particular case.
>
> [emphasis added]

104 The leads us to the issue of prejudice to the respondent. Mr Chan submitted that the respondent had incurred substantial costs in the Australian proceedings, which we agree is relevant. Besides that, we note that setting aside of the two judgments after four years would require the respondent to start again in conditions that are different from those four years ago.

Conclusion on the discretionary exercise

105 In summary, the appellant's failure to enter appearance and attend the assessment was deliberate and inexcusable. In the same vein, his delay in

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applying to set aside the judgments was substantial and deliberate. In contrast, his defence raised no more than an arguable case at best. The equities of the case thus pointed overwhelmingly against setting aside the O 13 Interlocutory Judgment and the Assessment Judgment.

Conclusion

106 For the reasons stated in detail above, we dismissed the appeal (see [4] above).

Sundaresh Menon
Chief Justice

Judith Prakash
Justice of the Court of Appeal

Belinda Ang Saw Ean
Judge of the Appellate Division

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