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Setting Aside a Default Judgment: New Developments in Singapore

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Default judgments; Setting aside; Singapore

Introduction

The rationale underlying the court’s discretionary power to set aside a default judgment is easy to state. Where a claim is determined as a consequence of a party’s failure to comply with procedural rules, that determination ought not necessarily be determinative. It ought not because the court’s primary function is to determine claims on their substantive merits. To ensure that the court has power to comply with that primary purpose it ought therefore have the power to revoke, in appropriate circumstances, judgments entered in default, i.e. judgments entered on grounds other than substantive ones.1 The application of this power, particularly its translation into concrete rules that can be applied consistently, has not however been straightforward. Embedded in the myriad rules developed to guide the courts in exercising this jurisdiction lie distinctions between the following: (a) regular and irregular judgments; (b) arguable and triable issues; and (c) the “real prospect of success” test, the ex debito justitiae rule and the “bound to lose” test. This has led to a degree of confusion in the application of the associated tests which in turn may have obscured the true rationale behind the discretionary power to set aside default judgments. Inasmuch as Singapore derived its rules of civil procedure from England, it has been no less spared from these difficulties.

Recently in Mercutine Pte Ltd v Canberra Development Pte Ltd,2 a unanimous Singapore Court of Appeal laid down a comprehensive and novel set of rules which both consolidate the existing law and give effect to the underlying rationale behind setting aside default judgments.3 This new development in

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1 per Lord Atkin in Evans v Bartlam [1937] A.C. 473, 480.
2 Mercutine Pte Ltd v Canberra Development Pte Ltd [2008] SGCA 38 (V.K. Rajah J.A. delivering the judgment of the court).
3 Further references to the “Court of Appeal” will refer to the Singapore Court of Appeal unless otherwise specified.
Singapore should be of comparative interest to other jurisdictions with similar procedural rules.

The facts in Mercurine

*M*ercurine concerned a purported lease agreement between Mercurine and Canberra, which allowed Mercurine occupation of one of Canberra’s properties. Subsequently, disputes arose between the parties, which led to Mercurine refusing to pay the rent due. Canberra thereafter commenced an action against Mercurine for the unpaid rent and possession of the property concerned. Judgment in default of appearance against Mercurine was entered for both the unpaid rent and possession. According to Mercurine, after it had known about the default judgment, it initiated negotiations with Canberra, resulting in a compromise agreement. By this agreement, Mercurine would pay Canberra a sum of money in exchange for Canberra withdrawing the default judgment. After Mercurine paid the sum, Canberra nonetheless insisted on possession of the property. It was in response to this demand that Mercurine applied for a declaration that the compromise agreement was binding and that it did not have to give up possession of the property. This application was subsequently converted into a writ action and set down for trial to be heard later with another suit which was also commenced by Mercurine. In this latter suit, Mercurine sought to ascertain the terms of the lease agreement it had with Canberra. Shortly after this order was made, Mercurine filed an application to set aside the default judgment obtained by Canberra. The default judgment was irregular as Canberra had both failed to stipulate the correct amount of rent due and did not produce a certificate required under the Singapore Rules of Court for a possession order. The set aside application was allowed at first instance. That decision was however reversed on appeal on the basis that there had been undue delay in filing that application.

A second appeal, brought by Mercurine before the Court of Appeal, succeeded. It succeeded because the Court of Appeal held that there was no undue delay. However, because the other related suits had already been set down for trial, the Court of Appeal decided that instead of setting aside the default judgment outright, the default judgment would be deemed to be set aside if Mercurine succeeded in those two suits. This was presumably because setting aside the default judgment at this time would serve no practical purpose. Notwithstanding this, the Court of Appeal took the opportunity to discuss the applicable principles for setting aside default judgments, both regular and irregular.

Regular default judgments

First, the Court of Appeal dealt with setting aside regular default judgments. It noted that the test, as originally laid down by the House of Lords in *Evans*
v Bartlam, only required the defendant to show that there were arguable or triable issues for the default judgment to be set aside. However, following the English Court of Appeal’s decision in Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc, this test was subsequently interpreted as requiring the defendant to show that there was a defence which had “a real prospect of success”. After noting the criticisms of the “real prospect of success” test in cases such as The Ruben Martinez Villena (No. I) and Day v Royal Automobile Club Motoring Services Ltd, the Court of Appeal turned to the existing position in Singapore. Whilst the Singapore courts had adopted the test in Evans v Bartlam before Saudi Eagle, the Court of Appeal had itself in Abdul Gaffer v Chua Kwang Yong adopted the “reasonable prospect of success” test, which it understood to have been established by Saudi Eagle. This was probably due to the great deference paid to English authorities by the Singapore courts at that time. Regrettably, since Abdul Gaffer was a decision of the highest court in Singapore, the lower courts were judicially bound to apply the “reasonable prospect of success” test. This led some courts to fashion out an “exception” whereby the “reasonable prospect of success” test was not applied if the case at hand involved questions of fact, presumably because the interlocutory process was ill-suited to resolve such questions. However, in Mercurine, the Court of Appeal finally decided that the continued adherence to the “reasonable prospect of success” test was no longer appropriate given that this was too high a standard for the defendant to meet. Such a test also did not fulfil the rationale underlying the discretionary power to set aside default judgments as articulated in Evans v Bartlam. On that basis, the Court of Appeal restored the “arguable or triable issue” test in respect of the setting aside of regular default judgments in Singapore.

Irregular default judgments

As for the setting aside of irregular default judgments, the Court of Appeal raised what can be described as a novel approach. Historically, judgments which were irregular in the sense of being void had to be set aside as of right (i.e. ex debito justitiae). On the other hand, judgments which were irregular in the sense of being voidable would be set aside only if the court deemed it appropriate to do so. Whilst this historical divide between void and voidable judgments has now been eliminated by Ord.2 r.1 of the Singapore Rules of Court, the Court of Appeal thought that the ex debito justitiae rule was still

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8 Abdul Gaffer v Chua Kwang Yong [1995] 1 S.L.R. 484.
10 Amdab v Proctorus (1888) L.R. 20 Q.B.D. 764.
11 Mercurine [2008] SGCA 38 at [67]-[70]. Singapore Rules of Court Ord.2 r.1 substantively follows the English position and essentially states that all irregularities do not prima facie nullify the proceedings, although the court has a discretion to, inter alia, set aside the proceedings in question.
relevant. In particular, it was held that this rule should be the “starting point” in applications to set aside irregular default judgments on the rationale that litigants should observe procedural rules.\textsuperscript{12} The Court of Appeal further held that in deciding whether or not to depart from the \textit{ex debito justitiae} rule, the English statutory provisions stipulating when a court must set aside an irregular default judgment were instructive.\textsuperscript{13} Flowing from these provisions, the key question for the court is whether there has been such an egregious breach of the rules of procedural justice as to warrant the irregular default judgment being set aside as of right.\textsuperscript{14} However, where the court decides not to apply the \textit{ex debito justitiae} rule, it must then examine the merits of the defence on the basis of the more stringent “bound to lose” test in \textit{Faircharm Investments Ltd v Citibank International Plc}.\textsuperscript{15} The “bound to lose” test was preferred over the “arguable or triable issue” test (which applies to regular default judgments) so that the plaintiff is held responsible for his procedural impropriety. Further, the Court of Appeal held that it is the plaintiff who must persuade the court that the “bound to lose” test is satisfied.\textsuperscript{16}

Ultimately, the Court of Appeal’s approaches to both regular and irregular default judgments can be explained due to the difference it saw between the two types of default judgments. Insofar as regular default judgments are concerned, the Court of Appeal thought that there arose a presumption that the plaintiff acted correctly and should not be lightly deprived of the fruits of judgment. Conversely, where the default judgment is irregular, there is a presumption that the plaintiff breached the proper procedure and should not therefore be allowed to take advantage of its own default.\textsuperscript{17} The effect of these presumptions was later explained in terms of the “legal burden” which the plaintiff or the defendant had to discharge. Thus, where the default judgment is regular such that the aforementioned presumption applies, the legal burden rests on the defendant to show that its defence raises triable issues so that the default judgment against it should be set aside. However, where the default judgment was irregularly obtained, the legal burden falls on the plaintiff to show why the judgment should not be set aside. On this, the plaintiff not only has to convince the court that the \textit{ex debito justitiae} rule does not apply, it also needs to persuade the court that the defendant is “bound to lose” in the event that the default judgment is set aside and the matter re-litigated.\textsuperscript{18} Notwithstanding these rather firm guidelines, the Court of Appeal was at pains to point out that it is the factual matrix of each case that determines whether a default judgment ought to be set aside.\textsuperscript{19}

\begin{footnotes}
\item[12] \textit{Mercurine} [2008] SGCA 38 at [74].
\item[13] CPR r.13.2 (UK).
\item[14] In deciding this issue, the Court of Appeal held that the courts should pay heed to the following non-exhaustive factors: (a) whether the defendant was given proper notice of the proceedings against him; (b) the nature of the procedural breach committed by the plaintiff; and (c) whether such breach was committed in bad faith. See \textit{Mercurine} [2008] SGCA 38 at [76].
\item[16] \textit{Mercurine} [2008] SGCA 38 at [91]–[92].
\item[17] \textit{Mercurine} [2008] SGCA 38 at [43].
\item[18] \textit{Mercurine} [2008] SGCA 38 at [98].
\item[19] \textit{Mercurine} [2008] SGCA 38 at [99].
\end{footnotes}
In demonstrating the application of these principles to the facts in Mercurine, the Court of Appeal held that the irregularity in the default judgment had not caused egregious procedural injustice to Mercurine to invoke the application of the ex debito justitiae rule. This was because Mercurine itself admitted that it suffered no prejudice. The Court of Appeal then went on to evaluate the defence on the “bound to lose” test, coming to the conclusion that at least the part of the default judgment ordering payment of rent should not be set aside as it was undisputed that that sum was due in any event. However, as that part of the default judgment could not be severed from the order for possession, the Court of Appeal would have set aside the default judgment wholly if not for the more practical orders it had made.

Evaluation

On the whole, the Court of Appeal’s approach in Mercurine is likely to be welcomed in Singapore. Insofar as regular default judgments are concerned, there exists in Singapore a slight dissatisfaction with the difficulty of the “real prospect of success” test. Therefore, the re-adoption of the “arguable or triable issue” test is to be lauded. Indeed, one must not be unduly bound up by the colourful expressions used in the case law relating to setting aside regular default judgments. Whether the expression used is “arguable or triable issue”, “real prospect of success” or otherwise, one must not lose the proverbial woods for the trees and lose sight of the rationale that underlies and underpins the exercise of the discretionary power, i.e. that the court will be extremely slow to allow judgment to be passed when the merits of the case have not been argued conclusively before it. The Court of Appeal’s return to Evans v Bartlam not only for the “arguable or triable issue” test but also as an articulation of the true rationale that underpins the discretionary power to set aside regular default judgments is an approach that will resolve difficulties created by Abdul Gaffer in Singapore. It may also be of comparative interest to jurisdictions still hampered by the “real prospect of success” test or its equivalent reformulations.

However, it is suggested that the Court of Appeal’s approach in relation to irregular default judgments is not without some difficulties. First, whilst the Court of Appeal’s repeated allusions to the importance of the factual matrix may be theoretically sound, that is unlikely to afford much comfort to practitioners who might require a more concrete exposition of the applicable law. As much as the Court of Appeal disavowed the exhaustive nature of the factors which a court should bear in mind when deciding whether or not to apply the ex debito justitiae rule, the factors it listed are likely to be the ones followed in practice. These factors may serve unintentionally to constrain the true rationale underpinning the Court of Appeal’s approach. Secondly, it is arguable that the Court of Appeal might have carried the recognition of the procedural impropriety on the part of the plaintiff too far. If the first stage involving the applicability of the ex debito justitiae rule holds the plaintiff responsible for procedural lapses, and the second stage involving the “bound to lose” test applies only if the ex debito justitiae rule does not apply, then it might
be asked whether the second stage “over-penalises” the plaintiff. Put another way, if the plaintiff manages to convince the court that the ex debito justitiae rule does not apply (presumably because the plaintiff had not committed an “egregious” procedural misdeed), then why should the plaintiff continue to be held responsible for procedural impropriety by means of the more stringent “bound to lose” test? Indeed, the second stage ought to revert to a proper evaluation of the defence on the same basis as regular default judgments, i.e. by the application of the “arguable or triable issue” test. If the reason behind the Court of Appeal’s approach is the distinction between “egregious” and “non-egregious” procedural improprieties, then it is respectfully suggested that this is too fine a distinction to lay down. Thirdly, the Court of Appeal’s characterisation of the different approaches in relation to regular and irregular default judgments in terms of “legal burden” on the defendant and plaintiff respectively might need some clarification. Indeed, the Singapore Rules of Court make no express distinction between the two forms of default judgments such that it is always the defendant who makes the application to set aside. It is trite evidence law that the legal burden falls on the one who makes the application. As such, the Court of Appeal’s holding that the “legal burden” falls on the plaintiff to convince the court why an irregular default judgment should not be set aside is potentially problematic. The Court of Appeal would have been on firmer ground had it reasoned in terms of a presumption arising in favour of the defendant. By this reasoning, there might be a presumption for setting aside, but that shifts only the evidential burden and certainly does not change the legal burden.

Conclusion

Notwithstanding the abovementioned (minor) conceptual problems, Mercurine represents a landmark decision in Singapore civil procedure. It is a judgment firmly grounded in the rationale underlying the discretionary power to set aside default judgments. Throughout its judgment, the Court of Appeal shows great mastery of the applicable first principles and this can be especially seen in its clear treatment of the law in relation to regular default judgments. That part of the judgment is certainly of comparative utility to other jurisdictions. As for the Court of Appeal’s treatment of the law in relation to irregular default judgments, it remains to be seen if its judgment turns out to be overly elaborate and lead to confusion in practice. There are also, it has been respectfully suggested, certain conceptual problems that might need to be resolved on another occasion. However, the Court of Appeal’s admittedly novel approach in relation to irregular default judgments certainly represents, on the whole, a viable improvement of the law. Indeed, in the final analysis, Mercurine represents a considered judgment on the relevant principles on the setting aside of default judgments and should warrant more than a cursory read in jurisdictions other than Singapore.

20 Mercurine [2008] SGCA 38 at [43], [98].