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

**[2022] SGHC 188**

Suit No 865 of 2018 (Summons No 3731 of 2021)

Between

PNG Sustainable Development Program Limited

… *Plaintiff*

And

(1) Rex Lam Paki
(2) Sarah Mina Paki
(3) OPPA Limited
(4) Orpheus No 27 Ltd
(5) Argos Global (PNG) Ltd
(6) Nick Roniotis

… *Defendants*

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# GROUNDS OF DECISION

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[Civil Procedure — Judgments and orders]
[Civil Procedure — Jurisdiction — inherent]
[Civil Procedure — Delay]

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# v
# Rex Lam Paki and others

## [2022] SGHC 188

General Division of the High Court — Suit No 865 of 2018 (Summons No 3731 of 2021)
Vinodh Coomaraswamy J
29 October, 1 November 2021

30 August 2022

**Vinodh Coomaraswamy J:**

1 The first defendant applies under O 32 r 6 of the Rules of Court (Rev Ed 2014) ("the Rules") to set aside a final judgment which I entered against him on 4 March 2020 under O 27 r 3 of the Rules ("the Judgment").

2 I have dismissed the application. The first defendant has appealed against my decision. I now set out the grounds for my decision. In these grounds of decision, unless otherwise specified, all references to Orders and to rules are references to the Orders and the rules of the Rules.

## Background

### *The parties*

3 The plaintiff is a company limited by guarantee. It was incorporated in Singapore in 2001 with the principal objective of promoting sustainable development within Papua New Guinea and of advancing the general welfare of the people of Papua New Guinea, including but not limited to the people of the Western Province of Papua New Guinea.[1]

4 The plaintiff has, in the past ten years or so, been embroiled in a series of proceedings to enforce against it certain contractual, fiduciary and other obligations which it is alleged to owe arising from the circumstances in which it was incorporated in 2001. The plaintiff is represented in this action as well as in those other proceedings by Dentons Rodyk & Davidson LLP ("Dentons"). The subject matter of this action has only an incidental connection to the subject matter of the other proceedings in which Dentons has represented the plaintiff. It is not, therefore, necessary to describe those proceedings further.

5 Although there are six defendants to this action, only the first, second and fourth defendants are central to this application. I shall therefore use the term "the Defendants" to refer only to these three defendants collectively.

6 The first defendant is an accountant by training.[2] He was a director of the plaintiff from September 2011 until he was removed from office by a resolution of the plaintiff's members in September 2017.[3]

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1 Statement of claim paragraph 2.

2 1st affidavit of Rex Lam Paki, paragraph 5.

3 Statement of claim paragraph 3 and 4.

7 The second defendant is the first defendant's wife.[4] She has no other connection to the plaintiff.

8 The fourth defendant is a company incorporated in Papua New Guinea.[5] The second defendant is the sole registered shareholder and director of the fourth defendant. The Defendants' case is that this represents the true position, *ie,* that the second defendant is the sole ultimate beneficial owner and the real controller of the fourth defendant.[6] The plaintiff's case is that it is in fact the first defendant who is the sole ultimate beneficial owner and the real controller of the fourth defendant[7] and that the second defendant acts in the affairs of the fourth defendant on the first defendant's instructions.[8]

9 The three remaining defendants in this action are the third, fifth and sixth defendants. These three defendants extricated themselves from this action at an early stage, in July 2019. That was when they succeeded in having service of process in this action on them outside Singapore set aside on the grounds that the Singapore courts lack personal jurisdiction over them. I will, where necessary, refer to these three defendants collectively as "the remaining defendants". The remaining defendants were represented in this action by Rajah & Tann Singapore LLP ("R&T").

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4 Statement of claim para 3.

5 1st affidavit of Sarah Mina Paki, para 10.

6 Statement of claim para 8; 1st affidavit of Rex Lam Paki, para 18; 1st affidavit of Sarah Mina Paki, para 12.

7 Statement of claim para 7.

8 Statement of claim para 8.

***The plaintiff's claims against the Defendants***

10 The plaintiff commenced this action in 2018. Its claim arises out of its sale in 2014 of a wholly owned subsidiary known as Cloudy Bay Sustainable Forestry Ltd ("Cloudy Bay") jointly to: (a) a company known as Lifese Engineering (PNG) Limited ("Lifese"); and (b) the third defendant (collectively "the Purchasers").

11 At the time of the sale, the first defendant was a director of Cloudy Bay[9] and also the Chairman of its board of directors.[10]

12 The plaintiff's claim against the first defendant is that he breached his fiduciary duties to the plaintiff in the following ways:

(a) He acted contrary to the plaintiff's interests by taking A$6.6m (about $6.4m) in bribes for procuring the sale of Cloudy Bay to the Purchasers and by failing to enforce the terms of the sale contract against the Purchasers following completion.[11]

(b) He misappropriated PGK 1.7m (about $0.67m) from funds which Cloudy Bay held on trust for the plaintiff.[12]

(c) He diverted Cloudy Bay's money for his own benefit through a series of irregular transactions[13] as follows:

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9 Statement of claim, para 6(d).

10 Statement of claim, para 6(d).

11 Statement of claim para 34(b) and 36.

12 Statement of claim paras 23 and 38.

13 Statement of claim at para 27.

(i) agreeing to pay A$9m (about $8.7m) to Lifese;[14] and

(ii) waiving the plaintiff's right to receive PGK 25m (about $9.9m) from the Purchasers, being deferred consideration for the purchase of Cloudy Bay.[15]

It is the plaintiff's case that these irregular transactions eroded the value of Cloudy Bay, put the plaintiff in breach of the sale contract and obliged the plaintiff to compensate the Purchasers.

13 The plaintiff's claim against the second and fourth defendants is that they are liable to the plaintiff for dishonestly assisting the first defendant's breaches of fiduciary duty or for knowingly receiving the benefits of those breaches.[16]

14 As a result, the plaintiff claimed the following seven heads of principal relief against the Defendants:

(a) A declaration that the first defendant had breached his fiduciary duties to the plaintiff.[17]

(b) A declaration that the first defendant is liable to account to the plaintiff for the A$6.6m and PGK 1.7m or such other sum as the court thinks fit as a constructive trustee by reason of his breaches of fiduciary duty and/or breaches of trust.[18]

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14 Statement of claim at para 29.

15 Statement of claim paras 29 and 37.

16 Statement of claim paras 48–52 and 63–67.

17 Statement of claim at page 31, prayer 1.

18 Statement of claim at page 31, prayer 2.

(c) An order that the first defendant pay the plaintiff the A$6.6m and PGK 1.7m or such other sum as the court deems fit.[19]

(d) Further and/or in the alternative, a declaration that the plaintiff is entitled to trace the A$6.6m and PGK 1.7m into any property which the first defendant acquired using any part of that money and to claim equitable title to that property on the basis that he holds that property on trust for the plaintiff.[20]

(e) An order that the first defendant pay damages to the plaintiff for his breaches of fiduciary duties and breaches of trust.[21]

(f) An order that the second and fourth defendants pay A$0.43m or such other sum as the court deems fit to the plaintiff as damages for their respective dishonest assistance or knowing receipt.[22]

(g) An account of the profits which the second defendant had made.[23]

***The plaintiff enters the Judgment***

15 I set out the procedural history of this action in detail at [109]–[162] below. For the time being, it suffices to note only the following procedural events leading up to the entry of judgment against the Defendants.

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19 Statement of claim at page 32, prayer 3.

20 Statement of claim at page 32, prayer 4.

21 Statement of claim at page 32, prayer 5.

22 Statement of claim at page 33, prayers 8 and 9.

23 Statement of claim at page 33, prayers 10.

16 The plaintiff served the writ on the Defendants in Papua New Guinea in March 2019. The Defendants jointly appointed Eldan Law LLP ("Eldan") to represent them. Eldan duly entered an appearance for the Defendants, also in March 2019.

17 Eldan discharged itself from acting for the Defendants in July 2019. The Defendants were obliged to file their defences in December 2019. They failed to do so.[24]

18 As a result, the plaintiff applied *ex parte* under O 19 r 7(1) for leave to enter judgment against the Defendants in default of defence[25] in the following terms:

(a) an order that the first defendant is liable to account to the Plaintiff for the A$6.6m and PGK 1.7m;

(b) an order that the first defendant pay to the plaintiff the sum of A$6.6m and PGK 1.7m or such other sum as the court deems fit;

(c) an order that the plaintiff be entitled to trace the said sums into any property, real or immovable, which were acquired utilising any part of the same; and

(d) an order that the second and fourth defendant jointly and severally pay the plaintiff the sum of A$0.43m.

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24 16th Affidavit of John Malcolm Wylie at [34g].

25 HC/SUM 6374/2019.

The terms of the judgment which the plaintiff sought to enter against the Defendants are drawn from the statement of claim (see [14(b)]–[14(d)] and [14(f)] above).

19 The plaintiff's O 19 application came on for hearing before me in January 2020. The Defendants had notice of the hearing but were unrepresented and were absent. I declined to enter judgment in default of defence and directed the plaintiff to apply *inter partes* to enter judgment on admissions of fact under O 27 r 3 instead. My reasons for doing so are set out at [137]–[146] below. The hearing was accordingly adjourned.

20 In early February 2020, the plaintiff filed its application under O 27 r 3. The plaintiff's O 19 and O 27 applications came up for hearing together before me in March 2020. Once again, the Defendants had notice of the hearing but were unrepresented and absent.

21 At that hearing, I entered judgment in favour of the plaintiff and against the Defendants on the plaintiff's O 27 application. I also granted the plaintiff leave to withdraw its O 19 application with no order as to costs.

22 The Judgment which I entered was in the following terms:

> (a) I adjudged the first defendant liable to account to the plaintiff for and to pay to the plaintiff A$6.6m and PGK 1.7m together with simple interest on those sums at the rate of 5.33% per annum from the date of the writ to the date of judgment.

(b) I adjudged the plaintiff entitled to trace the sums under paragraph (a) above into any property, real or immovable, which the first defendant acquired using any part of the said sums.

(c) I adjudged the second and fourth defendants jointly and severally liable to pay the plaintiff the sum of A$0.4m together with simple interest on that sum at the rate of 5.33% per annum from the date of the writ to the date of judgment.

(d) I ordered the Defendants to pay to the plaintiff the costs of and incidental to this action, including but not limited to the costs of the O 27 application, which I fixed at $25,000 including disbursements.

This is the Judgment which the first defendant now seeks to set aside.

***The procedural nature of the Judgment***

23 I make three points about the procedural nature of the Judgment.

24 First, the Judgment is a regular judgment. The first defendant accepts this point.[26] He therefore accepts that the plaintiff complied with all of the applicable provisions of the Rules in applying for and entering the Judgment. There is therefore no basis to set this judgment aside under O 2 r 1(2) on grounds of procedural irregularity.

25 Second, the Judgment is a final judgment. I entered the Judgment under O 27 r 3. That rule gives the court the power to enter judgment summarily (*ie*, without a trial) upon a party's "clear admission of facts in the face of which it

[26] Certified Transcript, 1 November 2021, p 14 line 30 to p 15 line 3.

is impossible for the party making it to succeed" (*Ellis v Allen* [1914] 1 Ch D 904 at 909). Order 27 r 3 provides as follows:

> **Judgment on admission of facts**
>
> 3. Where admissions of fact are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the Court for such judgment or order as upon those admissions he may be entitled to, without waiting for the determination of any other question between the parties, and the Court may give such judgment, or make such order, on the application as it thinks just.

26 Judgment is entered under O 27 r 3 on the basis that the defendant has admitted that the facts relating to his liability are not in issue. The court is therefore entitled to enter judgment without having to make any findings of fact (*Shunmugam Jayakumar and others v Jeyaretnam Joshua Benjamin and others* [1996] 2 SLR(R) 658 at [35]). The purpose of allowing a plaintiff to enter judgment on admission of facts is to save time and costs (*Cove Development Pte Ltd v Ideal Accommodation (Singapore) Pte Ltd* [2009] SGHC 167 at [13]; *Singapore Civil Procedure 2021* vol 1 (Cavinder Bull gen ed) (Sweet & Maxwell, 2021) at para 27/0/2).

27 Third, the Judgment is a judgment on the merits. It is true that the Defendants failed to file a defence to the plaintiff's claim. It is also true that the Defendants were absent at the hearing of the plaintiff's O 27 application. But it would be wrong to characterise a judgment under O 27 r 3 as a default judgment. A default judgment is one entered purely by reason of a procedural default such as a failure to file a defence. A judgment entered under O 27 r 3 is entered after a consideration of the merits of the plaintiff's case in light of the defendant's admission of facts. I put it to the first defendant's counsel in the course of arguments that O 27 r 3 requires the court to consider the merits of the plaintiff's

claim before it enters judgment. Counsel quite rightly conceded that that is correct.[27]

28 Indeed, on an application under O 27 r 3, the plaintiff must satisfy the court that the facts which the defendant has admitted establish all the elements of the plaintiff's pleaded cause of action, failing which the court will refuse to enter judgment under O 27 r 3 (*Mycitydeal Ltd v Villas International Property Pte Ltd* [2014] 4 SLR 1077 at [69]). It is thus open to the court to decline to enter judgment under O 27 r 3 on the basis that the plaintiff is not entitled to judgment, even on the facts as admitted by the defendant. Furthermore, it is open to a court hearing an application under O 27 r 3 to enter judgment in the plaintiff's favour on the basis of the admissions, but to reject or modify some of the heads of relief which the plaintiff claims. The court has that power whether the admissions are historical admissions or are made in the course of the proceedings. It also has that power whether the admissions are made expressly or are deemed by the Rules to have been made.

29 The admissions on which the plaintiff relied on its O 27 application were deemed admissions. Under O 18 r 13, the Defendants' failure to traverse the facts alleged in the plaintiff's statement of claim constituted a deemed admission of those facts (see *Zulkifli Baharudin v Koh Lam Son* [1999] 2 SLR(R) 369). I entered the Judgment because, in light of those deemed admissions, the plaintiff satisfied me that it had established all of the elements of the causes of action it had pleaded against the Defendants and that it was entitled to enter judgment against the Defendants in terms of the prayers in its O 27 application.

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27 Certified Transcript, 1 November 2019, pp 9 (lines 17 to 22), 10 (lines 8 to 19) and 12 (lines 1 to 4).

30 I reiterate that the Judgment was a regular judgment, a final judgment and a judgment entered against the first defendant on the merits. It was not a judgment entered upon a default, nor was it in any sense a judgment entered only provisionally. The Judgment adjudicated the plaintiff's claim against the Defendants and rendered the subject matter of this action *res judicata*, at least in Singapore (see *Neptune Capital Group Ltd and others v Sunmax Global Capital Fund 1 Pte Ltd and another* [2016] 4 SLR 1177 at [50]).

***The application to set aside the Judgment***

31 In August 2021, the first defendant applied to set the Judgment aside as against him. That was over 16 months after I had entered the Judgment and after the first defendant had become aware of the Judgment (see [159]–[160] below).

32 The second and fourth defendants have not applied to set aside the Judgment as against them.

**The parties' arguments**

33 The first defendant's submissions in support of his setting aside application make three principal points. First, the court has the power under O 32 r 6, alternatively under the inherent power of the court preserved by O 92 r 4, to set the Judgment aside. Second, all of the first defendant's procedural lapses in this action – failing to file a defence in December 2019, failing to attend the hearing of the plaintiff's O 27 application in March 2020 and failing to bring this setting aside application as soon as he became aware of the Judgment – are due to significant financial difficulties he experienced from

2016 to 2021[28] arising from personal[29] and professional issues.[30] These financial difficulties meant that he could not afford to engage counsel to represent him in this action. Third, the first defendant has a *prima facie*[31] defence to the plaintiff's claim on the merits.

34 The plaintiff's submissions in response make four principal points. First, O 32 r 6, interpreted purposively, applies only to an interlocutory order, not to a judgment such as the plaintiff's.[32] Second, even if O 32 r 6 applies to a judgment, the first defendant failed to apply to set the Judgment aside within a reasonable time after he became aware of it. Third, and in any event: (a) the first defendant has no good explanation for not appearing by counsel or in person at the hearing of the O 27 application in March 2020[33] or for delaying over 16 months before applying to set the Judgment aside in August 2021;[34] (b) setting the Judgment aside after it has stood for over 16 months would cause significant prejudice to the plaintiff which cannot be remedied by costs;[35] and (c) the first defendant has no defence to the plaintiff's claim.[36] Finally, the plaintiff submits

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28 First defendant's written submissions dated 29 October 2021, paras 12 and 13; First defendant's affidavit filed on 6 August 2021, paras 10 to 16 and 57 to 58; First defendant's affidavit filed on 27 October 2019, paras 12 and 13.

29 First defendant's written submissions dated 29 October 2021, paras 12(c) and 13(c).

30 First defendant's written submissions dated 29 October 2021, para 13(b).

31 Certified Transcript, 1 November 2021, p 12 lines 13 to 15; p 72 line 28 to p 73 line 2; First defendant's written submissions dated 29 October 2021, para 44.

32 Certified Transcript, 1 November 2021, p 33 line 31 to p 34 line 2.

33 Plaintiff's written submissions dated 29 October 2021 at paras 46 to 55.

34 Plaintiff's written submissions dated 29 October 2021 at paras 64 to 65.

35 Plaintiff's written submissions dated 29 October 2021 at paras 56 to 63.

36 Plaintiff's written submissions dated 29 October 2021 at paras 66 to 97.

that the application itself is an abuse of process, and one which the court should not entertain regardless of any merits in the first defendant's defence.[37]

**The Issues**

35 The parties' submissions require me to decide the following issues:

(a) Whether I have the power under O 32 r 6 to set aside the Judgment;

(b) Whether I have an inherent power preserved by O 92 r 4 to set aside the Judgment; and

(c) If I have that inherent power, whether I should exercise it in the first defendant's favour in all the circumstances of this case and set the Judgment aside.

36 I accept the plaintiff's submissions on each of these issues. I now explain my reasons for doing so for each issue in turn.

**No power to set aside the Judgment under O 32 r 6**

37 Order 32 r 6 provides as follows:

> **Order made ex parte may be set aside (O. 32, r. 6)**
> 6. The Court may set aside an order made ex parte.

38 The first defendant's submission that the Judgment can be set aside under O 32 r 6 rests on two propositions. First, that the word "order" in O 32 r

[37] Plaintiff's written submissions dated 29 October 2021 at para 84; Certified Transcript, 1 November 2021, p 66 lines 6 to 7.

6 should be read as encompassing a "judgment", on the basis that there is no difference between an order and a judgment, whether in substance or form.[38] Second, that a judgment or order made at a hearing conducted in the absence of a party is "made ex parte" within the meaning of O 32, r 6 even if that party was duly served with the application.

39 I reject both propositions. For the reasons which follow, I hold that within the meaning of O 32 r 6: (a) a judgment is not an "order"; and (b) the Judgment was not "made ex parte".

***A judgment is not an "order"***

40 A judgment and an order do, of course, have several common features. They are both a formal adjudication by a court of competent jurisdiction in the course of litigation which carries the force of law. Thus, both represent the court's ruling or determination on a matter in dispute (*Woo Koon Chee v Scandinavian Boiler Service (Asia) Pte Ltd* [2010] 4 SLR 1213 at [26] and [28]). Both establish legal consequences. And, in both cases, those legal consequences may be enforced through the coercive power of the state.

41 Despite these common features, there remains a fundamental distinction between a judgment and an order. At common law, a judgment is an adjudication by a court of competent jurisdiction upon a cause of action, which: (a) terminates the litigation or a defined part of it in relation to that cause of action; and (b) determines the cause of action or a defined part of it conclusively as between the parties to the litigation, *ie* in a manner which the parties cannot

[38] Rex Lam Paki's written submissions at [23]–[29].

thereafter dispute or reopen before that court. An order is any formal adjudication by a court of competent jurisdiction which is not a judgment.

42 As a result of this fundamental distinction, judgments have certain legal consequences which orders do not. Only a judgment can give rise to merger. When a court of record enters judgment in litigation before it in favour of a plaintiff, the cause of action which was the subject matter of the litigation merges into the judgment, *transit in rem judicatam* (*Republic of India v India Steamship Co* [1993] AC 410 at 417H).

43 The result of a merger is that the inferior rights comprised in a cause of action thereby cease to have any independent existence and are merged into and replaced by the higher rights conferred by the judgment (*King v Hoare* (1844) 13 M&W 494 at 504; *Blair v Curran* (1939) 62 CLR 464 at 532; *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160 at [17]). The rights conferred by the judgment are higher rights because they have vindicated the plaintiff's cause of action with certainty and in a manner which carries the force of law. The rights merged into the judgment were inferior rights because they were merely private rights, and which carried no certainty that they would be vindicated. A mere order cannot and does not give rise to any form of merger.

44 Only a judgment can render its subject-matter *res judicata*. A *res judicata* gives rise to both cause of action estoppel and issue estoppel. Those two estoppels preclude re-litigation of the rights which have merged into the judgment and also relitigation of the issues necessary for the court's adjudication upon those rights. It is true that a future attempt to relitigate the subject matter of an order may be an abuse of process, particularly if there has

been no change in the relevant underlying circumstances. But it remains the fact that a mere order cannot and does not give rise to any form of *res judicata*.

45 Only a judgment can give rise to an implied obligation under the general civil law to comply with its terms. This implied obligation amounts to a new and freestanding cause of action in the civil law, arising from the judgment itself (*Williams v Jones* (1845) 13 M&W 627 at 633). A judgment can therefore be enforced by commencing an action on the judgment in another court (typically but not necessarily a foreign court) in addition to the more common mode of levying execution upon it in the same court. An order can be enforced only by levying execution upon it. A mere order cannot and does not give rise to any form of implied obligation.

46 Even though the Rules do not define the terms "judgment" and "order" expressly, the Rules do observe the distinction I have drawn. The Rules use the word "judgment" only in the sense I have defined it (see [40] above): see O 13 rr 7 and 8, O 19 r 8A and 9, O 70 r 20, O 73 r 7, O 79 r 4 and O 83 r 4 (judgment in default); O 14 rr 3, 5 and 11 and O 73 r 5 (summary judgment); O 15 r 16 (declaratory judgment); O 16 r 7 (judgment between defendant and third party); O 27 r 3 (judgment on admission of facts); O 29 r 17 (adjustment of interim payments on final judgment); O 35 r 2 (setting aside judgment given at trial in the absence of a party); O 35 r 6 (death of a party before court gives judgment), O 37 r 3 (assessment of damages in default of appearance or defence); O 48 r 2 (examination of party liable to satisfy judgment); O 55C r 3 and O 55D r 18 (enforcement of judgments which have been the subject-matter of appeal); O 56A r 22 and O 57 r 19 (judgment of an appellate court); O 59 r 10 (signing judgment for costs without order); O 67 (reciprocal enforcement of judgments); O 74 r 5 (arrest of debtor before

judgment); O 74 r 8 (mode of seizure before judgment); O 74 rr 13 and 14 (judgment notice); O 95 r 3 (setting aside judgment under the Building And Construction Industry Security Of Payment Act) and O 111 (proceedings under the Choice of Courts Agreement Act 2016).

47 The Rules also recognise that judgments are distinct from orders: see O 42 rr 1 to 6 and O 45 (dealing only with judgments), O 42 r 9 (dealing only with orders) and O 42 rr 7, 8, 10 and 11 (dealing with both judgments and orders).

48 Further, where the Rules intend the word "order" to encompass judgments in a particular context, express provision is made to that effect. Examples are O 73 r 1(2) and O 90 r 1. These rules set out for the purposes of O 73 and O 90 respectively an extended definition of "order" which includes a judgment. These extended definitions would not have been necessary if the Rules intended the word "order" to encompass a judgment by default. To put it another way, for the first defendant's argument to succeed, there would have to be an extended definition of "order" in O 32 equivalent to those found in O 73 r 1(2) and O 90 r 1. But there is none.

49 It is true that, in at least one specific case, the context of a rule compels the conclusion that the word "order" was intended to encompass a judgment. As the first defendant points out, O 34A r 6(1) empowers a court to enter judgment or make such order as the court thinks fit if one or more parties fails to attend a pre-trial conference. The express power in the very next subrule, O 34A r 6(2), refers only to the court's power to set aside an order and not a judgment. But this power must necessarily extend to a judgment entered under O 34A r 6(1). No doubt, in that specific case, the word "order" in O 34A r 6(2) must be

construed as encompassing a judgment entered under O 34A r 6(1). But that is only because the direct relationship between O 34A r 6(1) and its companion rule in O 34A r 6(2) compels that construction. That does not detract from the distinction which the Rules draw consistently between these two terms everywhere else, as I have set out at [46] to [48] above. Unlike O 34A r 6, there is no companion rule to O 32 r 6, or any other legislative context within O 32, which compels the word "order" in O 32 r 6 to be construed as encompassing a judgment.

50 The first defendant also points out that, like O 27 r 3, the following rules allow a court to enter judgment against a party but make no express provision for any such judgment to be set aside: O 18 r 19, O 24 r 16(1), O 25 r 3(2), O 26 r 6(1) and O 33 r 5. The first defendant's submission is that, unless the word "order" in O 32 r 6 is interpreted as encompassing a judgment, an appeal is the only avenue of recourse for a party who suffers a judgment under any of these rules.

51 I accept that that is the consequence of the distinction I have drawn between judgments and orders. But there is nothing onerous about that consequence. Where a party enters judgment under any of these rules without giving the opposing party reasonable notice of the hearing at which the judgment was entered, the judgment would be irregular and would be liable to be set aside on that ground alone under O 2 r 1(2). But if a party enters a regular judgment against an opposing party under any of these rules, an appeal against the judgment is the natural and only recourse as it would be for any other type of judgment entered *inter partes*.

52 The first defendant cites *BSD v Attorney General* [2019] SGHC 118 ("*BSD*") (at [52]) and the title of O 32 – "Applications and Proceedings in Chambers" – as support for his submission that O 32 r 6 is a provision of general application, applying to both judgments and orders. Order 32 r 6 is indeed a provision of general application, but only in the sense that it applies *prima facie* to all orders made in chambers in all proceedings of all types, not in the sense that it applies to both judgments and orders. In *BSD*, Chua Lee Ming J held that O 32 r 6 – being a provision of general application – did not govern who may apply to set aside a production order made *ex parte* under the Mutual Assistance in Criminal Matters Act (Cap 190A, 2001 Ed) because there was a specific provision in O 89B r 2(2) which governed that issue. That does not assist the first defendant in his argument that the word "order" in O 32 r 6 was intended to encompass a judgment.

53 The first defendant cites the Malaysian case of *Damai Laut Golf Resort Sdn Bhd v Sim Mee Yong (t/a Messrs Kantan Jaya)* [2000] 6 MLJ 487 as authority for the proposition that O 32 r 6 applies to judgments.[39] A close reading of that case shows that the submission is misconceived.

54 In that case, on a striking out application by the defendant, a deputy registrar of the High Court of Malaya at Kuala Lumpur ordered that the action be transferred to the lower courts. The plaintiff appealed against the transfer order to a judge in chambers. At the hearing of the appeal, the plaintiff's counsel was present, but the defendants' counsel was absent. The judge proceeded in the absence of the defendant's counsel and allowed the appeal. Although the report of this case refers to the judge giving "judgment" in favour of the plaintiff

[39] First defendant's written submissions at para 29.

on the merits, that clearly means in context that he allowed the registrar's appeal on the merits of the appeal and set aside the transfer order. It does not mean that he entered judgment for the plaintiff on the merits of the action, thereby bringing the action to an end with finality and with a *res judicata* in favour of the plaintiff. The real dispute in that case was whether the Malaysian equivalent of O 32 r 6 applied only to proceedings in chambers before a deputy registrar or whether it also applied to proceedings in chambers before a judge, such as a registrar's appeal. This case does not assist the first defendant.

55 For these reasons, I hold that the word "order" in O 32 r 6 cannot be construed as encompassing a judgment. To that extent, I accept the plaintiff's submission that the subject matter of O 32 r 6 is any order made in proceedings apart from a final judgment on the merits.[40] A judgment is outside the scope of O 32 r 6. I therefore have no power to set aside the Judgment under O 32 r 6.

### ***The judgment was not made*** **ex parte**

56 Even if I were to assume in the plaintiff's favour that the Judgment is an "order" within the meaning of O 32 r 6, the first defendant cannot invoke that rule unless the Judgment was "made ex parte" within its meaning. I do not accept that the Judgment was "made ex parte" within the meaning of O 32 r 6.

57 The first defendant submits that an order is "made ex parte" so long as the party against whom the order is made was absent at the hearing of the application on which the order was made, even if that party had reasonable notice of that hearing.[41] Therefore, his submission proceeds, the Judgment was

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40 Certified Transcript, 1 November 2021, page 28 line 31 to page 29 line 1.

41 First defendant's written submissions.

entered against him *ex parte* because he was absent at the hearing of the plaintiff's O 27 application on 4 March 2020, even though he had reasonable notice of that hearing.

58 I do not accept this submission. The architecture of the Rules demonstrates that an order is "made ex parte" within the meaning of O 32 r 6 if the order is made on an application: (a) which the Rules expressly permit the applicant to make *ex parte*; or (b) which was not served on a non-party affected by the order made on the application. An order which is made on an *inter partes* application which is duly served on all of the parties to the application and on all of the non-parties affected by the order is not an order "made ex parte" within the meaning of O 32 r 6.

59 An application under O 27 r 3 is not one of the classes of applications which the Rules expressly permit to be made *ex parte*. These are typically applications: (a) made at an early stage before the court has taken jurisdiction over a defendant (*eg* O 11 r 2(1) and O 16 r 2(1)); (b) made in circumstances where service is impracticable (*eg* O 10 r 4); (c) made in circumstances of urgency or where proceeding *inter partes* would defeat the purpose of the application (*eg* O 29 r 1(2)); (d) made in circumstances where the opposing party's substantive rights have already been determined and therefore the applying party can be taken *prima facie* to be entitled to the relief it seeks (O 46 r 3(1), O 69 r 3(3) and O 69A r 3(3); or (e) which are non-controversial or administrative in nature (O 67 r 13).

60 Because the Rules do not permit an application under O 27 r 3 to be made *ex parte*, an application to enter judgment under O 27 r 3 must be made *inter partes*. A party who seeks to enter judgment under O 27 r 3 must therefore

take out an application seeking that relief under O 32 r 1, set out the evidential basis for the application in the supporting affidavit and serve both on the opposing party as prescribed by O 32 r 3. This procedure is designed to give reasonable notice to the opposing party: (a) of the date fixed for the hearing of the O 27 application; and (b) of the case the opposing party has to meet in order to avoid judgment being entered against it at that hearing. This is simply an implementation of the *audi alteram partem* rule of natural justice.

61 The first defendant accepts that the plaintiff complied with these requirements in relation to its O 27 application.[42] That is no doubt why the first defendant concedes that the plaintiff's judgment is a regular judgment.[43] The principle of *audi alteram partem* did not require the plaintiff to go beyond that and to ensure that the Defendants actually attended and opposed the O 27 application on 4 March 2020 in person or by counsel.

62 The first defendant was not deprived of a reasonable opportunity to be heard on the O 27 application. The plaintiff afforded him that reasonable opportunity. The first defendant simply failed to grasp that opportunity, even if only to ask for an adjournment. His failure to grasp the opportunity did not turn the hearing of the plaintiff's *inter partes* O 27 application into an *ex parte* application let alone make the Judgment one which was "made ex parte" within the meaning of O 32 r 6.

63 In support of his submission, the first defendant cites the decision of the Federal Court on appeal from the High Court of Malaya at Singapore in *United*

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42 Third affidavit of Rex Lam Paki, paragraph 38; 5th affidavit of Alexander Choo Wei Wen at pdf p 7/31 to 13/31.

43 Certified Transcript, 1 November 2021, p 14 line 30 to p 15 line 3.

*Overseas Bank Ltd v Chung Khiaw Bank Ltd* [1968-1970] SLR(R) 194 ("*UOB v CKB*"). The first defendant relies on this decision as authority for the proposition that an order made on an *inter partes* application which is duly served on the respondent to the application, but which is heard in the respondent's absence, is an order made *ex parte* order within the meaning of O 32 r 6.

64 I do not accept this submission. To explain why, it is necessary to consider the facts of *UOB v CKB* in greater detail. The issue before the Federal Court in *UOB v CKB* was which of two banks had a prior interest over the other in certain real property owned by a defendant as a result of two orders made in the two sets of proceedings against the same defendant in respect of the same real property. The first set of proceedings was commenced by United Overseas Bank Ltd ("UOB"). The second set of proceedings was commenced by Chung Khiaw Bank Ltd ("CKB").

65 The chronology of the two sets of proceedings is important and is as follows. In June 1966, in the first set of proceedings, UOB entered final judgment against the defendant for over $370,000 (*UOB v CKB* at [2]). In October 1966, UOB secured an order attaching certain real property owned by the defendant in satisfaction of the judgment debt. The very next day, UOB duly registered the attachment against the property.

66 Meanwhile, in September 1966, CKB commenced the second set of proceedings by way of originating summons seeking a declaration that CKB was the legal mortgagee of the same real property that UOB would go on to attach in October 1966 (*UOB v CKB* at [3] and [5]). CKB duly served the originating summons on the defendant. The defendant failed to enter an

appearance. In November 1966, CKB's originating summons came up for hearing (*UOB v CKB* at [3]). The defendant was absent. UOB, not being a party to CKB's application, had no notice of the hearing at all. At that hearing, CKB entered judgment against the defendant (*UOB v CKB* at [5]). In January 1967, CKB duly registered its judgment against the property.

67 The two banks discovered each other's competing claims but were unable to come to any agreement as to priority. As a result, UOB applied in CKB's originating summons to set aside CKB's judgment against the debtor (*UOB v CKB* at [11(c)]). UOB brought this application under O LIII r 4(1) of the Rules of the Supreme Court 1934 ("the 1934 Rules") as a *non-party* affected by the judgment in favour of CKB.

68 Order LIII r 4(1) of the 1934 Rules provided as follows:

> Any order made *ex parte* may be varied or set aside on application, by any person affected by it, to a judge, on such terms as to costs or otherwise as to the judge seem fit.

Order LIII r 4(1) of the 1934 Rules is quite obviously the precursor of O 32 r 6 of the current Rules. Although the two provisions are not identically worded, I accept them to be *in pari materia* for present purposes (see also *Chan Lung Kien v Chan Shwe Ching* [2018] 4 SLR 208 at [16]).

69 At first instance in *UOB v CKB* (reported *sub nom Chung Khiaw Bank Ltd v Tay Soo Tong (United Overseas Bank Ltd, applicant*) [1968-1970] SLR(R) 68), Winslow J dismissed UOB's application. He did so for two principal reasons. First, the judgment which CKB had entered against the defendant was not an order made *ex parte* within the meaning of O LIII r 4(1) of the 1934 Rules because the defendant had been duly served. It was instead a judgment in default

of appearance, and therefore had a bespoke regime for setting aside governed by O XIII of the 1934 Rules. Second, UOB was not a "person affected by" the judgment within the meaning of O LIII r 4(1) of the 1934 Rules. UOB had suffered no injury directly under CKB's judgment. UOB therefore had no standing to apply to set CKB's judgment aside under O LIII r 4(1) of the 1934 Rules.

70 On UOB's appeal, the Federal Court reversed Winslow J's decision and set aside CKB's judgment. The Federal Court did so for two reasons. First, it held that an order is "made ex parte" within the meaning of under O LIII r 4(1) of the 1934 Rules if a party fails to appear at the hearing of the application on which the order was made, even if that party was duly served with the application (at [21]). Second, UOB was a "person affected by" CKB's judgment within the meaning of the rule because UOB had already registered its attachment when CKB's originating summons came on for hearing. UOB therefore had acquired priority over CKB's as-yet unregistered mortgage (at [28]). As such, UOB was "an essential party to [CKB's] originating summons and clearly were persons affected by the order made *ex parte* within the meaning of" the rule.

71 *UOB v CKB* does not assist the first defendant. The two most important points to note about the case are that: (a) the defendant was duly served with CKB's originating summons; and (b) it was UOB who applied to set aside CKB's judgment, not the defendant. *UOB v CKB* is therefore authority as to the status of CKB's judgment *as against UOB*, as a non-party to the proceedings affected by the judgment. That is not the issue before me now. The issue before me now is the status of a judgment entered against a duly served but absent defendant. *UOB v CKB* is not authority on that issue.

72 UOB succeeded in its application because the Federal Court accepted that UOB was a non-party affected by CKB's judgment, but who had had no notice of CKB's application. That is the basis on which the Federal Court held that UOB had a right to apply in CKB's proceedings to set CKB's judgment aside under O LIII r 4(1) of the 1934 Rules. Indeed, the Federal Court went so far as to hold that that CKB's judgment could not stand *ex debito justitiae* (at [29]) *as against UOB*. The Federal Court did not have to consider, and did not therefore consider, whether CKB's judgment could or should stand *as against the defendant*.

73 To put it another way, I have no doubt that the application to set aside CKB's judgment under Order LIII r 4(1) of the 1934 Rules would have failed in either of the following two situations: (a) if it had been the defendant applying to set the judgment aside instead of UOB; or (b) if UOB had been given an opportunity to appear and present arguments when CKB secured its judgment against the defendant. In both those cases, there would be no grounds for setting the judgment aside under O LIII r 4(1) of the Rules, even if there were other grounds under O XIII or some other provision of the Rules.

74 I therefore do not consider *UOB v CKB* to be authority for the proposition that an order made at the hearing of an application which takes place in the absence of a party who has been duly served with the application is an order made *ex parte* within the meaning of O 32 r 6. I concede that that is what the Federal Court appears to say in the following *dictum* (*UOB v CKB* at [21]):

> 21 It is clear then that a judge may proceed *ex parte* to hear an application where a party duly served fails to appear at the time appointed for the hearing. An application so heard in the absence of a party is not an *ex parte* application. It is the hearing which is *ex parte* and an order made on such a hearing is an *ex parte* order within the terms of O LIII r 4(1).

But I make two points about this *dictum*. First, reading it in the context of the facts of *UOB v CKB*, the substance of the *dictum* is that the hearing of CKB's application to enter judgment against the defendant was *ex parte as against UOB*, not that it was *ex parte as against the defendant*. Second, in so far as the Federal Court did intend to characterise the hearing of CKB's application as being *ex parte* as against the defendant, that characterisation was *obiter* and does not, with respect, bind me. As I have said, the issue before the Federal Court was whether a *non-party* to the proceedings, *ie* UOB, who was *not* served with CKB's originating summons could apply in CKB's proceedings to have CKB's judgment set aside under the precursor of O 32 r 6. The issue before the Federal Court was not *the defendant's* right to set aside CKB's judgment under that rule. That is the issue which is now before me.

75 This is a significant point. An order made on an application which the Rules permit the applicant to make *ex parte* is completely different from an order made on an application which the Rules require the applicant to make *inter partes* and which is duly served on the respondent to the application, even if the respondent fails to attend the hearing of the application. Order 32 r 6 is intended to cater for the former situation, not the latter.

76 An applicant who secures an order on an application which the Rules permit him to make *ex parte* secures that order even though the respondent has been deprived of his right to be heard. The purpose of O 32 r 6 in that context is to restore to the respondent his right to be heard, albeit after the order is made rather than before. As Sir John Donaldson MR made clear in *WEA Records Ltd v Visions Channel 4 Ltd* [1983] 1 WLR 721 ("*WEA Records Ltd*"), the conceptual basis for a right to apply to set aside an *ex parte* order is because that

order was made by the court with the benefit of only one party's evidence and submissions (at 727):

> As I have said, ex parte orders are essentially provisional in nature. *They are made by the judge on the basis of evidence and submissions emanating from one side only*. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his possession, whether or not it assists his application, this is no basis for making a definitive order and every judge knows this. *He expects at a later stage to be given an opportunity to review his provisional order in the light of evidence and argument adduced by the other side* and, in so doing, he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order.
>
> [emphasis added]

In that sense, and only in that sense, an order made on an *ex parte* application can be said to be provisional and not final: because it is made subject to the respondent's right to be heard in opposition to it and may, when that right is exercised, be set aside by the same court which made it. Until and unless the order is set aside, however, it has the force of law. But the respondent is allowed a right to apply to the same court to set aside the order because his right to be heard, albeit postponed, still prevails over the interest in finality in litigation.

77 On the other hand, an applicant who secures an order on an application which the Rules require him to make *inter partes* and who duly serves the application on the respondent does not deprive the respondent of his right to be heard. If the respondent chooses, for whatever reason, to be absent at the hearing and not to exercise that right, that does not in any way put him in the same position as the respondent to an *ex parte* application. In this situation, the respondent's right to be heard is not engaged. The interest in finality in litigation simply prevails over the defendant's failure to exercise a right to be heard which was afforded to him.

78 Sundaresh Menon JC (as the Chief Justice then was) captured this point in *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak dan Gas Bumi Negara* [2006] 4 SLR(R) 345 (at [19]):

> 19 Order 32 r 6 simply provides that the court may set aside an order made *ex parte* … In the case of the usual order of court, the interest of finality in litigation mandates that the only way in which such an order may be challenged is by an appeal. However the nature of an *ex parte* order is such that it is provisional in nature. … *this provisional nature derives from the fact that the court has moved upon hearing one party only.*
>
> [emphasis added]

79 If the first defendant's submission were correct, every order made on an *inter partes* application would be liable to be set aside under O 32 r 6 simply because the respondent to the application absented himself from the hearing despite being served with it. That would be a recipe for procedural chaos. That cannot have been the intention and cannot be the effect of O 32 r 6.

***Conclusion***

80 For the foregoing reasons, I hold that I have no power to set aside the Judgment under O 32 r 6. To read O 32 r 6 as applying to the Judgment would be wholly contradictory to the sharp distinction which the Rules draw between judgments and orders and also between orders made *inter partes* and orders made *ex partes*.

81 I should also add that I do not accept that *UOB v CKB* is authority for the proposition that a judgment is an "order" within the meaning of O 32 r 6. I say that for two reasons. First, for the reasons I have already given, it is clear that the architecture of the Rules as they stand today draws a sharp distinction between an "order" and a "judgment". That is so whatever may have been the position under the 1934 Rules. Second, the scope of the word "order" was not a

point on which the Federal Court heard argument in *UOB v CKB*. The Federal Court therefore merely assumed that a judgment was an "order" within the meaning of O LIII r 4(1) of the 1934 Rules.

82 The Judgment is a final determination on the merits of the parties' substantive rights. It renders those rights *res judicata* in Singapore. It can be dissolved only by an appellate court, not by the court which made it (*Jumabhoy Asad v Aw Cheok Huat Mick and others* [2003] 3 SLR(R) 99 at [7]).

**No inherent power to set aside the Judgment**

83 The first defendant's next submission is that I have an inherent power preserved by O 92 r 4 to set the Judgment aside. I do not accept this submission either.

84 In my view, the architecture of the Rules excludes any such inherent power. Where the Rules wish to confer a right on a respondent to an application to apply to set aside a regular judgment or order made on that application on the ground that the respondent was absent or failed to appear at the hearing of the application, the Rules do so by an express provision to that effect. Examples of these express provisions are:

(a) Order 14 rule 11, permitting a party who did not appear at the hearing of an application for summary judgment to apply to set aside the judgment.

(b) Order 28 rule 4(1), permitting a defendant who did not appear at the hearing of an originating summons to apply to have the originating summons reheard. This necessarily requires that the judgment entered by the court on the first hearing of the originating summons be set aside.

(c) Order 34A rule 1(4), permitting a party who did not appear when directed to do so at a pre-trial conference to apply to have any judgment, order or direction given at the pre-trial conference set aside or varied.

(d) Order 35 rule 2, permitting a party who did not appear when a trial of an action is called on to apply to set aside any judgment or order made at the trial.

(e) Order 55D rule 15(3), O 56A r 21(3) and O 57 r 18(3) permitting a party who did not appear when an appeal was heard to apply to have the appeal reheard. This necessarily requires that the judgment entered by the appellate court on the first hearing of the appeal be set aside.

(f) Order 70 rule 18(6), permitting a defendant who did not appear on a plaintiff's application for judgment in default of filing a preliminary act in admiralty proceedings to set aside a judgment entered on that application.

85 If the defendant's submission were correct, none of these express provisions would be necessary. In each case covered by these express provisions, the party who was absent or who failed to appear could simply invoke the court's inherent power to set aside the regular judgment or order.

86 I should also note in passing that these express provisions are another reason for rejecting the first defendant's submission that "order" in O 32 r 6 is capable of encompassing a judgment and that an order is "made ex parte" within the meaning of O 32 r 6 so long as the respondent to the application is absent when the application is heard, whether or not the respondent was duly served. If that were true, there would equally be no need for these express provisions.

87 The architecture of the Rules, in my view, leaves no room for an inherent power to set aside a judgment or order on the ground that the respondent was absent when the application was heard despite having been duly served with the application.

88 The first defendant submits that there is a lacuna in O 27 because it does not contain an express provision allowing a defendant to set aside a judgment under O 27 r 3 on the grounds that the defendant was absent at the hearing, whether or not duly served.[44] He submits, further, that this *lacuna* ought to be remedied by recognising an inherent power to set aside a judgment which is entered under O 27 r 3.

89 I do not accept this submission for two reasons.

90 First, the existence of the express provisions I have listed at [84] above indicates to me that the omission of an equivalent express provision in O 27 must have been deliberate. Given that deliberate omission, recognising an inherent power to set such a judgment aside would, it appears to me, subvert the legislative intent of the Rules. Further, my interpretation of the Rules does not leave a respondent in that situation without recourse. It simply means that the respondent's only recourse is by way of appeal to an appellate court and not to the court which entered the judgment.

91 Second, the first defendant's submission is circular in that it assumes what it seeks to establish. It assumes that there must be a power to set aside a judgment under O 27 r 3 and then characterises the absence of that power as a lacuna to be filled by recognising the court's inherent power to do so. That is

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44 Certified Transcript, 1 November 2021, pp 4 (line 19) to 5 (line 15).

not the correct approach. If that were the correct approach, it would have the capacity to subvert the Rules entirely.

92 For all of these reasons, it appears to me that it is not possible to recognise the inherent power which the first defendant advocates without subverting the architecture and legislative intent of the Rules.[45]

**No sufficient reason for the first defendant's absence or default**

93 In any event, even if I am wrong in this and I do have an inherent power to set aside the Judgment, which power has been preserved by O 92 r 4, I would not exercise that power on the facts of this case.

94 In *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR(R) 907 (at [32] and [35]–[36]) and in *Su Sh-Hsyu v Wee Yue Chew* [2007] 3 SLR(R) 673 (at [42]–[45] and [49]), the Court of Appeal set out a framework for analysing an application to set aside judgments, whether entered upon default or otherwise. In *First Property Holdings Pte Ltd v U Myo Nyunt (alias Michael Nyunt)* [2020] SGHC 276 ("*First Property*"), upheld by the Court of Appeal on appeal (see *U Myo Nyunt (alias Michael Nyunt) v First Property Holdings Pte Ltd* [2021] 2 SLR 816), Chua Lee Ming J synthesised those principles as follows at [58]–[60] (citations omitted):

> 58 A defendant's delay in applying to set aside a default judgment will be viewed differently depending on whether the default judgment is entered without a trial (*eg*, in default of appearance, pleadings or discovery) or after a trial in the defendant's absence.
>
> 59 Where a defendant applies to set aside a default judgment entered without a trial:

[45] Rex Lam Paki's written submissions at [35].

> (a) the question of whether there is a defence on the merits is the dominant feature to be weighed against the applicant's explanation for the default and any delay as well as against prejudice to the other party; and
>
> (b) the court will scrutinise the reasons for the delay; where the delay is deliberate, with the intent to gain some litigation advantage, a late application should *prima facie* be viewed uncharitably. Procedural rules must not occasion injustice by unfairly depriving a party of an opportunity to argue its case but the indolent cannot as a matter of course be awarded the same measure of justice as the diligent. The greater the delay, the more cogent the explanation must be as to why a miscarriage of justice would be occasioned if the default judgment were allowed to stand.

60 However, where the defendant applies to set aside a default judgment entered after a trial:

> (a) the predominant consideration in deciding whether to set aside the judgment is the reason for the defendant's absence; and
>
> (b) the reasons for non-attendance will be "most severely viewed" in instances where the defendant's omission was deliberate and contumelious. In such cases, the approach of the court is generally unforgiving. The court will be most reluctant to set aside the judgment even though there may be other persuasive countervailing factors in favour of setting aside. Any such countervailing factors would necessarily have to be very compelling to tilt the balance in favour of setting aside the judgment.

I gratefully adopt this synthesis of these principles for the purposes of the application before me.

95 Chua J speaks in his synthesis of two classes of judgments: one class entered without a trial (at [59]) and the other class entered after a trial (at [60]). The question then is whether the Judgment falls into the framework set out in [59] or in [60] of *First Property*. In my view, the Judgment falls into the

framework set out in [60]. That is so even though the Judgment is not one which was entered against the first defendant after a trial.

96 I arrive at this conclusion because I do not read the Court of Appeal's analysis in *Mercurine* or *Su Sh-Hsyu* and Chua J's synthesis at [59] and [60] of *First Property* as drawing a dividing line between judgments entered without a trial and judgments entered after a trial. If that were the true dividing line, judgments entered in a writ action under O 13 rr 1 to 6, O 14 r 3, O 18 r 19(1), O 19 rr 2 to 7, O 24 r 6(1), O 27 r 3 and judgments entered on an originating summons or upon breach of an unless order would all fall within the framework set out in [59] of *First Property* simply because they would have all been entered with no trial of the plaintiff's claim. And judgments entered after a trial with full participation by all parties as well as judgments entered at trial in the absence of one party under O 35 r 1(2) would all fall within the framework set out in [60] of *First Property*.

97 Dividing the universe of judgments this way would not group like with like such that it is justified in the former class to have greater regard to whether there is a defence on the merits and in the latter class to have greater regard to the interest in finality in litigation, demonstrated by the greater weight accorded to the reasons for the defendant's delay, default or absence.

98 As I pointed out to first defendant's counsel in the course of argument, the proper conceptual dividing line between the framework set out in [59] and in [60] of *First Property* is between: (a) judgments entered purely by reason of a procedural default, with the defendant having had no opportunity to be heard on the merits of the claim; and (b) judgments entered after affording a defendant an opportunity to be heard on the merits of the claim, whether or not the

defendant took advantage of that opportunity.[46] In the former class of cases, the merits of the defence are the dominant feature (see *Su Sh-Hsyu* at [43]). That is simply because the court did not consider those merits before entering judgment against the defendant. Where the court did consider the merits before entering judgment, the merits recede into the background and the predominant consideration is the interest in finality in litigation, bringing to the fore the reasons for the defendant's delay, absence or default when judgment was entered (*Su Sh-Hsyu* at [44]). That is because the merits have already been considered once.

99 On this basis, judgments entered under O 13 rr 1 to 6, O 19 rr 2 to 7, O 24 r 16(1) and an unless order come within the framework set out in [59] of *First Property*. And judgments entered under O 14 r 3, O 18 r 19(1), O 27 r 3, O 35 r 1(2) and on an originating summons come within the framework set out in [60] of *First Property*. Dividing the universe of this judgments in this way is conceptually sound and consistent with *Su Sh-Hsyu* (see [41]–[42]).

100 As I have mentioned (see [27] above), the first defendant rightly concedes that the Judgment was entered against him on the merits of the plaintiff's claims against the Defendants and not merely by reason of default, whether in filing a defence or failing to attend the O 27 application on 4 March 2020.[47] I therefore consider that the appropriate framework for the first defendant's application to set aside the Judgment is that set out in [60] of *First Property*.

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46 Certified Transcript, 1 November 2021, p 10 line to p 11 line 10.

47 Certified Transcript, 1 November 2021, pp 9 (lines 17 to 22), 10 (lines 8 to 19) and 12 (lines 1 to 4).

101 As the Court of Appeal held in *Su Sh-Hsyu* (at [44]), the considerations in this class of judgments are as follows:

> 44 …[W]here judgment has been entered after a trial in the defendant's absence, the predominant consideration in deciding whether to set aside the judgment is the reason for the defendant's absence. In *Shocked*, Leggatt LJ itemised (at 381) the other relevant factors that the court should take into consideration:
>
> > (a) prejudice – whether the successful party would be prejudiced by the judgment being set aside, especially if the prejudice was irremediable by an order of costs;
> >
> > (b) applicant's delay – whether there was any undue delay by the absent party in applying to set aside the judgment, especially if during the period of delay the successful party acted on the judgment, or third parties acquired rights by reference to it;
> >
> > (c) whether complete retrial required – whether the setting aside of a judgment would entail a complete retrial on matters of fact which have already been investigated by the court;
> >
> > (d) prospects of success – whether the applicant enjoyed a real prospect of success; and
> >
> > (e) public interest – whether the public interest in finality in litigation would be compromised.
>
> To these broad-ranging factors we would also add the overriding consideration of whether there is a likelihood that a real miscarriage of justice has occurred. This will be discussed in greater detail below.

102 Further, where a party deliberately absents itself and thereby allows a judgment on the merits to be entered against it, the court's discretion generally weighs heavily in favour of the interest in finality in litigation, despite the weight of the countervailing factors (*Su Sh-Hsyu* at [45]). That is simply because a party who has eschewed one opportunity afforded to it to address the court on the merits of its case will not easily persuade the court to undermine the principle of finality in litigation by affording it another such opportunity.

103 To all of these factors, I add only this gloss. *Mercurine*, *Su Sh-Hsyu* and *First Property* were all cases applying an express power conferred by the Rules to set aside a judgment. On this branch of my analysis, I am assuming in the first defendant's favour, and contrary to my finding, that I have an inherent power to set aside a judgment under O 27 r 3 even though the Rules provide no express power to do so and even though the Rules provide express powers to set aside other types of judgments. That feature of this branch of the analysis, in my view, tilts the balance even further in favour of upholding the interest in finality in litigation.

104 The touchstone when it comes to exercising the court's inherent powers is always one of necessity (*Wee Soon Kim Anthony v Law Society of Singapore* [2001] 2 SLR(R) 821 at [27]). The starting point is that, even when an inherent power exists, it "should only be invoked in exceptional circumstances where there is a clear need for it and the justice of the case so demands" (see *Roberto Building Material Pte Ltd and others v Oversea-Chinese Banking Corp Ltd and another* [2003] 2 SLR(R) 353 at [16]–[17]). In my view, therefore, the nature of an inherent power adds significantly on this branch of the analysis to the first defendant's burden in bringing himself within the framework in [60] of *First Property* and in satisfying each of the factors set out at [44] of *Su Sh-Hsyu* (see [101] above).

105 All of this means that the starting point in the exercise this hypothetical inherent power is the sufficiency of the first defendant's reasons for: (a) his absence at the hearing of the plaintiff's O 27 application; and (b) his failure to apply to set aside the Judgment when he learned of it in March 2020 and, in any event, earlier than August 2021. These are the predominant considerations on

the exercise of an inherent power to set aside the Judgment. The first defendant's counsel accepts this.[48]

106 Bearing all of this in mind, I accept the plaintiff's submission that the first defendant's application is an abuse of the process of the court. My findings are as follows. The first defendant was given more than a reasonable opportunity to be heard on the plaintiff's O 27 application. He learnt of the Judgment very shortly after it was entered. He therefore also had every opportunity to appeal against the Judgment within the stipulated time and even to apply for an extension of time to do so after that deadline expired. I am prepared to infer from the procedural chronology that the first defendant made a deliberate and considered decision to let this action proceed to judgment in Singapore in his absence and to let the Judgment stand without challenging it on appeal in order to take his chances resisting enforcement of that judgment outside Singapore.

107 The result is that the first defendant has failed to discharge the burden that rests on him to persuade a court to exercise an inherent power in his favour and to subvert the interest in finality in litigation.

108 In order to explain why I am prepared to draw this inference against the first defendant, it is necessary to describe the procedural chronology of this matter in more detail. I start with service of the writ.

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48 Certified Transcript, 1 November 2021, p 12 lines 16 to 25.

***The plaintiff serves the writ on the Defendants***

109 In March 2019, the plaintiff served the writ in this action on the first, second and fourth defendants in Papua New Guinea.[49] The first and second defendants accepted service of the writ in Papua New Guinea through a solicitor practising there whom they had instructed to act on their behalf, Mr Buri Ovia ("Mr Ovia").[50] The three Defendants jointly appointed Eldan Law LLP ("Eldan") as their solicitors. Eldan entered an appearance for the Defendants on 12 March 2019. At that time, the writ been served on the first and fourth defendants, but not on the second defendant. She therefore entered her appearance *gratis*, *ie* without being served with the writ (see *MV Popi v SS Gniezno; The Gniezno* [1968] P 418 and O 10 r 1(3)).[51]

110 From March 2019, therefore the first defendant had access to legal advice in relation to the plaintiff's action both from Eldan in Singapore and Mr Ovia in Papua New Guinea.

***The Defendants' representation in this action***

111 It is convenient at this point to set out the three firms of solicitors who have represented the Defendants in Singapore from the commencement of this action to the present date:

(a) From 12 March 2019 to 26 July 2019, Eldan represented all three Defendants.

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49 Memorandum of Service dated 17 December 2019; 15th affidavit of John Malcolm Wylie, paras 10 to 14.

50 11th affidavit of John Malcolm Wylie, paras 11 and 15.

51 Appearance dated 12 March 2019.

(b) From 27 February 2020[52] to 4 March 2020,[53] PRP Law LLP ("PRP") represented all three Defendants.

(c) From 5 July 2021[54] to the present day, Nicholas & Tan Partnership LLP ("N&T") has represented only the first defendant. The first defendant was therefore unrepresented from 4 March 2020 to 5 July 2021.

(d) On 10 September 2021, Tan Peng Chin LLC came on the record as representing the second defendant in this action.[55] That firm remains on the record as the second defendant's solicitors but have played no part in the hearing and determination of the first defendant's setting aside application. The second defendant was therefore unrepresented from 4 March 2020 to 10 September 2021 but has been represented since that date, at least nominally.

(e) The fourth defendant has been unrepresented in this action from 4 March 2020 to the present date.

***The defendants apply to set aside service***

112 In April 2019, both Eldan[56] (for the Defendants) and R&T[57] (for the remaining defendants) applied to set aside service of the writ. All six defendants

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52 Memorandum of Appearance dated 27 February 2020.

53 Order for Withdrawal of Solicitor dated 4 March 2020 (HC/ORD 1607/2020).

54 Notice of appointment of solicitors dated 5 July 2021.

55 Minute sheet of pre-trial conference on 31 August 2021; Notice of Appointment of Solicitor dated 10 September 2021.

56 HC/SUM 1792/2019.

57 HC/SUM 2006/2019.

took the position that the Singapore courts had no personal jurisdiction over them, alternatively that the Singapore courts should decline to exercise any such jurisdiction on grounds of *forum non conveniens*.

113 The Defendants filed two affidavits in support of their application. The first defendant swore one affidavit on his own behalf. The second defendant swore another affidavit on behalf of herself and the fourth defendant. Both affidavits were filed on 5 April 2019. The two affidavits cover the same ground, have the same structure (including largely identical topic and sub-topic headings) take the same positions on those topics and sub-topics and are, in some parts, identical word for word.[58] The second defendant's affidavit has assumed a significance on this application to which I will return (see [116]–[122] below).

114 All six defendants' applications to set aside service of the writ were heard together on 19 July 2019. The assistant registrar held that the Singapore courts did not have personal jurisdiction over any of the defendants.[59] She accordingly set aside service of the writ on all six defendants.

115 On 23 July 2019, the plaintiff appealed to a judge in chambers against the assistant registrar's decisions as against all six defendants. The appeals were fixed to be heard on 26 August 2019. Dentons served the appeal relating to the Defendants on Eldan on 23 July 2019. The first defendant accepts that Eldan

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58 1st affidavit of Rex Lam Paki, paras 61 to 66; 1st affidavit of Sarah Mina Paki, paras 40 to 45.

59 1st affidavit of Rex Lam Paki, para 20.

informed him that the appeal had been filed and that it was fixed for hearing on 26 August 2019.[60]

***The second defendant's social media post***

116 Meanwhile, on 1 or 2 July 2019, it matters not which,[61] a post appeared on a public blog in Papua New Guinea. The post was then republished on the second defendant's Facebook page.[62]

117 The post: (a) suggested that the first defendant had indeed been involved in corrupt activities in relation to the sale of Cloudy Bay; (b) alleged that the first defendant had used the second defendant to advance those corrupt activities; (c) alleged that the first defendant had perjured himself in his affidavit filed on 5 April 2019 in support of the application to set aside service; and (d) alleged that the first defendant had forged the second defendant's signature on her affidavit filed on 5 April 2019 in support of the application to set aside service (see [18] above).

118 The post was drawn up in the form of a newspaper article by the second defendant with the dateline 2 July 2019. There is no suggestion, however, that the post was ever published in any newspaper.

119 The headline on the post as published on the public blog was "**WIFE EXPOSES CROOK BUSINESSMAN REX PAKI'S HANDS ON PNGSDP DEAL**". The headline on the post as republished on the second defendant's

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60 1st affidavit of Rex Lam Paki, para 32.

61 Certified Transcript, 1 November 2021, page 72, line 21.

62 7th affidavit of John Malcolm Wylie, para 4 and pp 5 to 22.

Facebook page was "**WIFE NOW TURNS ON CROOK ACOUNTANT AND FRAUDSTER BUSINESSMAN REX PAKI…READ**". The post started as follows:

> I want to make my self clear to the people of papua New Guinea that i the wife of Rex Paki was used as rubber stamp by my Husband (REX PAKI) to do their dirty work for their own personal gain.. I personall hate CORRUPTIONS and it must come to an End, if we want to progress and see our country grow in fighting CORTUPTIONS FREE ..Let PNG become corruption free country by exposing the truth …
>
> Bellow are the false statements present in SINGAPORE court by my husband and his Associates which i am not aware of it … What belongs to the people of WESTERN is theirs, and we cannot steal from them and i am Coming out to expose CORRUPTION practice Like this..
>
> If I DONT WHO WILL?
>
> Good Morning Nicholas Riontis
>
> In the Name of the Lord Jesus Christ,
>
> I Mrs Mina Sarah Paki Declares her innocence of all the Lies that were made between Rex Lam Paki, Oppa and Lifese.
>
> You Nicholas Rionitis, ( Oppa ) plus Lifese's Business Deals with Rex Lam Paki of Ram Business Consultants … .Not in any where in the History of God and Man, Mrs Mina Sarah Paki is Involved. on 6 one of a numbf
>
> All the 11 paged affidavit to a Lawyer in Singapore is a False Statement, which was Written by Rex Lam Paki to Justify a Corrupt Deal with Rex Lam Paki, Nicholas Rionitis, ( Oppa ) and Lifese.
>
> I only was invited to take Rex Lam Paki, Nicholas Rionitis ( Oppa ) and Lifese guys to The Gold Place because they were my Relatives.
>
> You know Nicholas Rionitis ( Oppa ) because of my Family Connections and my Public Relations, Rex Lam Paki used me like a Guinea Pig in Politics, Business and other Matters relating with People in PNG and even overseas.
>
> Nick, Our God in Heaven ONLY Knows The TRUTH of All you, ( Oppa )and Lifese Business Deals with Rex Lam Paki, and God is the Only Witness to all the All you Three People's Businesses since 2010 or 2012 you came to Know Rex Lam Paki.

> You know very Well, Mrs Mina Sarah Paki is Not Involved with your So called Business Deals with Rex Lam Paki of Ram Business Consultants.
>
> [All errors original]

120 The post went on to allege that the second defendant's affidavit of 5 April 2019 was "a False Statement which was written by [the first defendant] to justify a Corrupt Deal with [the first defendant], [the sixth defendant], [the third defendant] and Lifese". The post further alleged that "… all the 11 Paged Affidavit that [the first defendant] wrote, Forged my Signatures, Scanned and sent [the affidavit] to His Lawyers in Singapore to Justify all His Corrupt Deals with Cloudy Bay with You [the third defendant] and Lifese is TOTAL A LIE (sic)".[63]

121 The first defendant's evidence on this application is that the second defendant was not the author of this post. His evidence is that the second defendant's relatives authored the post based on a misunderstanding of the facts and without her authorisation.[64]

122 But the first defendant did not at any time take this position, either through counsel or on affidavit, from the time the social media post was published until 6 August 2021, when he filed his affidavit in support of his application to set aside the judgment. For that period of almost two years, therefore, the available evidence established that the second defendant was taking a position on the merits of the plaintiff's claims which not only contradicted the first defendant's position but was hostile to his position. The second defendant was accusing the first defendant of perjuring himself in his

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63 16th affidavit of John Malcolm Wylie, para 20.

64 1st affidavit of Rex Lam Paki, paras 23 and 25.

own affidavit and, at worst, of forging the second defendant's signature on her affidavit or, at best, of suborning her perjury in the affidavit. All of that obviously raised the issue of whether a single firm of solicitors could continue to represent the Defendants collectively without facing an irreconcilable conflict of interest.

***Eldan applies to discharge itself***

123 On 1 July 2019, Eldan applied to discharge itself from acting for the Defendants. Eldan's stated grounds were that the Defendants had failed to pay the agreed amount to Eldan's account for anticipated legal fees and disbursements.[65] There was an issue between the parties as to whether the potential conflict of interest arising from the social media post ostensibly by the second defendant did or did not also play an unstated part in Eldan's decision to seek its discharge from acting for the Defendants. That issue is ultimately immaterial.

124 Eldan duly served the discharge application on the Defendants. The application came on for hearing on 23 July 2019 before the senior assistant registrar. She made an order in terms of the application.[66] Eldan served the order on Dentons on 26 July 2019. Under O 64 r 5(1), the Defendants ceased to be represented in this action with effect from 26 July 2019.[67]

125 I find that, as at 26 July 2019, the first defendant took a considered decision not to participate any further in the plaintiff's appeals on service. My

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65 HC/SUM 3286/2019; Affidavit of Ang Minghao filed on 1 July 2019, para 16; 1st affidavit of Rex Lam Paki, para 29.

66 HC/ORC 4946/2019.

67 16th Affidavit of John Malcolm Wylie at [31].

reasons for that finding are as follow. Dentons continued to keep the first defendant informed of developments in the appeal. Yet, the first defendant took no steps to appoint new counsel or to represent himself to resist the plaintiff's appeal. He saw no need to do so because, at this point, he had succeeded in having service against him set aside. He knew that the second defendant's social media post would make it difficult for him to find counsel in Singapore to represent him. He knew that R&T were representing the remaining defendants on the plaintiff's appeal. He believed that R&T's submissions for the remaining defendants would suffice to persuade the court to dismiss the plaintiff's appeals as against all six defendants, including himself.

***The registrar's appeals on jurisdiction***

126 On 21 August 2019, in anticipation of the hearing of the plaintiff's registrar's appeals on jurisdiction and *forum non conveniens* on 26 August 2019 (see [112] above), Dentons took it upon itself to send a letter to the first defendant: (a) reminding him and Mr Ovia that the hearing would take place on 26 August 2019; (b) asking if the first defendant had appointed Singapore solicitors to act for him in the appeal; and (c) to invite the first defendant to exchange written submissions for the appeal.[68] Although he denies receiving this letter, the first defendant accepts that he knew that the appeal would be heard on 26 August 2019.[69]

127 I heard the registrar's appeals as scheduled on 26 August 2019. The Defendants did not attend the hearing by counsel or in person. The hearing nevertheless proceeded against them in their absence. R&T represented the

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68 16th Affidavit of John Malcolm Wylie at [34(b)].

69 1st affidavit of Rex Lam Paki, para 33(g).

remaining defendants and argued their appeal for them. The hearing of the appeals could not conclude on 26 August 2019 and continued on 8 October 2019 and 19 November 2019. The first defendant asserts that he did not know that the hearings were to continue on 8 October 2019 and 19 November 2019.[70]

128 On 19 November 2019, I accepted the remaining defendants' submissions and dismissed the plaintiff's appeal as against them. The assistant registrar's decision setting aside service of the writ on those three defendants therefore stood. That is how the remaining defendants successfully extricated themselves from this action.

129 But I accepted the plaintiff's submissions as against the Defendants. I held that the Singapore courts had personal jurisdiction over the Defendants and should not decline to exercise that jurisdiction on grounds of *forum non conveniens*. I therefore allowed the plaintiff's appeal and reinstated service of the writ on the Defendants.

130 It therefore became necessary to give the parties directions for this action to proceed to trial, albeit only as against the Defendants. To that end, in the usual way, a pre-trial conference was fixed for 26 November 2019.[71] As the Defendants were still unrepresented, Dentons quite rightly took the initiative to send a letter to the first defendant by post on 19 November 2019 and by email on 20 November 2019. The letter: (a) informed the first defendant that I had allowed the plaintiff's appeal as against the Defendants, thereby reinstating service of the writ on them; (b) informed him that a pre-trial conference had been fixed for 26 November 2019 before the senior assistant registrar; (c) asked

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70 1st affidavit of Rex Lam Paki, para 33(g).

71 16th Affidavit of John Malcolm Wylie at [34d].

him to attend the pre-trial conference by counsel or in person.[72] The first defendant accepts that he received this letter by email on 20 November 2019.[73]

131 I find that, at this point, the first defendant took a deliberate decision not to participate any further in this action at all. He decided to allow this action to proceed in the usual course and to ignore any judgment by default that might be entered against him.

***The Defendants fail to file a defence***

132 On 25 November 2019, knowing that service had been reinstated against him, and only a day before the pre-trial conference, the first defendant telephoned Dentons and asked them to adjourn the pre-trial conference. Dentons told the first defendant that they had no instructions on an adjournment and urged him to appoint Singapore lawyers to represent him.[74] On the same day, Mr Ovia wrote to Dentons seeking an adjournment of the pre-trial conference.[75] Dentons replied to Mr Ovia setting out what they had told the first defendant in the phone conversation earlier that day.[76] Dentons also indicated that they intended to seek directions at the pre-trial conference for the Defendants to file their defences.[77]

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72 11th Affidavit of John Malcolm Wylie at p 348; 16th Affidavit of John Malcolm Wylie at [34d].

73 1st affidavit of Rex Lam Paki at para 33(c).

74 11th Affidavit of John Malcolm Wylie at [27]–[28].

75 11th Affidavit of John Malcolm Wylie at p 351.

76 11th Affidavit of John Malcolm Wylie at p 354.

77 11th Affidavit of John Malcolm Wylie at [29]–[30].

133 The Defendants did not attend the pre-trial conference on 26 November 2019 by counsel or in person, whether to ask for it to be adjourned or otherwise. The senior assistant registrar directed the Defendants to file their Defences by 13 December 2019. Dentons duly conveyed the direction to the first defendant and to Mr Ovia on 26 November 2019.[78] The first defendant does not deny receiving this letter.

134 Despite this, neither the Defendants nor Mr Ovia responded to Dentons.[79] Despite this, the Defendants failed to file their Defences in this action, whether by 13 December 2019 or at all.[80]

***The plaintiff tries to enter judgment in default of defence***

135 On 20 December 2019, the plaintiff applied under O 19 r 7(1) for leave to enter judgment against the Defendants in default of defence for the four heads of relief set out at [18] above.[81] The basis of the plaintiff's application was that the first defendant had failed to file a defence and was therefore deemed by O 18 r 13(1) read with O 18 r 3(3) to have admitted the allegations of fact in the plaintiff's statement of claim.[82] Order 18 r 13 provides as follows:

> **Admissions and denials (O. 18, r. 13)**
>
> **13**.—(1) Subject to paragraph (4), any allegation of fact made by a party in his pleading is deemed to be admitted by the opposite party unless it is traversed by that party in his

78 11th Affidavit of John Malcolm Wylie at para 33, p 358.

79 11th Affidavit of John Malcolm Wylie at para 34; Plaintiff's written submissions filed on 23 January 2020, para 8(n).

80 16th Affidavit of John Malcolm Wylie at [34g].

81 HC/SUM 6374/2019.

82 Plaintiff's written submissions dated 24 January 2020, paras 14 and 27; Notes of Argument, 30 January 2020, page 4 lines 7 to 11; lines 17 to 20.

> pleading or a joinder of issue under Rule 14 operates as a denial of it.
>
> (2) A traverse may be made either by a denial or by a statement of non-admission and either expressly or by necessary implication.
>
> (3) Subject to paragraph (4), every allegation of fact made in a statement of claim or counterclaim which the party on whom it is served does not intend to admit must be specifically traversed by him in his defence or defence to counterclaim, as the case may be; and a general denial of such allegations, or a general statement of non-admission of them, is not a sufficient traverse of them.
>
> (4) Any allegation that a party has suffered damage and any allegation as to the amount of damages is deemed to be traversed unless specifically admitted.

136 The plaintiff's O 19 r 7(1) application came on for hearing before me on 30 January 2020. At the hearing, I told counsel for the plaintiff that I had two concerns about the plaintiff applying to enter judgment against the Defendants in default of defence.

137 First, I was not comfortable about entering judgment on a complicated equitable claim against the Defendants simply by reason of their default in filing a defence.[83] In the interests of rectitude of decision, I wanted the plaintiff to discharge its burden of establishing on the balance of probabilities that it was entitled to enter judgment against the Defendants on the merits and in the terms prayed for in its application (see [18] above). As the plaintiff itself accepts,[84] on an application for leave to enter judgment under O 19 r 7(1), the court cannot receive evidence and is confined to examining the allegations in the statement of claim to ensure that they establish a reasonable cause of action. The only exception is that the court hearing an O 19 r 7(1) application may receive

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83 Notes of Argument, 30 January 2020, p 2 lines 15 to 24; p 5 line 17 to p 6 line 4.

84 Plaintiff's written submissions filed on 23 January 2020 at paras 15–16.

evidence on issues relating to the scope of the relief to be granted and on issues relating to costs (*Phonographic Performance Ltd v Maitra* [1998] WLR 870 at 875G to 876A cited in the White Book 2022 at 19/7/11).

138 Second, if the plaintiff indeed had a good claim on the merits, I was concerned that there might be difficulty enforcing a default judgment outside Singapore under the private international rules of the enforcing jurisdiction (see *eg Indian Overseas Bank v Svil Agro Pte Ltd and others* [2014] 3 SLR 892 at [21]).[85] There was evidence before me that the Defendants have no assets in Singapore.[86] It was therefore almost certain that enforcement would have to take place outside Singapore, most likely Papua New Guinea. In that sense, I did not want the Singapore courts to enter a judgment against the Defendants in vain.

139 In addition, although I did not express this third concern to counsel, I was not comfortable granting leave to enter judgment against the Defendants on an *ex parte* application. I thought it more appropriate that any application to enter judgment against the Defendants should proceed *inter partes*. I was of that view for three reasons. First, the Defendants had entered an appearance and had thereby indicated, at least initially, an intention to defend the plaintiff's claim in this action. Second, they had filed affidavits in support of their application to set aside service. While the evidence in those affidavits was primarily relevant to jurisdiction and *forum non conveniens* and even though the Defendants had defaulted in filing formal defences to the plaintiff's claim, I thought that the Defendants should have the opportunity, if they wished, to rely on the evidence in those affidavits to resist judgment being entered against them by default.

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85 Notes of Argument, 30 January 2020, p 4 lines 21 to 23; p 5 line 17 to p 6 line 4.

86 1st affidavit of Rex Lam Paki at paragraph 5; 1st affidavit of Rex Lam Paki, paras 15 and 20; 1st affidavit of Sarah Mina Paki, paras 9 and 13.

Third, there was no express provision in O 19 permitting an application for leave to enter judgment under O 19 r 7(1) to be brought *ex parte*. And, because the Defendants had entered an appearance in this action, O 62 r 10 did not operate to release the plaintiff from its obligation to serve the O 19 application on them. I therefore thought that the plaintiff should proceed under O 19 r 7(1) *inter partes*.

140 I could have addressed all of these concerns simply by directing the plaintiff to file an application for summary judgment under O 14. That would have required the plaintiff to establish on the merits and on the balance of probabilities that there was no issue or question in dispute which ought to be tried and that there was no other reason for a trial within the meaning of O 14 r 3(1). That would also have required the plaintiff to give notice of the application to the Defendants.

141 But that procedural option is not now available. Order 14 r 1 as amended now stipulates that the defendant filing a defence is a condition precedent to an application to enter summary judgment. And the Rules gave the court no discretion to dispense with that condition precedent and to allow an application for summary judgment to be brought without the defendant having filed a defence. An application for summary judgment brought in circumstances where any of the stipulated conditions precedent is not fulfilled is therefore liable to be dismissed (see White Book 2022 at 14/1/4).

142 Given that the option of proceeding to a judgment on the merits under O 14 was no longer available, I considered whether I should direct the plaintiff to proceed to have its claim adjudicated at trial. That was one option for ensuring that the plaintiff's claim was adjudicated on the merits and with notice to the

Defendants. But I rejected this option. I considered the time and costs involved in having the plaintiff's claim tried were wholly unnecessary and wholly disproportionate given that the Defendants had given no indication either through Dentons or directly to the court following the pre-trial conference on 26 November 2019 that their initial intention to defend, indicated by entering an appearance, continued to be their intention.

143 It appeared to me that the only procedural route available by which to consider the plaintiff's application to enter judgment against the Defendants with the ability to look beyond the defendant's procedural default and without incurring unnecessary and disproportionate time and costs was an *inter partes* application for judgment on admissions under O 27 r 3.

144 At my suggestion, therefore, counsel for the plaintiff agreed to make an application under O 27 r 3 praying for judgment to be entered against the Defendants on the deemed admission of facts arising under O 18 r 13 from the Defendants' failure to file a defence. I adjourned the plaintiff's O 19 application to be heard on 28 February 2020 together with the plaintiff's application to be filed under O 27 r 3.

145 I further directed the plaintiff, once it had made the O 27 application, to:[87]

(a) Give each of the Defendants notice:

(i) that the O 27 application would be heard on 28 February 2020; and

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87 Notes of Argument, 30 January 2020, p 7 lines 5 to 20.

(ii) that, if they did not attend the hearing of the O 27 application by counsel or in person, the court would make such orders and enter such judgment against one or more of the Defendants as it considered just.

(b) File written submissions by 25 February 2020 in which the plaintiff demonstrated how the facts deemed admitted under O 18 r 13, in light of the applicable principles of law, entitled the plaintiff to the relief sought in the application for judgment under O 27.

(c) Give notice to the Defendants of the written submissions at or about the same time as the plaintiff filed them.

146 I considered that this procedure would give me comfort that, if I were to enter judgment in the plaintiff's favour, it would only be after giving the Defendants a reasonable opportunity to be heard and would only be for what the plaintiff was entitled to in law, and not for whatever the plaintiff had prayed for in its statement of claim simply because the Defendants had failed to file a defence.[88]

***The plaintiff applies to enter judgment under O 27***

147 On 18 February 2020, the plaintiff duly filed the O 27 application and had it fixed for hearing before me on 28 February 2020 together with the adjourned O 19 application.[89] The O 27 application claimed precisely the same relief against the Defendants as the O 19 application (see [18] above).

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88 Notes of Argument, 30 January 2020, p 5 line 17 to p 6 line 4.

89 HC/SUM 772/2020.

148 Also on 18 February 2020, the plaintiff gave notice as directed to the Defendants that the O 27 application would be heard on 28 February 2020 and that written submissions were to be filed by 25 February 2020.[90] The first defendant accepts that he received this notice.[91]

149 This notice brought home to the first defendant and those advising him the real risk that he could now have not a judgment by default but a judgment on the merits entered against him in Singapore. On 25 February 2020, the Defendants belatedly appointed PRP to act for them in this action. That appointment was subject to the Defendants' putting PRP in funds against anticipated fees and disbursements. PRP received the funds on 27 February 2020.[92]

150 On 27 February 2020, one day before I was to hear the O 27 application, PRP came formally on the record for the Defendants. PRP wrote to Dentons asking for the applications to be adjourned four weeks to enable the Defendants to file their defences. In response, Dentons asked PRP to clarify whether PRP felt it could act jointly for the Defendants in light of the very serious allegations the second defendant had ostensibly made in the social media post (see [116]–[122] above). The first and second defendants had, from July 2019 until then, maintained a studious silence on the veracity or otherwise of the very serious allegations made against the first defendant in the post. They had never alleged by counsel or on affidavit that the second defendant was not the author of the post or that its contents were false.

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90 16th Affidavit of John Malcolm Wylie at [36d].

91 1st affidavit of Rex Lam Paki, para 38.

92 1st affidavit of Rex Lam Paki, para 40.

151 When the O 19 and O 27 applications came on for hearing before me on 28 February 2020, Dentons informed me that they could agree only to a short adjournment to allow PRP to take instructions and consider its position on the issue of an actual or potential conflict of interest. I therefore adjourned the applications to 4 March 2020.[93]

152 During the adjournment, PRP took instructions personally from the first and second defendants. As a result of those instructions, PRP felt it could not continue to act jointly for them.[94] Accordingly, PRP applied on 2 March 2020 for an order discharging itself as the Defendants' solicitors.[95] That application was also fixed for hearing before me on 4 March 2020.

153 PRP duly informed the Defendants of the application as required by O 64 r 5(2). PRP's evidence on affidavit is that they advised the Defendants to engage solicitors or to attend the hearing on 4 March 2020 in person, failing which the court may make orders against them in their absence.[96] The first defendant does not contradict PRP's evidence. The first defendant says merely that he cannot recall whether PRP informed him that the O 27 application was to be heard on 4 March 2020 before discharging themselves.[97] On this point, I accept PRP's evidence. It is consistent with the inherent probabilities and is not inconsistent with the first defendant's evidence.

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93 16th Affidavit of John Malcolm Wylie at [36h].

94 1st Affidavit of Pradeep G Pillai filed on 2 March 2020, para 10; 1st affidavit of Rex Lam Paki, para 43.

95 16th Affidavit of John Malcolm Wylie at [36j].

96 1st Affidavit of Pradeep G Pillai filed on 2 March 2020, para 47.

97 1st affidavit of Rex Lam Paki at para 47.

154 The plaintiff's O 19 and O 27 applications and PRP's discharge application came on for hearing before me on 4 March 2020. I dealt first with PRP's application. Having read the affidavit in support of the application and having heard from counsel from PRP, I granted an order in terms of the application. PRP then withdrew from the hearing.

155 From that point forward, the Defendants were no longer represented, on the O 19 and the O 27 applications before me on 4 March 2020.

***Judgment is entered against the Defendants***

156 Given that the Defendants were now unrepresented, I considered whether to hear the O 27 application on 4 March 2020 or to adjourn it yet again.

157 I decided to hear the O 27 application. I came to that decision for two reasons. First, I was satisfied that Defendants had had reasonable notice: (a) that the O 27 application would be heard on 28 February 2020 and then again on 4 March 2020; (b) of the relief which the plaintiff was seeking in the O 27 application; and (c) of the risk that I could enter judgment against any one or more of them on the O27 application if they failed to participate in the hearing by counsel or in person. Second, a week had elapsed since the first hearing of the O 27 application on 28 February 2020. In that week, the Defendants had given no indication by counsel or in person to Dentons or the court that they wanted another adjournment or that they intended to oppose the O 27 application in person following PRP's discharge.

158 I then heard the O 27 application. I had read the statement of claim and the plaintiff's written submissions before the hearing. I heard oral submissions from plaintiff's counsel and tested his submissions with questions during the

hearing. Having considered all of the material before me, I was satisfied that the plaintiff had established on the balance of probabilities that it was entitled on the factual and legal merits of its claim to the relief which it sought in the O 27 application. I therefore entered the Judgment against the first defendant.

***The Defendants are given notice of the Judgment***

159 On 10 March 2020, Dentons sent the Defendants a copy of the Judgment by email and post.[98] The first defendant is conspicuously silent as to whether he received this notification. Dentons sent the email to an email address of the first defendant at which he admits receiving other emails which Dentons had sent to him in this action.[99]

160 I therefore accept that the first defendant was aware from 10 March 2020 both that judgment had been entered against him on 4 March 2020 and also of the terms of the Judgment.[100] The time for the first defendant to appeal against the judgment would expire on 10 April 2020. The first defendant did not appeal against the Judgment, whether by 10 April 2020 or otherwise.

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98 16th affidavit of John Malcolm Wylie at para 36(m).

99 3rd affidavit of Rex Lam Paki, paras 33(c) and 38.

100 16th affidavit of John Malcolm Wylie at p 76 to 79.

***The plaintiff enforces the Judgment outside Singapore***

161 Between March 2020 and April 2021, the defendants did not satisfy the Judgment. The Judgment remains wholly unsatisfied to date.[101]

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162 In April and May 2021, the plaintiff registered the Judgment for enforcement against the Defendants in New South Wales, Papua New Guinea[102] and Queensland.[103] In May 2021, the plaintiff served notice of the New South Wales registration on the second defendant in Queensland.[104] In August 2021, the plaintiff served notice of the New South Wales and the Papua New Guinea registration on the first defendant, also in Queensland.[105]

163 It was only now, in August 2021, that the first defendant applied to set the Judgment aside as against him. That was over 16 months after the first defendant had become aware of the Judgment. I have no hesitation in drawing the inference that he did so, not because he considers that he has any merits in his defence, but only in order to cause delay in the enforcement of the Judgment against him in those jurisdictions.

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101 16th affidavit of John Malcolm Wylie at para 43.

102 3rd affidavit of Rex Lam Paki, paras 62 and 65.

103 16th affidavit of John Malcolm Wylie at para 43.

104 3rd affidavit of Rex Lam Paki, paras 61 and 67.

105 3rd affidavit of Rex Lam Paki, paras 64 and 68.

***Impecuniosity***

164 The first defendant submits that the true reason for his failure to engage solicitors to represent him is his impecuniosity. I reject this submission. The burden of establishing impecuniosity rests on the first defendant. He has adduced insufficient evidence of impecuniosity to discharge that burden. In any event, he would have to establish impecuniosity that persisted uninterrupted throughout the period from March 2020 to August 2021. The available evidence suggests that he was not impecunious, at least in March 2020 when he engaged PRP. It is significant to me that PRP withdrew as the first defendant's solicitors not because of his impecuniosity but because of a conflict in acting for both the first defendant and the second defendant at the same time. I do not consider it a coincidence that the first defendant was somehow able to find the means to engage Singapore counsel only when the risk of the Judgment actually being enforced against him became a reality and he needed to delay the enforcement proceedings against him outside Singapore.

165 Further, even if the first defendant were impecunious without interruption from March 2020 to August 2021, he could at any time have acted in this action in person. He could have filed a defence simply setting out the factual basis on which he resisted the plaintiff's claim. That would have sufficed to prevent the deemed admissions on which the plaintiff relied from arising. He could have asked the plaintiff or asked the court by correspondence for an adjournment of the O 27 application, just as he asked the plaintiff's solicitors for an adjournment of the pre-trial conference.

166 It is also significant that the period of his delay occurred during the Covid 19 pandemic. Our courts were able throughout these proceedings, and despite the pandemic, to hear from him by video link, even though he was

outside the jurisdiction and may have been unable to travel. There was nothing to prevent him from appearing at the O 27 application and seeking an adjournment by video link. Indeed, there was nothing to prevent him appearing at the O 27 application and presenting his case on the merits by video link. Our courts often hear from litigants in person. And if those litigants in person are able to present sufficient facts to the court to make out a claim or a defence, our courts do not punish them for being unschooled in the law. The first defendant took no such steps.

***Conclusion on inherent power***

167 From the chronology of events, it is clear to me that the first defendant took a deliberate decision from the time PRP discharged itself that he would ignore this action, allow judgment to be entered against him in this action and ignore the judgment. He did all this because he knew that he had no assets in Singapore. That is quite obviously not a good reason for his absence at the O 27 hearing or for his delay in seeking to set the Judgment aside. This is the predominant consideration in this setting aside application.

168 The defendant had every opportunity to be heard at every critical juncture in this case. His decision not to take advantage of that opportunity was deliberate. His decision to leave the Judgment unchallenged, whether by an appeal or by a setting aside application, for over 16 months was also deliberate. It was only when the plaintiff secured registration of the judgment in Papua New Guinea, New South Wales and Queensland, where the first defendant is either present or has assets, that he belatedly decided to take this action and the Judgment seriously. Even then, he failed to bring an application to extend time for appealing against the Judgment despite indicating that that was his intention. That was the proper procedural course for him to have taken. The public interest

in finality in litigation dictates that the proper procedural avenue by which a judgment can be dissolved, subject to any contrary express provision in the Rules, is by a higher court reversing the judgment on appeal and not by the very court which entered the judgment setting it aside.

169 All of this suggests to me that the only reason the first defendant now brings this setting aside application is to delay the enforcement proceedings in those jurisdictions and not because he believes that his defence has any merits. The first defendant has failed to discharge his burden to secure the benefit of the exercise of any inherent power to set aside the judgment. The interest in finality in litigation prevails.

170 In the words of Prakash J (as she then was) in *Vallipuram Gireesa Venkit Eswaran v Scanply International Wood Product (S) Pte Ltd (Kim Yew Trading Co, third party)* [1995] 2 SLR(R) 507:

> 19 It was obvious from the chronology of events, however, that the third party had only decided to make the present application when the defendants had obtained a hearing date for the registration in Malaysia of their judgment. In the absence of any reason for the delay and any other explanation for the timing of the application, I had very serious doubts as to the *bona fides* of the third party. It appeared to me that it was simply trying to further delay the enforcement of the judgment without any good cause to do so. In these circumstances I saw no reason why I should examine the "merits" of the third party's case and set aside the judgment if I found such merits to exist.

171 Indeed, on my findings, I have no hesitation in characterising the first defendant's application as an abuse of the process of the court. The application ought to be dismissed even if I were to assume in the first defendant's favour that he has an arguable defence on the merits to the plaintiff's claim (see *First Property* at [105]).

**The Judgment cannot be set aside under O 35 r 2**

172 I conclude by rejecting an argument advanced by the plaintiff. The plaintiff's argument turns on O 35 rr 1(2) and 2. Those rules provide as follows:

> **Failure to appear by both parties or one of them (O. 35, r. 1)**
>
> …
>
> (2) If, when the trial of an action is called on, one party does not appear, the Judge may proceed with the trial of the action or any counterclaim in the absence of that party, or may without trial give judgment or dismiss the action, or make any other order as he thinks fit.
>
> **Judgment, etc., given in absence of party may be set aside (O. 35, r. 2)**
>
> 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) Unless the Court otherwise orders, an application under this Rule must be made within 14 days after the date of the judgment or order.

173 The plaintiff's submission proceeds as follows. The Court of Appeal defined "trial" in *Spandeck Engineering (S) Pte Ltd v Yong Qiang Construction* [1999] 3 SLR(R) 338 ("*Spandeck Engineering*") at [17] to mean "a hearing, whether in open court or in chambers, in which the judge determines the matter in issue before him, whether it be an issue of fact or law". I entered the Judgment in chambers on 4 March 2020, having determined the issues of fact and law before me on the O 27 application. That hearing was therefore a "trial" at which the first defendant did not appear within the meaning of O 35 r 1(2). The proper course for the first defendant was to have applied to set the Judgment aside under O 35 r 2(1). However, O 35 r 2(2) requires any such application to be made within 14 days of the date of the judgment, *ie* on or before 18 March 2020.

The first defendant is therefore well out of time to apply to have the judgment set aside under the applicable provision of the Rules.

174 I do not accept the plaintiff's submission. The hearing on 4 March 2020 was not a trial, it was the hearing of an interlocutory application in chambers. The definition of "trial" which the Court of Appeal adopted in *Spandeck Engineering* was an extended definition specifically intended to advance the legislative purpose of s 34(2)(*a*) of the Supreme Court of Judicature Act (Cap 322, 1999 Ed) in circumstances where the ordinary meaning of the word would have had anomalous and incongruous results (at [9], [11] and [13]) which Parliament could not have intended (at [14]). The definition of "trial" which the Court of Appeal adopted in *Spandeck Engineering* is not the ordinary meaning of that word.

175 In *Spandeck Engineering* (at [2]), the Court of Appeal set out the ordinary meaning of "trial" taken from *Jowitt's Dictionary of English Law* (Sweet & Maxwell, 2nd Ed, 1977) at p 1805:

> Trial, the hearing of a cause, civil or criminal, before a judge who has jurisdiction over it, according to the laws of the land. A trial is the finding out by due examination the truth of the point in issue or question between the parties, whereupon judgment may be given (Co Litt 124b).
>
> A trial is that step in an action, prosecution or other judicial proceeding, by which the questions of fact in issue are decided.

176 This definition captures the essence of a trial. It is an exercise by which the court finds out the facts in issue in a dispute by examination, *ie* examination in chief and cross-examination of witnesses, as governed by ss 137 to 168 of the Evidence Act (Cap 97, 1997 Ed).

177 The plaintiff's claim against the Defendants was never called on for trial within the meaning of O 35 r 1(2). I entered the Judgment summarily (*ie* without a trial) on the Defendants' admissions of fact under O 27 r 3. Order 35 cannot conceivably apply to the Judgment or to any application to set it aside.

**Conclusion**

178 In my view, the proper course for the first defendant would have been to apply under O 3 r 4 for an extension of the one-month time limit stipulated in O 56 A r 6 to appeal against the Judgment rather than to apply to set the Judgment aside, whether under O 36 r 2 or any provision or power. I have therefore dismissed his application even though I am prepared to assume in his favour that he has an arguable defence on the merits to the plaintiff's claim.

179 It may appear that my decision elevates form over substance and penalises the first defendant simply for proceeding under the wrong provision of the Rules in bringing this application. However, for the following reasons, I do not accept that characterisation.

180 First, an application to extend time to appeal to the Appellate Division *after* the one month time limit for filing a notice of appeal stipulated by O 56A r 6 has expired can only be made to the Appellate Division under O 3 r 4, and can no longer be made to the General Division under O 56A r 20 (see *Lioncity Construction Co Pte Ltd v JFC Builders Pte Ltd* [2015] 3 SLR 141 at [32]; *Mah Kiat Seng v AG* [2020] 3 SLR 918 at [44]). The application which the first defendant ought to have made to initiate the process for dissolving the judgment should have been brought in an entirely different court: the Appellate Division. The first defendant's failure to make that application is not, therefore, an "irregularity" within the meaning of O 2 r 1(1), which I can cure under O 2 r

1(2), even if the conditions precedent for the exercise of that power set out in O 2 r 2(1) were satisfied.

181 Second, even if I had the power to extend time for the first defendant to appeal against the Judgment, as a judge of the General Division, I would not have exercised that power in favour of the first defendant for the very same reasons I have given for finding that the first defendant's conduct would not warrant the exercise of any inherent power I may have to set aside the Judgment. For the reasons I have given, the procedural chronology of this action shows that the first defendant's attempt to challenge the Judgment is an abuse of the process of the court and results from his deliberate decision not to defend this action. His application would remain an abuse of the process regardless of the provision of the Rules which the first defendant chose to rest it on.

182 To put it simply, not only has the first defendant adopted the wrong procedure to dissolve the Judgment, he has also proceeded before the wrong court.

183 For all these reasons, I have dismissed with costs the first defendant's application to set aside the Judgment.

Vinodh Coomaraswamy
Judge of the High Court

Mark Seah, Alexander Choo and Philip Teh (Dentons Rodyk & Davidson LLP) for the plaintiff;
Nicholas Jeyaraj s/o Narayanan (Nicholas & Tan Partnership LLP) for the first defendant;
The second defendant, third defendant, fourth defendant, fifth defendant and sixth defendant absent and unrepresented.