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

[2023] SGHCR 8

Originating Claim No 499 of 2022 (Summons No 795 of 2023)

Between

The Management Corporation
- Strata Title Plan No. 4572

… *Claimant*

And

(1) Kingsford Development Pte Ltd
(2) Xinyuan Construction Pte Ltd
(3) Cui Zhengfeng
(4) ADF Waterproof Pte Ltd

… *Defendants*

GROUNDS OF DECISION

[Civil Procedure — Judgments and orders — Judgment for a defendant's failure to file a notice of intention to contest or not contest — Setting aside]
[Building And Construction Law — Building and construction related contracts — Collateral warranties]

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Management Corporation Strata Title Plan No 4572
v
Kingsford Development Pte Ltd and others

[2023] SGHCR 8

General Division of the High Court — Originating Claim No 499 of 2022
(Summons No 795 of 2023)
AR Desmond Chong
3, 10, 29 May, 1, 7 June 2023

30 June 2023

AR Desmond Chong:

Introduction

1 The claimant ("C") was the management corporation of a condominium development located in Hillview Rise (the "Development"). C brought an action in Originating Claim No 499 of 2023 ("OC 499") to claim damages from the Development's developer and contractors for alleged defects in the Development. The present application was brought by the fourth defendant in OC 499, ADF Waterproof Pte Ltd ("D4"), to set aside a judgment (dated 3 February 2023) that was entered in C's favour due to D4's failure to file a notice of intention to contest or not contest the originating claim within the stipulated deadline under the Rules of Court 2021 ("ROC 2021"). The requirement under the ROC 2021 for a defendant to file a notice of intention to contest or not contest is equivalent to the requirement under the revoked Rules of Court

(Cap 322, R 5, 2014 Rev Ed) ("ROC 2014") for a defendant to enter an appearance. Under the ROC 2014, the judgment sought to be set aside in this case would have been referred to as a "default judgment", as judgment was entered in default of the defendant's entry of appearance. As the parties also adopted this term to refer to the judgment at issue in this case, I shall refer to the judgment as the "Default Judgment" for convenience.

2 It is well established that the court's approach to determine if a default judgment should be set aside depends on whether the default judgment was "regular" or "irregular" or, to be more precise, whether the default judgment was "regularly" or "irregularly" obtained. The test for irregularity has been settled since the Court of Appeal's decision in *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR(R) 907 ("*Mercurine*"): a default judgment was irregularly obtained when the claimant had breached procedural rules and entered the default judgment when it was not entitled to do so (*Mercurine* at [43]). However, there appeared to be some uncertainty over the *nature and extent* of procedural breach required to render a default judgment to be "irregularly" obtained. This case presented the court with the opportunity to consider this question.

3 After considering the parties' submissions, I granted D4's application to set aside the Default Judgment, save that I also ordered D4 to provide security in the sum of S$80,000 by way of a solicitor's undertaking. I provided my brief reasons orally at the hearing, and I now set out the full grounds of my decision.

Parties and background facts

4 C was the Management Corporation - Strata Title Plan No. 4572 of the Development. The first defendant, Kingsford Development Pte Ltd ("D1"), was the developer of the Development. The second defendant, Xinyuan

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Construction Pte Ltd ("D2"), was a company that was in the business of building construction. The third defendant, Mr Cui Zhengfeng ("D3"), was the common director and shareholder of D1, D2, and Kingsford Construction Pte Ltd (the "Contractor"), which was the main contractor of the Development. D4, the applicant in the present application, was a Singapore-incorporated company that was in the business of waterproofing installation. As this application did not concern D1 to D3, they did not appear at the hearings before me for this application.

5 The background facts as pleaded by C were as follows. In 2017, the Contractor provided various warranties to D1 for the construction of the Development. These warranties included an "Indemnity and Warranty for Aluminium Windows and Doors" ("Aluminium Windows Warranty") and two other warranties related to waterproofing installation (collectively, the "Waterproofing Warranties"): (a) an "Indemnity and Warranty for Waterproofing/Watertightness of Substructure" and (b) an "Indemnity and Warranty for Waterproofing/Watertightness of Toilet, Kitchen, Balcony, Yard Floors Works and Roofs". D4 was a party to and was defined as the "Specialist" under the Waterproofing Warranties.[1] I shall refer to the Aluminium Windows Warranty and the Waterproofing Warranties collectively as the "Project Warranties".

6 The Contractor was struck off from the register of companies on or around 10 December 2021. Subsequently, D2 "agreed to take over" all the terms and conditions under the Project Warranties, such that D2 became the main

[1] Statement of claim dated 30 December 2022 at [5] and [7]; see Melissa Ooi Gaik Ming's affidavit dated 5 April 2023, pp 35 and 40.

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contractor of the Development. D1 assigned its present and future rights, title, interest and benefits in the Project Warranties to C.[2]

7 OC 499 was brought by C against the defendants for breach of contract and negligence for alleged defects in the building and construction of the Development. The alleged defects were listed in Annex B of the statement of claim. C served the originating claim on D4 on 16 January 2023 at 3.35pm by leaving a copy of the originating claim (with the statement of claim) at D4's registered address at Innovation Place. Consequently, the deadline to file a notice of intention to contest or not contest under O 6 r 6(1) of the ROC 2021 was 14 days from 16 January 2023, that is, by 30 January 2023. D4 failed to do so. The other defendants filed their notice of intention to contest on 27 January 2023. On 3 February 2023, C applied and obtained the Default Judgment against D4. On 22 February 2023, the parties appeared before a Senior Assistant Registrar ("SAR") at a Case Conference. The learned SAR directed that any application by D4 to set aside the Default Judgment must be filed by 22 March 2023. D4 duly did so, and the present application was filed on 22 March 2023.

Applicable legal principles

8 The applicable legal principles governing the setting aside of a judgment entered due to a defendant's failure to file a notice of intention to contest or not to contest under the ROC 2021 are the same as those under the ROC 2014, and neither party contended otherwise. There is no indication in either the *Report of the Civil Justice Commission* (2017) (Chairperson: Justice Tay Yong Kwang) ("CJC Report") or the text of the ROC 2021 that different principles apply under the ROC 2021. In *Zhou Wenjing v Shun Heng Credit Pte Ltd* [2022] SGHC 313

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2 Statement of claim dated 30 December 2022 at [7].

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at [53] to [56], Goh Yihan JC also applied the same principles under the ROC 2014 to a case governed under the ROC 2021.

First stage: Test to determine if a default judgment was regularly or irregularly obtained

9 As aforementioned in the introduction at [2] above, the legal framework governing the determination of whether a default judgment should be set aside depends on whether the default judgment was "regularly" or "irregularly" obtained. These principles were laid down by the Court of Appeal in *Mercurine*, as follows.

> (a) A default judgment would have been regularly obtained if it was entered due to a *defendant's* breach of procedural rules (such as a failure to file a notice of intention to contest or not contest within 14 days after the statement of claim was served on the defendant under O 6 r 6(1) of the ROC 2021, or a failure to file a defence within 21 days after the statement of claim was served on the defendant under O 6 r 7(1) of the ROC 2021) (see *Mercurine* at [43]).
>
> (b) On the other hand, a default judgment would have been irregularly obtained if, in addition to the defendant's non-compliance with procedural rules, the claimant itself had breached procedural rules and entered a default judgment when it was not entitled to do so. A judgment may have been irregularly obtained not only because of the claimant's intentional failure to comply with procedural rules, but also because of clerical or accidental mistakes made by the claimant (*Mercurine* at [43]).

10 The foregoing principles showed that, while the caselaw often drew the distinction between "*regular* and *irregular* default judgments" [emphasis in

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original] (see *Mercurine* at [43]), the focus of the enquiry was not on whether the *default judgment itself* was "regular" or not. Instead, to be precise, the distinction was between whether the default judgment was regularly or irregularly *obtained* (see *Mercurine* at [98], where the Court of Appeal stated "… Where the default judgment has been *regularly* obtained … In contrast, where it is alleged that the default judgment was *irregularly* obtained …" [emphasis in original]; see also *U Myo Nyunt (alias Michael Nyunt) v First Property Holdings Pte Ltd* [2021] 2 SLR 816 ("*U Myo Nyunt*") at [60], where the Court of Appeal stated that "Judgments falling under O 13 of the ROC [2014] can be classified broadly, into two types: those *entered regularly*, and those *entered irregularly* …" [emphasis added]).

Second stage: Tests for setting aside regular and irregular judgments

11 The test for setting aside a default judgment that was regularly obtained is whether the defendant could establish a *prima facie* defence in the sense of showing that there are triable or arguable issues. If so, the default judgment should be set aside. This test is not stricter than that for obtaining permission to defend in summary judgment applications (*Mercurine* at [60]).

12 On the other hand, the starting position for setting aside a default judgment that was irregularly obtained is that it should be set aside as of right. This is known as the *ex debito justitiae* rule. However, this starting position may be departed from. The test is whether there was such an egregious breach of the rules of procedural justice to warrant setting aside a default judgment that was irregularly obtained as of right (*Mercurine* at [74] to [76] and [96]). Examples of such egregious breaches of procedural justice include situations where the default judgment was entered prematurely or where the defendant had no notice of the proceedings against it (*Mercurine* at [91]). The relevant factors to

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consider if a default judgment that was irregularly obtained should be set aside as of right include the following (*Mercurine* at [76]):

(a) the nature of the irregularity, in particular, whether it consists of entering a default judgment prematurely or failing to give the defendant proper notice of the proceedings;

(b) whether the defendant took a fresh step in the proceedings after becoming aware of the default judgment;

(c) whether there was any undue delay by the defendant in filing its setting aside application*;* and

(d) whether a claimant's breach of procedural rules was committed in bad faith.

13 The court has an unfettered discretion to decide whether a default judgment that was irregularly obtained should be set aside as of right. In exercising this discretion, the court may take into account the following non-exhaustive factors (*Mercurine* at [96]):

(a) the blameworthiness of the respective parties;

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

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

14 In addition, for both default judgments that had been regularly and irregularly obtained, the defendant's delay in bringing the setting aside application is a factor to be considered to determine if the default judgment

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should be set aside. For instance, in *U Myo Nyunt* at [89] to [105], the Court of Appeal found that the 3.5-year delay in applying to set aside the default judgment was substantial and deliberate, and the defendant had raised no more than an arguable case at best. Therefore, the Court of Appeal declined to set aside the default judgment.

Burden of proof

15 As for the burden of proof, for default judgments that were regularly obtained, the legal burden rests on the defendant to show that its defence raises triable issues so that, notwithstanding its default which resulted in judgment being properly entered against it, the court should exercise its discretion to deprive the claimant of its rights under the default judgment that was regularly obtained (*Mercurine* at [98]).

16 On the other hand, for default judgments that were irregularly obtained, the defendant only needs to establish the irregularity, whether factual or legal. Once the defendant discharges this burden and the court is of the view that the default judgment was irregularly obtained, the legal burden falls on the claimant to show why the judgment should not be set aside (*Mercurine* at [98]).

17 Where a default judgment that was irregularly obtained is not set aside as of right, the court has to consider whether to nonetheless set aside the default judgment on some other basis. In this regard, one of the most crucial factors is the merits of the defence. Should the court find that the defendant is "bound to lose" if the default judgment was set aside and the matter re-litigated, the court should ordinarily uphold the default judgment, subject to any variation which the court deems fit to make and/or any terms which it deems fit to impose (*Mercurine* at [92] to [93], [96]). The test of whether a defendant is "bound to lose" if a default judgment that had been irregularly obtained was set aside is

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not the same as the test for determining whether summary judgment should be entered (which is whether the defendant could show triable issues) (*Mercurine* at [90]).

Conditions for setting aside a default judgment

18 When setting aside a default judgment, the court has the discretion to impose conditions, such as an order that the defendant provide security for the claimant's claim when this would be just (as when the defendant's veracity was in doubt and his defence suspect) (see *IBM Singapore Pte Ltd v Beans Group Pte Ltd* [2012] 1 SLR 910 ("*IBM*") at [14] to [16]). Under the ROC 2014, such an order was known as an order for conditional leave to defend. In the context of summary judgment, the Court of Appeal held in *Akfel Commodities Turkey Holding Anonim Sirketi v Townsend, Adam* [2019] 2 SLR 412 ("*Akfel*") at [51] that the grant of conditional leave is reserved to cases where the defendant's evidence has not reached the level of showing a reasonable probability of a *bona fide* defence, a fair case for defence, reasonable grounds for setting up a defence, or a fair probability of a *bona fide* defence. These terms are preferred to the old terminology used in the caselaw to describe the circumstances that warrant an order for conditional leave to defend, such as "a real doubt about the defendant's good faith", or a defence that was "shadowy", a "sham", "suspicious", or "hardly of substance" (*Akfel* at [31]). These principles were equally applicable here (see *IBM* at [15]).

Parties' submissions

19 I shall first outline the parties' submissions broadly. D4's submission was that the Default Judgment was irregularly obtained and should be set aside as of right. Furthermore, D4 submitted that C was unable to show that D4 was bound to lose. Alternatively, if the court found that the Default Judgment was

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regularly obtained, D4 submitted that the Default Judgment should be set aside because D4 had a *prima facie* defence that raised triable or arguable issues.

20 C submitted that the Default Judgment was regularly obtained and it should not be set aside as D4 had not shown any triable issues. In C's first set of written submissions, C did not address the issue of whether the Default Judgment was irregularly obtained and, if so, whether the Default Judgment should be set aside. This was because D4 did not state on affidavit that the Default Judgment was irregularly obtained. C's counsel orally submitted before me that, *if* the Default Judgment was irregularly obtained, this application would be filed out of time, as O 3 r 2(10) of the ROC 2021 states that "[a]n application under [O 3 r 2(8)]" to set aside a judgment which was obtained without complying with the ROC 2021 "must be taken out *within 14 days* after the date the applicant knows or should have known that any of the grounds in that paragraph exists" [emphasis added]. Consequently, I granted the parties permission to file further submissions to address the questions of whether the Default Judgment should be set aside on the basis that it was irregularly obtained and, if the Default Judgment was irregularly obtained, whether the present application was filed out of time.

21 Parties also did not address the issue of conditional leave to defend in their original written submissions, even as an alternative ground. As such, I gave the parties an opportunity to file further written submissions to address this point. At the hearing before me, C's counsel submitted that, if conditional leave to defend were granted, security of $3 million should be provided by D4. This sum was *not* stated in C's pleadings. Instead, according to C's counsel, the sum of $3 million was stated as the estimated amount in dispute in the case details on eLitigation. On the other hand, D4 submitted that, if conditional leave to defend should be granted, only security of $10,000 should be provided by it

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because C had a 10-year warranty under the Waterproofing Warranties which ran until 2 January 2027. Thus, C's interests were preserved whether or not D4 provided any security as a condition for the setting aside of the Default Judgment. D4 did not submit that it would not have the financial means to provide security above $10,000. Alternatively, D4 submitted that the quantum of $3 million was too high, and that its liability, if any, should be limited to the scope of the contracts which it had entered into. In this regard, D4 submitted that the total value of D4's works amounted to $394,545.

Issues to be determined

22 The parties' submissions raised the following issues for determination:

(a) First, was the Default Judgment regularly or irregularly obtained?

(b) Second, the 14-day timeline under O 3 r 2(10) of the ROC 2021 only applied to applications to set aside a default judgment which was obtained without complying with the ROC 2021. Therefore, O 3 r 2(10) would not apply if the Default Judgment was regularly obtained. As such, *if* the Default Judgment was irregularly obtained, was the present application filed out of time?

(c) Third, if the Default Judgment was not filed out of time, should the Default Judgment be set aside and, if so, on what basis?

23 I considered each issue in turn.

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Was the Default Judgment regularly obtained?

Parties' submissions

24 I first turned to the issue of whether the Default Judgment was regularly obtained. D4's submission was that the Default Judgment was irregularly obtained because C breached O 6 r 5(1) of the ROC 2021, which provides that "[a]n originating claim must be in Form 8" of the Supreme Court Practice Directions 2021 ("SupCt PD 2021"). Form 8 prescribes the standard form for an originating claim. In particular, a note in Form 8 provides that:

> …
>
> Notes:
>
> 1. This originating claim must be served within 3 months after the date of issue, unless renewed by order of the Court. *A notice of intention to contest or not contest an originating claim in Form 10 is to be attached to this originating claim when it is served.*
>
> …
>
> [emphasis added]

25 Form 10 of the SupCt PD 2021 prescribes the standard form for a notice of intention to contest or not contest. D4 submitted that the Default Judgment was irregularly obtained because a notice of intention to contest or not contest in Form 10 was not attached to the originating claim when it was served on D4.

26 Alternatively, D4 submitted that the Default Judgment was irregularly obtained because the originating claim was not served within 14 days after the originating claim was issued, as required under O 6 r 5(6) of the ROC 2021. As the originating claim was issued on 30 December 2022, D4 submitted that it had to be served by 13 January 2023, but D4 only received the originating claim on 16 January 2023.

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27 C did not dispute that it did not attach a notice of intention to contest or not contest in Form 10 to the originating claim when it was served on D4. C's submission was that it did not breach O 6 r 5(1), as the originating claim was in Form 8, and the note in Form 8 for a notice of intention to contest or not contest to be attached to the originating claim when served (as extracted at [24] above) was not a requirement under the ROC 2021. C further submitted that there was no substantive procedural unfairness occasioned in this case. As for O 6 r 5(6), C submitted that it did not breach this provision, as reasonable steps to serve the originating claim on D4 was made within 14 days after the originating claim was issued. In any event, C highlighted that D4 did not state on affidavit that it was seeking to set aside the Default Judgment on the basis that it was irregularly obtained.

Did D4 have to state the irregularity on affidavit?

28 I turn to briefly consider C's submission that D4 should have stated in its affidavit filed in support of this application that it was seeking to set aside the Default Judgment on the basis that it was irregularly obtained. On this issue, D4 submitted that the ROC 2021 and the SupCt PD 2021 did not provide for this requirement. D4 also submitted that the High Court's decision in *Zulkifli Baharudin v Koh Lam Son* [1999] 2 SLR(R) 369 ("*Zulkifli*") at [11] holding otherwise was inapplicable to the ROC 2021, as *Zulkifli* concerned O 2 r 2(2) of the ROC 2014 (which stated that "[a]n application [to set aside any judgment for irregularity] may be made by summons and the grounds of objection must be stated in the summons"), but O 2 r 2(2) is not present in the ROC 2021.

29 In my view, D4's submission missed the point, as it was trite that it was for a party seeking to rely on a factual ground to assert that ground on affidavit, because an affidavit is "a statement of evidence" (O 15 r 18, ROC 2021). The

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question of whether a default judgment was irregularly obtained was a question of part fact and part law, as the fundamental underlying question was whether there was a procedural breach *which amounted* to the default judgment being irregularly obtained.

30 It is thus for a defendant to specify whether it is applying to set aside a default judgment on the basis that it was regularly or irregularly obtained, and, if the latter, the specific procedural breaches being relied upon by the defendant. This is important for at least two principal reasons: it would (a) ensure that the claimant would be afforded the opportunity to respond in its response affidavit to the specific procedural breaches raised by the defendant, and (b) put the claimant on notice that, if the court agreed with the defendant that the default judgment was irregularly obtained, the legal burden would be *on the claimant* to show why the default judgment should not be set aside, including that the defendant was bound to lose (see [16] and [17] above). If the claimant did not know that the defendant was applying to set aside the default judgment on the basis that it was irregularly obtained, the legal burden would be *on the defendant* to show that there were triable or arguable issues (see [11] above).

31 Nevertheless, in this case, D4 did minimally highlight the two specific grounds under O 6 r 5(1) and O 6 r 5(6) in its affidavit.[3] What D4's affidavit lacked was an express statement that the Default Judgment was irregularly obtained. Consequently, as aforementioned at [20] above, I had asked the parties' counsel if they intended to file further submissions and/or affidavits to address this point. The parties sought permission to file further submissions on this issue. As such, I granted the parties an opportunity to file further submissions on whether the Default Judgment was irregularly obtained and, if

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3 See Delon Soh's affidavit dated 20 March 2023 at [35(a)] and [35(b)].

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so, whether it should be set aside. As C was provided an opportunity to fully address this point, I proceeded to analyse whether the Default Judgment was irregularly obtained. In future cases, applicants seeking to set aside a default judgment should state *on affidavit* whether it is applying to do so on the basis that the default judgment was regularly or irregularly obtained, and, if the latter, the specific procedural breaches being relied upon by the defendant.

O 6 r 5(1)

32 I now turn to consider the parties submissions on O 6 r 5(1) of the ROC 2021. In my judgment, there was procedural non-compliance by C which rendered the Default Judgment to have been irregularly obtained.

When does non-compliance with Form 8 constitute an irregularity?

33 In this regard, as aforementioned at [27] above, C had submitted that the test for irregularity is whether there was substantive procedural unfairness caused to D4. In my view, it was clear from the Court of Appeal's judgment in *Mercurine* that, to determine if a default judgment had been irregularly obtained, the test is to consider if the claimant *had breached a procedural rule* in obtaining the default judgment. The question of whether there was substantive procedural unfairness caused to the defendant comes at the second stage of the analysis when considering if the irregularly obtained default judgment should be set aside as of right. This is clear from the following parts of the judgment in *Mercurine*.

> (a) First, the Court of Appeal held in *Mercurine* that a default judgment that was irregularly obtained is "where, quite apart from the defendant's non-compliance with procedural rules, *the plaintiff itself breaches procedural rules* and enters a default judgment *when it is not*

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in fact entitled to do so" [emphasis added] (*Mercurine* at [43]). There are two key points from this holding: the test for irregularity is whether the claimant (i) had breached a procedural rule (ii) in obtaining a default judgment "when it was not entitled to do so". The latter phrase is critical as it shows that not *any* procedural breach by the claimant would result in an irregularity. Instead, the procedural rule that has been breached by the claimant has to be one that was *relevant* to the entry of the default judgment. In the context of a default judgment entered for a defendant's failure to file a notice of intention to contest or not contest, some examples of such relevant procedural rules would include (i) the rules on the form and service of an originating claim under O 6 r 5 of the ROC 2021; and (ii) the rules under O 6 rr 6(5)–6(7) of the ROC 2021 concerning when and how the claimant may apply for the default judgment.

(b) Second, the Court of Appeal held in *Mercurine* at [43] that "a judgment may be irregular not only because of the plaintiff's intentional failure to comply with procedural rules, but also because of *clerical or accidental mistakes made by the plaintiff*" [emphasis added]. This clearly indicates that substantive procedural fairness is *not* the yardstick or test to determine if a default judgment was irregularly obtained. Rather, a mere procedural breach would constitute an irregularity in and of itself. Similarly, Professor Jeffrey Pinsler SC states that "[a] judgment is regular when there has been *full compliance* with the rules so that there can be no objection on a procedural basis" [emphasis added] (Jeffrey Pinsler SC, *Singapore Civil Practice, Volume 1* (LexisNexis, 2022) at para 11-13). Therefore, the test for irregularity is not whether there was substantive procedural unfairness occasioned to the defendant in the sense that the defendant was not given proper and fair notice of the

action against it. This analysis comes at the next stage when determining if the irregularly obtained default judgment should be set aside as of right. This leads to the next point.

(c) Third, in *Mercurine*, the Court of Appeal was careful to distinguish between the stages of (i) first determining whether the default judgment was irregularly obtained and (ii) then determining whether the default judgment that had been irregularly obtained should be set aside as of right. The key factor at the second stage is whether there was egregious procedural injustice (see [12] above). This makes it clear that any determination of the existence of substantive procedural unfairness should be done at the second stage when determining if the default judgment should be set aside as of right, and not at the first stage when determining if the default judgment was irregularly obtained. Otherwise, the two stages of the analysis would be duplicative. Indeed, the Court of Appeal in *Mercurine* did not confine the scope of irregularity to situations where there had been substantive or egregious procedural injustice (such as where a claimant had entered default judgment prematurely). Instead, the Court of Appeal phrased the test more broadly (as outlined at [33(a)] and [33(b)] above). This is also Professor Jeffrey Pinsler SC's interpretation of the Court of Appeal's holding in *Mercurine* (see [33(b)] above).

34 Therefore, the first question was whether O 6 r 5(1) was relevant to the entry of the Default Judgment, such that the alleged breach of O 6 r 5(1) may constitute an irregularity. In my view, as I have mentioned at [33(a)] above, O 6 r 5(1) was relevant to the entry of the Default Judgment. The Default Judgment was entered under O 6 r 6(5) of the ROC 2021 as D4 failed to file a notice of intention to contest or not contest within 14 days after the statement of

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claim was served on D4. This 14-day timeline is found in O 6 r 6(1), which states that "[a] defendant *who is served an originating claim* in Singapore must file and serve a notice of intention to contest or not contest within 14 days after the statement of claim is served on the defendant" [emphasis added]. Therefore, the Default judgment was entered *following the service of the originating claim* on D4. As O 6 r 5(1) is a rule on the form an originating claim must take, it is clear that O 6 r 5(1) is relevant to the entry of the Default Judgment, and the alleged breach of this procedural rule may constitute an irregularity.

35 The next question was whether O 6 r 5(1) was breached in this case. Specifically, did it constitute a breach of O 6 r 5(1) when C failed to comply with the requirement in Form 8 to attach a notice of intention to contest or not contest in Form 10 to the originating claim when it was served on D4? This requirement was a new requirement that was not present in the ROC 2014 (see O 6 r 1(1) of the ROC 2014 and Form 2 in Appendix A of the ROC 2014).

36 In most cases, it would be clear whether a claimant had committed a procedural breach. For instance, it would be clear if a claimant had obtained a default judgment prematurely before the 14-day timeline for the defendant to file a notice of intention to contest or not contest under O 6 r 6(1). However, in this case, the *nature and extent* of procedural breach required to render the Default Judgment to be irregularly obtained was less straightforward. This was because O 6 r 5(1) of the ROC 2021 required the originating claim to be "in Form 8", but it was unclear when an originating claim could be said to *not* be "in Form 8". For instance, would a minor typographical error in the originating claim that deviated from Form 8, or a failure to include a few paragraphs from Form 8 in the originating claim, constitute breaches of O 6 r 5(1)?

37 When considering if an originating claim is "in Form 8", it is important to consider *what* Form 8 requires, and the *purpose* behind those requirements under Form 8. Form 8 prescribes the standard form of the originating claim as follows:

> 8.
>
> O. 6, r. 5(1)
>
> ORIGINATING CLAIM
>
> IN THE GENERAL DIVISION OF THE HIGH COURT / STATE COURTS OF THE REPUBLIC OF SINGAPORE
>
> Originating Claim No. of 20 .
>
> Filed: [date]
>
> (Renewed for service for ___ months from [date] by an order of Court dated [date])
>
> Between
>
> [Claimant's name and identification number]
>
> Claimant(s)
>
> And
>
> [Defendant's name and identification number]
>
> Defendant(s)
>
> To: The defendant [name]
>
> 1. The claimant of [address] has commenced an action against you in the [General Division of the High Court/State Courts] of Singapore.
>
> 2. The claim(s) by the claimant is set out in the statement of claim attached (or briefly in this document).
>
> 3. You may do the following:
>
> (a) offer to settle the claim(s) or negotiate with the claimant; and
>
> (b) in any event, if you believe you have a defence, you must:
>
> (i) consult a lawyer unless you want to act in person;

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(ii) file and serve a notice of intention to contest or not contest the originating claim ***that is attached to this document*** within [14 days/21 days] of being served the statement of claim;

(iii) file a defence within [21 days/5 weeks] of being served the statement of claim.

4. If you do not file your notice within the time stated in paragraph 3, the Court may give judgment to the claimant.

5. If your defence is not filed within the time stated in paragraph 3, the Court may give judgment to the claimant.

6. Parties are to attend a case conference to take directions from the Court on the date and time shown above.

Solicitor for the claimant

[Name, address, email address and telephone number of solicitor]

Notes:

1. This originating claim must be served within 3 months after the date of issue, unless renewed by order of the Court. ***A notice of intention to contest or not contest an originating claim in Form 10 is to be attached to this originating claim when it is served***.

2. Where the claimant sues or a defendant is sued in a representative capacity, the originating claim must be endorsed with a statement of the capacity in which the claimant sues or a defendant is sued, as the case may be.

3. If a statement of claim is not attached, to set out a concise statement of the nature of the claim made or the relief or remedy required.

(Seal of the Court and signature of the Registrar)

[emphasis added in bold italics]

38 It is clear from the foregoing that the core objective and substance of Form 8 – and, in turn, O 6 r 5(1) of the ROC 2021 – is to:

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(a) give the defendant notice that the claimant has commenced an action against the defendant (see paragraphs 1 and 2 of Form 8, and paragraph 3 of the Note in Form 8);

(b) set out the key steps that the defendant has to take to contest the claim (such as the timelines to file a notice of intention to contest or not contest and a defence) (see paragraphs 3 and 6 of Form 8); and

(c) set out the consequences of a failure to take those steps (that is, that the court may give judgment to the claimant) (see paragraphs 4 and 5 of Form 8).

39 Not every deviation from the requirements of Form 8 may cause an originating claim to be so defective as to amount to a breach of O 6 r 5(1). To analyse the issue in a *principled* manner, it is critical to consider if the form of the originating claim that was served on D4 failed to achieve the core goal and substance of Form 8 (as outlined at [38] above). In this regard, before delving into the specific facts of this case, it would be helpful to consider the following range of hypothetical situations.

(a) First, at one end of the spectrum is where a claimant did not use Form 8 *at all* to draft the originating claim.

(b) Second, there might be an omission by the claimant to include a *material part* of Form 8 in the originating claim (as outlined at [38] above). One example could be a failure by the claimant to include paragraphs 3 to 6 of Form 8 to the originating claim that was served on the defendant. Another example could be a failure by the claimant to either attach a statement of claim to the originating claim or to set out a concise statement of the nature of the claim made or the relief or remedy

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required in the originating claim (as required by paragraph 2 and the Notes (at paragraph 3)).

(c) Third, there might be an omission by the claimant to include a *minor part* of Form 8 in the originating claim that is *not* material to the *substance* of Form 8 (as outlined at [38] above). One possible example is a failure by the claimant to include the header section of Form 8 to the originating claim.

(d) Fourth, there could be a *minor* typographical or editorial error that was not in compliance with Form 8, such as a misspelling of "originating claim" in the header section of the originating claim.

40 The foregoing shows the wide range of possible situations whereby a defendant might seek to claim that an originating claim was not in Form 8. I did not have to come to a firm view on whether any of the hypothetical examples at [39] above constitutes a procedural breach that amounts to an irregularity, since none of the examples applied squarely to the present facts. In my tentative view, the first two situations at [39(a)] and [39(b)] above *may* constitute a procedural breach of O 6 r 5(1) of the ROC 2021 that would render a default judgment to have been irregularly obtained. This is because those two situations would result in the originating claim being served on the defendant to be so defective that it would not have achieved the main purpose of Form 8. In such a situation, it may be artificial or unprincipled to find that the originating claim was "in Form 8".

41 On the other hand, the third and fourth situations at [39(c)] and [39(d)] above may *not* constitute a procedural breach of O 6 r 5(1) that would amount to an irregularity. This is because the originating claim served in those two situations would, notwithstanding the minor typographical or editorial error committed by the claimant, still have achieved the main purposes of Form 8 as

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outlined at [38] above. There may thus not be any breach of O 6 r 5(1). Nevertheless, as these hypothetical examples did not concern the present case, I need not reach any firm view on the matter. These hypothetical examples are nevertheless helpful to show that not every deviation from Form 8 may constitute a breach of O 6 r 5(1).

Present facts

42 I turn to the facts of the present case. In this case, it was undisputed that C had failed to attach a notice of intention to contest or not contest in Form 10 to the originating claim when it was served. However, paragraph 1 of the Notes section of Form 8 clearly stated that "[a] notice of intention to contest or not contest an originating claim in Form 10 is to be attached to this originating claim when it is served." Paragraph 3(b)(ii) of Form 8 also stated that, if the defendant believed that it had a defence, the defendant "must file and serve a notice of intention to contest or not contest the originating claim *that is attached to this document* …" [emphasis added].

43 The purpose of O 6 r 5(1) as specified at [38(b)] above sheds light on the reason why Form 8 requires a claimant to attach a notice of intention to contest or not contest to the originating claim when serving the latter on a defendant. This is because Form 8 itself *does not* explain *what* a notice of intention to contest or not contest is. To a non-legally trained person, the statement in Form 8 that the defendant must "file and serve a notice of intention to contest or not contest the originating claim" begs the question of *what* such a notice is. This explains why Form 8 expressly states that the defendant must "file and serve a notice of intention to contest or not contest the originating claim *that is attached to this [originating claim]* …" [emphasis added]. This would then turn the defendant to the attention of the attached notice of intention

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to contest or not contest, which has to be in the standard Form 10 (as stated in paragraph 1 of the Notes of Form 8 (and O 6 r 6(3) of the ROC 2021)). Form 10 states as follows:

> 10.
>
> O. 6, r. 6(3)
>
> O. 10, r. 4(1)
>
> NOTICE OF INTENTION TO CONTEST OR NOT CONTEST
>
> (Title as in action)
>
> To: The claimant [name]
>
> The defendant [name] intends:
>
> *(a) To contest your originating claim;
>
> *(b) Not to contest your originating claim;
>
> (If the defendant's intention to contest or non-contest is not in respect of all the claims, state the contested claims and those not contested).
>
> *Solicitor for the defendant*
>
> [Name, address, email address and telephone number of solicitor]
>
> Note:
>
> This notice must be filed and served within (a) 14 days after the statement of claim is served in Singapore on the defendant; or (b) 21 days after the statement of claim is served out of Singapore on the defendant.
>
> (*Use as appropriate)

44 Therefore, the reason why Form 8 requires Form 10 to be attached to the originating claim is so that (a) the terms of the attached Form 10 would show the defendant *what* a notice of intention to contest or not contest is, and (b) allow the defendant to be able to make copies of the notice of intention to contest or not contest to file and serve the latter within time, even without assistance from

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a lawyer. This makes complete sense when considering that one of the core purposes of the ROC 2021 is to "simplify rules, avoid outdated language without discarding established legal concepts" and "ensure fairness to all litigants" (see CJC Report at para 1 of the Chairman's introductory remarks).

45 Once the broader purpose of Form 8 (as set out at [38] above) was considered in conjunction with the purpose of Form 8's specific requirement to attach Form 10 to the originating claim when it was served (as set out at [44] above), it was evident that C's failure to attach the notice of intention to contest or not contest to the originating claim when it was served on D4 was not a minor editorial error. Rather, this procedural breach was akin to the second situation at [39(b)] above, because C's procedural breach caused the originating claim that was served on D4 to be sufficiently defective that it undermined one of the main purposes of Form 8 – and, in turn, *O 6 r 5(1)* – highlighted at [38(b)] above, which was that the originating claim served on D4 had to *clearly* set out the key steps that D4 had to do to contest the claim. Consequently, on the present facts, it would not be principled to find that the originating claim that was served on D4 was "in Form 8", as the originating claim lacked a material part of Form 8.

46 As such, I found that C had not complied with the requirement under O 6 r 5(1) of *the ROC 2021* for the originating claim to be in Form 8. Therefore, the failure to attach a notice of intention to contest or not contest was not mere non-compliance with Form 8 of the SupCt PD 2021, but with the requirements under *the ROC 2021*. Accordingly, I found that the Default Judgment was irregularly obtained.

47 In any event, I did not agree with C's submission that only breaches of the ROC 2021 could constitute an irregularity (see [27] above). While Practice

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Directions do not have the force of substantive law (see *Odex Pte Ltd v Pacific Internet Ltd* [2008] 3 SLR(R) 18 at [30]; see also *Deutsche Bank AG v Chang Tse Wen and others* [2010] SGHC 125 at [13]), O 3 r 2(4) of the ROC 2021 states that any non-compliance with not only the ROC 2021 but also "any practice directions" may entitle the court to disallow or reject the filing or use of the document, or dismiss, stay or set aside the proceedings and give the appropriate order even though the non-compliance could be compensated by costs, if the non-compliance is inconsistent with any of the Ideals of the ROC 2021 (outlined in O 3 r 1(2) of the ROC 2021) in a material way. This provision was not present in the ROC 2014. Therefore, O 3 r 2(4) of the ROC 2021 indicates that non-compliance with Practice Directions could amount to a procedural irregularity. Whether a breach of a Practice Direction amounts to an irregularity requires a fact-sensitive analysis on a case-by-case basis. Accordingly, I did not agree with C's submission that only breaches of the ROC 2021 could constitute an irregularity.

O 6 r 5(6)

48 For completeness, I briefly turned to D4's alternative submission that C had breached O 6 r 5(6) of the ROC 2021. I disagreed with D4 that it had shown that there was any breach of this provision in this case. O 6 r 5(6) states that:

> If the originating claim is to be served in Singapore, *reasonable steps to serve* on the defendant must be made as soon as possible and, in any event, within 14 days after the originating claim is issued. [emphasis added]

49 In other words, the requirement in O 6 r 5(6) is not for service to be effected within 14 days after the originating claim was issued. Rather, the requirement under O 6 r 5(6) is for "reasonable steps to serve" to be made within 14 days after the originating claim was issued. This is in addition to O 2 r 3(2) of the ROC 2021, which states that a claimant "has to take reasonable steps to

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serve the originating claim with a statement of claim … on a defendant expeditiously”.

50 The actual time period within which an originating claim must be served on a defendant is 3 months from the date of its issue. This is provided in O 6 r 3(1) of the ROC 2021, which clearly states that an originating claim is “valid for service for 3 months beginning with the date of its issue”. This is also stated in Form 8, as the first paragraph of the Notes in Form 8 states that an “originating claim must be served *within 3 months after the date of issue*, unless renewed by order of the Court” [emphasis added].

51 In this case, C had attested that reasonable steps were taken on 13 January 2023 to serve the originating claim on D4.[4] Though the detailed steps taken by C were not clearly explained in C’s affidavit, C’s counsel explained at the hearing before me that C’s process server was instructed to serve the originating claim on D4 on 13 January 2023, but the process server had only served the originating claim on D4 on 16 January 2023. This was why C’s letter enclosing the originating claim and the statement of claim was dated 13 January 2023.[5] The fact that the letter was indeed dated 13 January 2023 supported the claim by C’s counsel. As such, C had clearly taken reasonable steps to serve the originating claim on D4 by 13 January 2023. Therefore, there was no breach of O 6 r 5(6) of the ROC 2021.

Was the application filed out of time?

52 As I had found that the Default Judgment was irregularly obtained, I next turned to consider C’s submission that the present application was filed out

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4 See Melissa Ooi Gaik Ming’s affidavit dated 5 April 2023 at [39].

5 See Delon Soh’s affidavit dated 20 March 2023, p 127.

of time. The parties were agreed that O 3 r 2(8) of the ROC 2021 governed the procedure for applications to set aside default judgments that had been irregularly obtained. C submitted that, if the default judgment was irregularly obtained, this application was filed out of time because O 3 r 2(10) of the ROC 2021 states that an application to set aside anything which was done without compliance with the ROC 2021 "must be taken out *within 14 days* after the date the applicant *knows or should have known* that any of the grounds in [O 3 r 2(8)] exists" [emphasis added]. However, C did not specify the date when this 14-day timeline was due. On the other hand, D4 submitted that the 14-day timeline only started to run from the time D4 was advised by counsel, and C had not proven when the 14-day timeline started to run. In the alternative, D4 submitted that it should be granted an extension of time to file this application.

53 I disagreed with D4's submission that the 14-day timeline only started to run from the time it was advised by counsel. While D4's submission might seem intuitively tempting, it was illogical. If this submission were accepted, a party would *never* need to comply with *any* stipulated deadlines under the ROC 2021 or other written laws that were drafted on similar terms as O 3 r 2(10) *as long as that party was tardy in appointing, or did not appoint, counsel*. For instance, if D4 had taken *10 whole years* before seeking legal advice in this case, by D4's submission, D4 would *still be within time* to file its setting aside application under O 3 r 2(10), as long as D4 filed that application within 14 days after D4 appointed counsel. This would not make any sense.

54 Rather, when a party "should have known" that any of the grounds under O 3 r 2(8) exists is a fact-sensitive enquiry that requires a case-by-case analysis. It is a party's own decision as to whether he should seek legal advice, but this is not the decisive factor at all. If a party could not speak English and did not have any legal knowledge or experience, it would be for that party to take the

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initiative to seek advice as soon as possible, rather than to idly sit on the papers that had already been served on the party. In this case, D4 was served the originating claim on 16 January 2023, so the burden was on D4 (through its directors or employees) to read it or seek advice as to what next steps it had to take. The Default Judgment was filed on 3 February 2023 and service of the Default Judgment was effected on 8 February 2023. D4's counsel submitted that the Default Judgment only reached D4 one or two days later. Therefore, taking D4's case at its highest, D4 should have known that one of the grounds under O 3 r 2(8) existed by 10 February 2023, and it should have filed the present application by 24 February 2023.

55 Nevertheless, D4 submitted that, at the Case Conference on 22 February 2023, the learned SAR directed that D4 was to file its application to set aside the Default Judgment by 22 March 2023. D4 submitted that this direction "overrides" the 14-day timeline under O 3 r 2(10). The parties did not adduce any Notes of Evidence of the Case Conference, so it was unclear if D4 made the specific submission before the SAR that it was seeking an extension of time to file an application to set aside the Default Judgment on the basis that it was irregularly obtained, notwithstanding the 14-day timeline under O 3 r 2(10). Be that as it may, as there *was* a court direction that the present application may be filed by 22 March 2023, and this application was duly filed by that day, I agreed with D4 that the application was not filed out of time. Even if the application were filed out of time, I would have granted D4's alternative application for an extension of time pursuant to O 3 r 2(1) of the ROC 2021, since a one-month extension (from 24 February to 22 March 2023) was not unduly long.

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Should the judgment be set aside?

Should the judgment be set aside as of right?

56 I next turned to whether the Default Judgment should be set aside. While I had found that the Default Judgment was irregularly obtained, the analysis did not stop there. As aforementioned, while setting aside as of right remained the starting point where a default judgment was irregularly obtained, the court has an *unfettered discretion* to decide whether an irregularly obtained default judgment should be set aside as of right, and the overarching test is whether there were *egregious breaches of procedural justice* (see [12] and [13] above). Examples highlighted by the Court of Appeal in *Mercurine* at [96] where this might be the case include situations where the irregularity consists of the premature entry of a default judgment or a failure to give proper notice of the proceedings to the defendant. The common thread to these two examples is that the defendant was *unfairly deprived of an opportunity to defend its case*.

57 In this case, I found that C's failure to attach a notice of intention to contest or not contest to the originating claim did not amount to such an egregious breach of procedural justice. This was because this failure did not unfairly deprive D4 of an opportunity to file a notice of intention to contest to defend its case. In this regard, D4 attested that it was not legally advised or represented at the material time, and it thus did not know of the steps that it had to take after being served with the originating claim and statement of claim.[6]

58 However, I found this explanation to be without merit. Notwithstanding C's failure to attach a notice of intention to contest or not contest to the originating claim that was served on D4, paragraphs 3 and 4 of the originating

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[6] Delon Soh's affidavit dated 20 March 2023 at [28].

claim stated in plain English that D4 had to "file and serve a notice of intention to contest or not contest the originating claim ... within 14 days of being served the statement of claim" and that if D4 did "not file your notice within the time stated in paragraph 3, *the Court may give judgment to the claimant*" [emphasis added].

59 The director of D4, Mr Delon Soh ("Mr Soh"), stated on affidavit that he only understood Chinese.[7] However, this was no excuse, as it was for him to seek legal advice or to ask a colleague who understood English for assistance. D4's explanation was especially inexcusable in this case because D4 was a company. There was thus no basis for D4 to allege that it did not know the steps it had to take to contest the claim, even if D4 was not legally represented when it was served the originating claim. If D4 was uncertain, the burden was on D4 to seek legal advice expeditiously, as expressly stipulated in paragraph 3(b)(i) of the originating claim itself (see [37] above). As such, I found that there was no egregious breach of procedural justice in this case.

60 Consequently, by reference to the factors outlined at [12] and [13] above, it was clear that the Default Judgment should not be set aside as of right:

> (a) There was no egregious procedural injustice in this case, and the nature of the irregularity did not consist of (i) entering the Default Judgment prematurely; or (ii) failing to give D4 proper notice of the proceedings.
>
> (b) D4 did not take a fresh step in the proceedings after becoming aware of the Default Judgment.

[7] Delon Soh's affidavit dated 20 March 2023 at [20].

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(c) I next considered D4's delay in making the present application. In this regard, I had already explained that D4's reasons for the delay hold no merit. Nevertheless, as the length of delay (of 1.5 months) was not unduly long, I found this to be a neutral factor that neither leaned in favour of setting aside the Default Judgment nor against it.

(d) C's procedural breach was not committed in bad faith.

(e) Neither party was so blameworthy as to justify either setting aside the Default Judgment or allowing it to stand. C's procedural breach was minor, and D4's delay in bringing the present application was not unduly long.

(f) D4 had not admitted liability under the Default Judgment.

(g) D4 would be unduly prejudiced if the Default Judgment was allowed to stand, as C was seeking to claim damages for *all* the defects in the Development from D4.

61 As such, I declined to set aside the Default Judgment as of right.

Should the judgment be set aside on some other basis?

62 I next turned to the issue of whether the Default Judgment should be set aside on some other basis. A central factor is the merits of the defence (see [17] above). In this regard, C's claim in OC 499 brought against D4 was for breach of warranties and negligence. C pleaded that, under clause 1 of the Waterproofing Warranties, D4 provided a warranty that the Development would be free from any defects, including any shrinkage, seepage, or leakage in relation to the Development, for a period of 10 years from the date of completion of the Development (which was in 2017) and that, in the event of any defects

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appearing within this period, D4 would repair or make good the defects. C's claim was that D4 had failed to do so.

63 On the other hand, D4's counsel submitted in her written submissions that D4's defence was that (a) it was not in breach of the Waterproofing Warranties; (b) in any event, not all of the defects in Annex B of the statement of claim were within the scope of D4's contract or related to the Waterproofing Warranties; and, (c) "as with all construction disputes", D4 must be provided an opportunity to inspect the alleged defects before it could be determined whether the defects claimed were within the scope of the Waterproofing Warranties.

64 In my judgment, C had shown a *prima facie* claim. The text of the Waterproofing Warranties showed that the definition of defects was consistent with C's submissions: it was *not* limited to the contracts D4 entered or to waterproofing systems. Instead, the Waterproofing Warranties provided as follows:[8]

> (a) In the preamble, Kingsford Construction Pte Ltd was defined as the "Contractor", D4 was defined as the "Specialist", and D1 was defined as the "Employer". The "Works" were defined as the *"construct[ion], complet[ion] and maint[enance]"* of the Development [emphasis added]. The preamble then stated that "[t]he Contractor *and the Specialist* have agreed to *jointly and severally warrant* the Works and to jointly and severally indemnify the Employer, in relation to the Works in the manner hereinafter appearing." [emphasis added]. Therefore, the "Works" were *not* limited to waterproofing works, but

8 See Melissa Ooi Gaik Ming's affidavit dated 5 April 2023, pp 35, 36, 40 and 41.

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pertained to the entire construction, completion, and maintenance of the Development.

(b) Clause 1 then stated that:

> The Contractor and the Specialist jointly and severally warrant that the Works shall be free from any defect, deterioration, failure, lack of fitness, non-satisfaction of performance specifications or other requirements under the Contract or other faults in the Works including without prejudice to the generality of the foregoing any shrinkage, seepage or leakage if applicable in relation to the Works ('the Defects') .... [emphasis added]

65 Therefore, the text of the Waterproofing Warranties clearly provided *prima facie* support to C's pleaded claim.

66 On the other hand, the defence as characterised by D4's counsel was *not* what D4 *stated on affidavit*. D4's affidavit stated as follows:[9]

(a) Paragraph 34 of Mr Soh's affidavit (dated 20 March 2023) ("Mr Soh's Affidavit") identified the first main plank of D4's defence, which was that "not all the defects alleged in Annex B [of the statement of claim] fall within [D4's] scope of works", so "[D4] should not be held liable for these alleged defects".

(b) Paragraph 33 of Mr Soh's Affidavit identified the second main plank of D4's defence, which was that C had not discharged its burden of proof to prove that D4 caused the alleged defects.

67 Therefore, D4 was able to identify the broad thrust of its defence in its affidavit, including some defects which it said did not fall within the scope of

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[9] See Delon Soh's affidavit dated 20 March 2023 at [31] to [34].

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its works and, thus, did not fall within the Waterproofing Warranties. On this basis, and bearing in mind the high threshold that C had to show to prove that D4 was bound to lose, I accepted that D4 was not bound to lose.

68 However, both planks of D4's defence were caveated in Mr Soh's Affidavit:

(a) Paragraph 32 of Mr Soh's Affidavit stated "From a review of Annex B *and without having had an opportunity to inspect and investigate the alleged defects*, it *seems* there are alleged defects which do not fall within the scope of ADF's works and thus, ADF should not be liable for these defects. …" [emphasis added].

(b) Paragraph 33 of Mr Soh's Affidavit stated "More importantly, as explained above, an inspection needs to be conducted by ADF first *in order to determine if the alleged defects exist and whether the defects fall within ADF's scope of works*. The inspection will also allow ADF *to investigate the cause of the alleged defects*. *Without conducting an inspection, it cannot be concluded* that ADF is liable for the defects." [emphasis added].

69 Therefore, while D4 was able to identify the broad thrust of its defence on affidavit, D4's attested defence was tentative, uncertain, and brief. D4's defence, as attested on affidavit, was that *it did not yet know* whether (a) the alleged defects existed, (b) whether the defects, if they existed, were caused by D4, and (c) if the alleged defects fell within D4's scope of works. D4's defence was that an inspection needed to be conducted to determine if the alleged defects existed and whether D4 was liable for the defects because it caused the defects. As for D4's defence that the alleged defects did not fall within D4's scope of works, D4 also caveated that by stating that that "seem[ed]" to be the case and

that statement was made "*without having had an opportunity to inspect and investigate the alleged defects*". This was *barely* a defence. This showed that D4 itself was uncertain if it even had a defence and, if it did, what defence it was. To use the terminology in the caselaw, D4's defence, at this juncture, had not reached the level of showing a reasonable probability of a *bona fide* defence.

70 I was also unable to agree with D4's submission that its tentative defence was due to a lack of inspection at this stage, which D4's counsel submitted was required in "all construction disputes". This missed the point. A defence must be filed and served within 21 days after an originating claim is served (O 6 r 7(1), ROC 2021). The ROC 2021 *did not* provide an exception for disputes in the construction industry. As the originating claim was served on 16 January 2023, D4's defence was due to be filed and served by 6 February 2023. D4 was *already late* in filing a notice of intention to contest or not to contest. As C's counsel pointed out, D4 had ample time to conduct any inspections it needed. As D4's counsel confirmed before me, D4 had even conducted one inspection in June 2020. Therefore, D4's intention to conduct an inspection did not assist it. It was now long past not only the deadline to file a notice of intention to contest or not contest but also the deadline to file a defence. There was thus no reason why D4 was still unable to state *on affidavit* a clear and proper defence.

71 As such, contrary to D4's submission, whether or not it was standard practice for an inspection to be carried out during a construction dispute was a red-herring and beside the point. The point was that *a defence had to be filed* within 21 days after the originating claim was served under O 6 r 7(1) of the ROC 2021. This timeline ran by default and applied regardless of whether a defendant intended to conduct an inspection or not. Whether or not it was standard practice for an inspection to be carried out, it certainly was *not* standard practice to file a "tentative" defence.

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72 In addition, in an application to set aside a default judgment, the court has to assess the merits of the defence to determine whether the defendant is bound to lose. While the legal burden was on C to show this (since I had found that the Default Judgment was irregularly obtained), C had shown a *prima facie* case that D4 was bound to lose. Thus, the evidential burden shifted to D4 to show that it was not bound to lose. In these circumstances, bearing in mind that the deadline to file a defence had long passed, and D4 had to show in this application that it was not bound to lose, it simply did not inspire confidence that D4 was still unable to depose a firm defence on affidavit.

73 As such, I agreed with D4 that the Default Judgment should be set aside as D4 was not bound to lose. However, as D4 was unable to affirmatively or clearly state its defence relating to the existence of the defects and its liability on affidavit, I agreed with C's alternative submission that the overall impression was that some demonstration of commitment on the part of D4 to the claimed defence was called for. As such, I found that conditions should be imposed for setting aside the Default Judgment.

What conditions should be imposed?

74 I next turned to the question of the conditions that should be imposed in this case. The relevant principles may be distilled from the decisions of the High Court in *Millennium Commodity Trading Ltd v BS Tech Pte Ltd* [2017] SGHC 58 ("*Millenium*") and *Wee Cheng Swee Henry v Jo Baby Kartika Polim* [2015] 4 SLR 250 ("*Wee Cheng Swee Henry*"). The quantum of security should be determined with two factors in mind: first, doing justice to the claimant in light of the strength of its case and the uncertainties attached to the defendant's defence; and, second, doing justice to the defendant in light of his financial means (*Millenium* at [125]; *Wee Cheng Swee Henry* at [112]). In respect of the

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latter, the court should be guided by the following principles (see *Millenium* at [125]).

(a) It would be wrong in principle to impose a condition which the defendant would find *impossible*, as opposed to merely difficult, to comply with.

(b) The defendant bore the burden of showing that it would be impossible to comply with a condition with the court proposed to impose. This is a high burden (see *Wee Cheng Swee Henry* at [119]).

(c) In discharging that burden, the defendant has a duty to fully and frankly disclose his financial position to the court.

(d) In considering whether it is impossible for the defendant to comply with the condition, it is legitimate to have regard not just to the defendant's financial resources, but also to those who might reasonably be expected to extend financial assistance to the defendant in his hour of need.

75 As stated by the Court of Appeal in *Mohd Zain bin Abdullah v Chimbusco International Petroleum v Chimbusco International Petroleum (Singapore) Pte Ltd and another appeal* [2014] 2 SLR 446 at [39], the court ought to not to begin with any starting point in determining the amount of security to be provided, and should instead exercise its discretion flexibly to meet the needs of the case before it.

76 In this case, the parties' submissions on the conditions to be imposed have been set out at [21] above. Bearing in mind that damages against D4 had not been quantified in the claimant's statement of claim, and D4 was contesting

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the existence of the defects, I was of the view that security of $80,000 would strike the right balance. D4's counsel confirmed in writing that D4 was able to provide security in this amount by way of solicitor's undertaking, and that it did not need to file an affidavit of means to address this issue. Consequently, I ordered D4 to provide security in the sum of S$80,000 by way of a solicitor's undertaking.

Conclusion

77 In conclusion, I granted the present application to set aside the Default Judgment, save that D4 was to provide security in the sum of S$80,000 by way of a solicitor's undertaking. I thank the parties' counsel for their submissions.

Desmond Chong
Assistant Registrar

Lynette Chew Mei Lin and Leonard Chew Wei Chong (Holborn Law LLC) for the claimant;
First to third defendants absent;
Sunita Sonya Parhar (S. S. Parhar Law Corporation) for the fourth defendant.

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