IN THE APPELLATE DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC(A) 24

Appellate Division / Civil Appeal No 123 of 2021

Between

Rex Lam Paki

… *Appellant*

And

PNG Sustainable Development Program Ltd

… *Respondent*

GROUNDS OF DECISION

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

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Rex Lam Paki
v
PNG Sustainable Development Program Ltd

[2023] SGHC(A) 24

Appellate Division of the High Court — Civil Appeal No 123 of 2021
Kannan Ramesh JAD and Andre Maniam J
24 April 2023

4 July 2023

Andre Maniam J (delivering the judgment of the court):

Introduction

1 The appellant applied to set aside a judgment that had been entered against him on admissions of fact. The Judge who granted judgment held that the court did not have the power to set aside a judgment on admissions, because the Rules of Court did not expressly provide for this. The Judge further held that if the court had the power to set aside the judgment, he would not do so in this case. His grounds of decision are set out at *PNG Sustainable Development Program Ltd v Rex Lam Paki and others* [2022] SGHC 188 (the "GD").

2 We dismissed the appellant's appeal against that decision with costs to the respondent. We agreed with the appellant that the court did have the inherent power to set aside a judgment on admissions, but we agreed with the Judge that setting-aside was not warranted in this case.

Background

Parties

3 The appellant was formerly a director of the respondent company. In 2018, the respondent sued the appellant for breaches of fiduciary duties. In March 2019, the writ was served on the appellant. After proceedings in which service was disputed, on 26 November 2019 the appellant was directed to file his defence by 13 December 2019, but he did not do so.

4 While there are six named defendants to the action, only the appellant (who was the first defendant), the second defendant, and the fourth defendant (collectively, the "defendants") were central to the setting aside application. This was because the third, fifth and sixth defendants succeeded in having service of process set aside on grounds that the Singapore courts did not have personal jurisdiction over them: GD at [9].

Application for judgment in default of defence

5 On 20 December 2019, in HC/SUM 6374/2019 ("SUM 6374"), the respondent applied for leave to enter judgment against the appellant in default of defence. On the same basis, judgment was also sought against the second defendant (the appellant's wife) and the fourth defendant (a company of which the appellant's wife was the sole registered shareholder and director).

6 At the hearing of the application on 30 January 2020, the Judge indicated that he wished to be addressed on the merits of the claim, rather than simply to give judgment in default of defence. He directed the respondent to apply under O 27 of the Rules of Court (Rev Ed 2014) ("ROC 2014") for judgment on admissions of fact.

Judgment on admissions

7 The respondent duly filed HC/SUM 772/2020 ("SUM 772") for judgment on admissions, those admissions being deemed admissions arising from the defendants not having filed a defence.

8 SUM 772 was first heard on 28 February 2020. At the hearing, PRP Law LLP ("PRP") represented the defendants. An issue of potential conflict of interests (in representing multiple defendants) was raised in relation to PRP's representation of the defendants. The court adjourned the application to allow PRP to take instructions and respond.

9 On 2 March 2020, PRP filed an application to be discharged as solicitors for the defendants.

10 On 4 March 2020, the court granted PRP a discharge from acting as solicitors for the defendants, following which the court heard and granted SUM 772 and entered judgment against the defendants (the "Judgment"). SUM 6374 was consequently withdrawn.

11 At the hearing on 4 March 2020, the defendants did not attend in person or by solicitors. Nor did they contact the respondent's solicitors or the court to seek an adjournment.

12 On 10 March 2020, the respondent's solicitors sent a copy of the Judgment to the defendants. The appellant could have filed an appeal against the Judgment, but he did not do so; neither did the second defendant or the fourth defendant.

Application to set aside the judgment

13 Some 17 months later, on 6 August 2021 the appellant filed HC/SUM 3731/2021 ("SUM 3731") to set aside the Judgment. This application was filed after the appellant received notice that the Judgment had been registered in New South Wales and Papua New Guinea.

14 On 1 November 2021, the Judge dismissed SUM 3731. The appellant appealed against that decision, and we dismissed the appeal.

The court's inherent power to set aside judgments and orders

15 The Judge noted that the ROC 2014 had no specific provision allowing for a judgment on admissions to be set aside. He then held that the architecture of the ROC 2014 excludes any inherent power to do so: GD at [83]–[92]. The Judge reasoned that had he granted the respondent's initial application for judgment in default of defence, he would have had express power under the ROC 2014 to set aside the judgment; but as the respondent had applied for and obtained judgment on admissions, the court did not have power to set aside *that* judgment.

16 On the Judge's reasoning, a court has *no **inherent** power* to set aside any judgment or order. It either has an *express* power under a specific rule in the ROC 2014, or it has *no* power to set aside a judgment or order at all. This reasoning cannot hold given the Court of Appeal's decision in *Harmonious Coretrades Pte Ltd v United Integrated Services Pte Ltd* [2020] 1 SLR 206 ("*Harmonious Coretrades*") which recognised that the court has the inherent power to set aside its judgments or orders to prevent injustice:

> 34 It is settled law that there are at least three circumstances in which a court may set aside a judgment or order of court. These were first set out in the decision of Judith

Prakash J (as she then was) in *Ong Cher Keong* ([24] *supra* at [44]–[46]):

> 44 The basic principles which govern applications to set aside orders of court or judgments are concisely set out in paras 558, 559 and 560 of Halsbury's Laws of England vol 36 (4th Ed). There are three situations in which an order may be set aside. The first situation is when the order has been obtained irregularly, that is, the person obtaining the order has not complied with the requirements of the Rules of Court in some aspect. In this situation, the person against whom the order is made is entitled to have it set aside …
>
> 45 The second situation is when a judgment has been obtained by fraud. Such a judgment may be impeached by means of an action which may be brought without leave. The fraud must relate to matters which prima facie would be a reason for setting the judgment aside if they were established by proof and the fraud must have been discovered after the judgment was passed …
>
> 46 The third situation is where an order or judgment has been obtained in default of the appearance of one of the parties to the suit. In such a case, the person against whom the order has been made may apply for it to be set aside but the court has a discretion as to whether to allow the application. As a rule, the applicant must show by affidavit that he has a defence to the action on the merits …

35 Prakash J reiterated these three grounds in her subsequent decision in *Sunny Daisy* ([24] *supra* at [21]).

36 The Judge was cognisant of these authorities and held that the Final Garnishee Order was not made under any of the three circumstances. However, he held that the three circumstances were not exhaustive and the court retained a residual discretion to set aside a judgment or court order. This residual discretion flowed from the court's inherent powers to prevent injustice.

37 On this point, we agree with the Judge. The court's inherent powers are preserved by O 92 r 4 of the Rules of Court which reads as follows:

> **Inherent powers of Court (O. 92, r. 4)**
>
> 4. For the avoidance of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any

> order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

38 We could see no basis to hold that the court has no inherent power to set aside a judgment or court order in circumstances where such an order to set aside is needed to prevent injustice. To circumscribe the scope of the court's powers to the three circumstances as espoused in *Ong Cher Keong* may lead to some injustice in less usual cases.

39 In our opinion, such a view about the High Court's inherent power accords with this court's decision in *MCST Plan No 301 v Lee Tat Development Pte Ltd* [2011] 1 SLR 998 where it was held that the Court of Appeal has the inherent jurisdiction to reopen and rehear an issue which it decided in breach of natural justice, as well as to set aside the whole or part of its earlier decision founded on that issue (at [55]). A breach of natural justice does not fall within the three circumstances as identified in *Ong Cher Keong* ([24] *supra*). In holding that the Court of Appeal has the inherent jurisdiction to set aside a decision reached in breach of natural justice, this court reasoned as follows (at [55]):

> Nothing in the [Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed)] prescribes for this situation, and we see no justification to circumscribe the inherent jurisdiction of this court (which would be the effect if we were to rule that the [Court of Appeal] has no inherent jurisdiction to reopen an issue which it decided in breach of natural justice) as that could potentially result in this court turning a blind eye to an injustice caused by its own error in failing to observe the rules of natural justice.

40 We therefore agree with the Judge that the court retains the residual discretion to set aside a judgment or court order so as to prevent injustice. However, we emphasise that this is not a licence to litigants to make frivolous applications to set aside judgments or court orders. The court's inherent power to set aside a judgment or court order should never become a back-door appeal or an opportunistic attempt to relitigate the merits of the case. One such situation where the court's inherent power could be justifiably invoked might be where the substratum or the very foundation of a court order has been destroyed, such that the continued existence or future performance of the court order would lead to injustice. Indeed, this was how the Judge viewed the case before him. However, as we explain below, we do not accept that the facts of the present appeal were such that the foundation of the order was destroyed or that the Final Garnishee Order would have resulted in injustice.

> …
>
> 63 In the circumstances, although we agree with the Judge that the court has the inherent power to set aside a judgment or court order to prevent injustice, we do not agree that the circumstances gave rise to such injustice that warranted the setting aside of the Final Garnishee Order. For these reasons, we allowed the appeal and restored the Final Garnishee Order. We fixed costs at $28,800 for the appeal before us and $5,000 for RA 79 before the Judge, both amounts to be inclusive of disbursements, and ordered that these amounts be paid by UIS to HCPL, with the usual consequential orders to apply.
>
> [emphasis added]

17 It is clear from these passages in *Harmonious Coretrades* that besides being able to set aside judgments or orders when they have been obtained irregularly, by fraud, or in default of appearance, the court retains a residual discretion, flowing from the court's inherent powers, to set aside judgments or orders so as to prevent injustice (*Harmonious Coretrades* at [34]–[40]). This is consistent with O 92 r 4 of the ROC 2014 which recognises that the court has the inherent power to "make any order as may be necessary to prevent injustice…": see also *Harmonious Coretrades* at [37]–[38].

18 The present case was not one in which the Judgment was obtained irregularly, or by fraud, or in default of appearance. But, as is clear from *Harmonious Coretrades*, the court still has a residual discretion, flowing from its inherent powers, to set aside a judgment on admissions if setting-aside is necessary to prevent injustice.

19 The respondent contended that where there is (or was) a right of appeal, there is no inherent power to set aside a judgment or order. We did not accept that argument. It would unjustifiably limit the court's inherent power as recognised in *Harmonious Coretrades*. Setting-aside might be necessary to prevent injustice although there is (or was) a right of appeal. Indeed, it appears

that the order that was set aside in *Harmonious Coretrades* was one that could have been appealed against, but the Court of Appeal nevertheless recognised that the High Court would have had inherent power to set it aside, had this been necessary to prevent injustice. That being said, whether there was a right of appeal, and (if so) why an appeal was not pursued, are relevant considerations in deciding whether setting-aside is necessary to prevent injustice. We address this point below (at [25]–[30]).

Whether it was necessary to set aside the judgment to prevent injustice

20 Although we held that the court did have the inherent power to set aside a judgment on admissions, we agreed with the Judge that the Judgment should not be set aside. It was not necessary to do so to prevent injustice.

21 Although the Judge found that he had no inherent power to set aside the Judgment, he went on to consider, in the alternative, whether any such power should be exercised to set aside the Judgment. He decided that the applicable principles were set out in cases such as *Mecurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR(R) 907 ("*Mercurine*"), *Su Sh-Hsyu v Wee Yue Chew* [2007] 3 SLR(R) 673 ("*Su Sh-Hsyu*"), and *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 in *U Myo Nyunt (alias Michael Nyunt) v First Property Holdings Pte Ltd* [2021] 2 SLR 816). The Judge placed particular emphasis on the synthesis of the principles for setting aside a judgment in *First Property* (at [59]–[60]):

> 59 Where a defendant applies to set aside a default judgment entered without a trial:
>
> > (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: *Su Sh-Hsyu*

> *v Wee Yue Chew* [2007] 3 SLR(R) 673 ("*Su Sh-Hsyu*") at [42]–[43]; 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: *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR(R) 907 ("*Mercurine*") at [32] and [35]–[36].
>
> 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.
>
> See *Su Sh-Hsyu* at [44]–[45], [49] and [57].

22 Paragraph 59 of *First Property* dealt with judgments entered by reason of a procedural default, with the defendant having had no opportunity to be heard on the merits of the claim. The principles in question apply to the setting aside of a default judgment under O 13 r 8 of the ROC 2014: *Su Sh-Hsyu* at [42]–[43].

23 Paragraph 60 of *First Property* dealt with judgments entered after a trial in the defendant's absence. The principles in question apply to the setting aside of a judgment under O 35 r 2 of the ROC 2014: *Su Sh-Hsyu* at [1], [44]–[45].

24 The present case did not concern an application to set aside a judgment under either O 13 r 8 or O 35 r 2 of the ROC 2014. The appellant sought, instead, to invoke the court's inherent power to set aside a judgment entered on admissions of facts. Such a judgment was, as the Judge had noted, a regular and final judgment, and a judgment entered on the merits. It was not a judgment entered upon a default, nor was it a judgment entered after a trial: GD at [30], [95]. Although there was no "trial", we agree with the Judge that the principles in *First Property* at [60] guide the exercise of the court's discretion, as the Judgment was one entered on the merits.

25 In this regard, it is not sufficient for a party applying to invoke the court's inherent power to set aside a judgment, in a case such as the present, merely to show that he has merits in his intended defence. The court will consider the applicant's explanation (if any) for the defaults and delay (*ie*, failure to file a Defence, non-attendance at the hearing, failure to file an appeal, and delay in applying to set aside the Judgment) as well as whether there is any prejudice to the other party.

26 In the present case, the appellant had no good reason for not filing his Defence. He was then absent at the hearing of the SUM 772, and he took no action to either file an appeal against the judgment when he learned of it in March 2020, or to set it aside. It was only in August 2021 that the appellant finally applied to set aside the Judgment.

27 We upheld the Judge's decision that the appellant did not have good reasons for his defaults and delay in relation to the Judgment: GD at [106]–[171]. In particular:

(a) The appellant was represented by solicitors (PRP) from 27 February 2020, the day before the first hearing of SUM 772. As noted above, the hearing was adjourned to 4 March 2020 for PRP to consider its position on the issue of conflict. PRP decided that it could not continue to act for both the appellant and his wife (the second defendant), and applied on 2 March 2020 to be discharged as their solicitors. PRP said on affidavit that it had advised the defendants they ought to engage solicitors or to attend the hearing of SUM 772 on 4 March 2020 in person, failing which the court might make orders against them in their absence.

(b) The appellant contended that he did not engage solicitors because of his impecuniosity, but the Judge rejected this: GD at [164]–[166]. There was no evidence in the first place that the appellant was unable to engage solicitors in place of PRP when PRP applied for a discharge (on the grounds of conflict, not on the grounds of lack of funds) in March 2020. The appellant had put PRP in funds, and with PRP's discharge the balance of those funds would have been available for him to use towards engaging new solicitors.

(c) As the Judge observed, the appellant could also have acted in person – he could have sought an adjournment of the hearing, and he could have filed a Defence: GD at [165]–[166]. Indeed, the appellant had contacted the respondent's solicitors earlier to request an adjournment of a pre-trial conference, but he did not do the same when

SUM 772 was heard. Nor did he contact the court to seek an adjournment.

(d) The appellant then did nothing in relation to the Judgment for some 17 months – the Judgment was entered against him on 4 March 2020, and a copy was sent to him on 10 March 2020; but he only applied to set aside the Judgment on 6 August 2021.

28 There was no good reason for the appellant being absent from the hearing on 4 March 2020 when the Judgment was entered (and not even seeking to adjourn it), or for him to only apply to set aside the Judgment some 17 months after he had learnt of it. It appears that the appellant was prompted to act only after he was notified about the registration of the Judgment in New South Wales and Papua New Guinea. His concern, it seems, was about the Judgment being ***enforced*** against him, rather than about the Judgment having been ***entered*** against him.

29 In those circumstances, it was not enough for the appellant to make arguments on the substantive merits, in the hope of getting the Judgment set aside pursuant to the court's inherent power.

30 As the Court of Appeal observed in *Harmonious Coretrades* (at [40]), "the court's inherent power to set aside a judgment or court order should never become a back-door appeal or an opportunistic attempt to relitigate the merits of the case". In the present case, the appellant could have filed an appeal against the Judgment deadline expired, but he did not; nor did he file an application to extend time to appeal. The appellant's arguments on the substantive merits were no more than a back-door appeal, an attempt to relitigate the merits of the case when there was no appeal. That is precisely what the Court of Appeal in

Harmonious Coretrades (at [40]) had warned against the court's inherent power being used for.

31 A similar situation arose in *Vallipuram Gireesa Venkit Eswaran v Scanply International Wood Product (S) Pte Ltd (Kim Yew Trading Co, third party)* [1995] 2 SLR(R) 507 ("*Vallipuram*"). There, the third party (against whom judgment had been entered) had not appeared at the trial. Under the Rules of Court in force at that time, it could have applied to set aside the judgment within seven days after the trial, but it did not do so. It only applied to set aside the judgment nearly two years after the event. The judge found that on that basis alone, the application could have been dismissed (*Vallipuram* at [13]). Moreover, the third party put forward no explanation for its absence from the trial, or for its failure to do anything to set aside the judgment for such a long period (*Vallipuram* at [15]). In the circumstances, it appeared to the court that the third party was simply trying to delay the enforcement of the judgment without any good cause to do so; the court concluded that it saw no reason why it should examine the so-called "merits" of the third party's case and set aside the judgment if it found such merits to exist (*Vallipuram* at [19]).

32 The appellant had no good reason for his defaults and delay: he never filed a Defence, he was absent at the hearing at which the Judgment was entered against him, he did not appeal the Judgment in time, he did not seek an extension to appeal out of time, and he only applied to set aside the Judgment some 17 months after he had learnt of it. Having belatedly applied to set aside the Judgment, he then made arguments on the substantive merits as if he had appealed. This was no more than a back-door appeal that the court could not condone. Having failed to take action up till this point, despite having had numerous opportunities to do so, it was too late in the day for the appellant to contend that the Judgment could not stand.

Conclusion

33 The court has the inherent power to set aside its judgments or orders where it is necessary to do so to prevent injustice. In the present case, however, it was not unjust for the Judgment to stand, taking into account the appellant's lack of a good reason for his defaults and lengthy delay. We accordingly dismissed the appeal with costs fixed at $35,000 (inclusive of disbursements).

Kannan Ramesh
Judge of the Appellate Division

Andre Maniam
Judge of the High Court

Boey Swee Siang, Suchitra Suresh Kumar and Abel George (Premier Law LLC) for the appellant;
Mark Jerome Seah Wei Hsien, See Kwang Guan (Martin), Alexander Choo Wei Wen and Philip Teh Ahn Ren (Dentons Rodyk & Davidson LLP) for the respondent.