TR Networks Ltd and Others v Elixir Health Holdings Pte Ltd and Others [2005] SGHC 106

Case Number : Suit 964/2004, RA 52/2005

Decision Date : 31 May 2005

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Lee Mun Hooi and Wong Nan Shee (Lee Mun Hooi and Co) for the plaintiffs / appellants; Edwin Lee (Rajah and Tann) for the fifth defendant / respondent

Parties : TR Networks Ltd; TRN Marketing Pte Ltd; TR Networks Inc — Elixir Health Holdings Pte Ltd; Elixir Health Singapore Pte Ltd; Health Manna Pte Ltd; Seet Cheng Hwa; Chiew Chee Boon Steven; Yeo Chye Poh

Civil Procedure – Judgments and orders – Default judgment – Plaintiffs obtaining judgment in default of defence – Whether judgment regular – Whether judgment should be set aside – Principles governing court's discretion to set aside default judgments

31 May 2005

Tay Yong Kwang J:

1 This is an appeal by the plaintiffs against the decision of an assistant registrar given on 28 February 2005 setting aside the judgment entered in default of defence on 26 January 2005 against the fifth defendant and the execution proceedings taken out pursuant to that judgment. The assistant registrar also granted the fifth defendant leave to withdraw the appearance entered on 30 December 2004 on his behalf (in circumstances which I shall explain shortly) and to enter an appearance by 7 March 2005. The fifth defendant was ordered to pay the plaintiffs costs of $2,000 plus disbursements for the proceedings below. The assistant registrar was of the view that while the default judgment was regularly obtained, the fifth defendant had a meritorious defence.

2 The plaintiffs sought to persuade me to set aside the assistant registrar's orders or, alternatively, order the fifth defendant to furnish security or pay into court the amounts claimed by them. Before me, the fifth defendant maintained, as he did before the assistant registrar, that the default judgment was an irregular one and that the order on costs should therefore be varied. I varied the assistant registrar's decision by adding the condition that the fifth defendant provide security for the amounts claimed, either by way of banker's guarantee or in such other form as may be agreed between the parties within 21 days. In default thereof, the plaintiffs would be at liberty to enter judgment against the fifth defendant for the said amounts. I also ordered the fifth defendant to pay the plaintiffs the costs of the appeal, fixed at $2,000.

The plaintiffs' case

3 On 6 December 2004, the plaintiffs commenced this action. Against the fourth, fifth and sixth defendants, the plaintiffs claimed $37,707.17, being the sum demanded under a guarantee dated 15 June 2004 for the refund of money paid under a Share Acquisition Agreement of the same date; and $305,570.04, being the sum demanded under an indemnity dated 22 April 2004 for the outstanding price of goods sold and delivered to the first defendant. Under the guarantee, the said defendants jointly and severally undertook to pay to the first defendant all losses suffered by the first plaintiff as a result of any breach by the first, second and third defendants under the said Share Acquisition Agreement. Under the indemnity, the said defendants agreed to indemnify the first plaintiff in respect of all sums of money owing by the first defendant in consideration of the first plaintiff

continuing to supply goods to the first defendant.

4 On 20 December 2004, the Writ of Summons was served on the first, second and third defendants. On 30 December 2004, WLAW LLC filed a Memorandum of Appearance on behalf of the first, second, fourth and fifth defendants. On 7 January 2005, judgment in default of appearance was entered against the third defendant. On 14 January 2005, judgment in default of defence was entered against the first and second defendants. On 17 January 2005, judgment in default of defence was also entered against the fourth defendant.

5 Although service had not been effected on the fifth defendant, it appeared that the fifth defendant entered an appearance *gratis* through WLAW LLC. Subsequently, on 12 January 2005, WLAW LLC applied, as solicitors for the fifth defendant, "for an order declaring that WLAW LLC have ceased to be the solicitors acting for the said fifth defendant". The Affidavit filed by Ng Hweelon, one of the solicitors of WLAW LLC, explained that appearance for the fifth defendant "was made by mistake as I was not instructed by the said defendant". The solicitor asked that the Memorandum of Appearance filed on behalf of the fifth defendant be withdrawn and added that he had spoken to the solicitors for the plaintiffs "about this mistake" and they informed him that they did not object to the withdrawal of the Memorandum of Appearance. An order in terms of the application was obtained *ex parte* on 13 January 2005. However, no step was taken to withdraw or to amend the Memorandum of Appearance filed on 30 December 2004.

6 By their Memorandum of Service filed on 20 January 2005, the plaintiffs' former solicitors stated that the Writ of Summons was served on the fifth defendant on 15 January 2005 by posting a copy thereof and the Order of Court for Substituted Service dated 31 December 2004 on the fifth defendant's residential address at 4 Haig Road #02-477, Singapore 430004 ("the Haig Road address") and also by posting a copy of each of the said documents on the notice board of the High Court on 17 January 2005. As the Memorandum of Appearance for the fifth defendant remained on record, judgment in default of defence was entered against him on 26 January 2005 and this judgment was served on him at 97A Lorong H Telok Kurau, Singapore 426118 ("the Telok Kurau address") by way of the plaintiffs' former solicitors' letter of 28 January 2005.

7 Before the issuance of the Writ of Summons, the plaintiffs' former solicitors sent a letter of demand dated 14 September 2004 to the fifth defendant at the Telok Kurau address demanding payment of $315,196.10, US$8,000.00 and costs pursuant to the said indemnity. A letter of demand of the same date and in similar terms (but claiming two additional sums of money) was also sent to the first defendant at its business address.

8 On 24 September 2004, the first defendant, through its financial controller, wrote a "without prejudice" letter to the first plaintiff, referring to a meeting the week before and stating the outstanding amount due to the first plaintiff as it appeared from the first defendant's records. That letter also proposed a repayment schedule starting with $32,292.83 on 24 September 2004 followed by ten monthly instalment payments of between $20,000.00 and $50,000.00. Three cheques, all dated 24 September 2004, making up the total of $32,292.83 were said to be enclosed with the letter.

9 On 4 October 2004, the first defendant wrote again to the first plaintiff. This time, the letter was not marked "without prejudice" and was signed by the fifth defendant as managing director. It referred to a meeting on 24 September 2004 and the earlier letter of the same date and stated that "our greatest concern is to settle all outstanding issues and we are financially committed to it". The same three cheques mentioned earlier were attached with a promise to forward the other ten

cheques for the remaining instalments on 6 October 2004.

10 On 6 October 2004, the said ten cheques, all post-dated, were sent to the first plaintiff by way of the first defendant's letter. This letter was again signed by the fifth defendant as managing director and was not marked "without prejudice".

11 The first three cheques and the first of the subsequent ten cheques, dated 24 October 2004, totalling $62,292.83, were in part payment of the $100,000.00 paid under the Share Acquisition Agreement dated 15 June 2004 and covered by the guarantee. These cheques were paid when presented. The part payment had been taken into account and hence the claim for the remaining $37,707.17. On 24 November 2004, when the next cheque was due for payment, the first plaintiff was informed in writing by the fifth defendant, on behalf of the first defendant, not to present it for payment until otherwise notified. The plaintiff then commenced this action.

12 After the plaintiffs had issued a Writ of Seizure and Sale and a statutory demand under the Bankruptcy Act (Cap 20, 2000 Rev Ed), the fifth defendant attempted on many occasions to discuss settlement of the judgment obtained against him and a meeting was therefore held on 16 February 2005. At this meeting, the fifth defendant admitted to the plaintiffs' claims and sought the indulgence of the plaintiffs' chairman to allow him to pay by instalments. He was asked to put in writing his proposals for the plaintiffs' consideration. Accordingly, by a letter dated 17 February 2005, the fifth defendant wrote to the first plaintiff to set out his proposals for settlement of the judgment sums. The letter, marked "without prejudice", had the caption:

> Re: Repayment Schedule – Suit 964/2004/S – Writ of Sale & Seizure (recd on 16/2/05) & Statutory Demand under S62 of Bankruptcy Act 1995 (recd on12/2/05)

His proposals were not acceptable to the plaintiffs.

13 Based on the above matters, the plaintiffs argued that there were no merits to the defence raised by the fifth defendant. They contended that his application filed on 22 February 2005 was made for the sole purpose of stalling the execution proceedings taken out against him.

The case for the fifth defendant

14 The fifth defendant applied to set aside the default judgment of 26 January 2005 and, as a consequence, the Writ of Seizure and Sale and the statutory demand under the Bankruptcy Act, both dated 7 February 2005. He also asked that he be given leave to withdraw the Memorandum of Appearance of 30 December 2004 and be allowed to enter an appearance in this action. His grounds were that the default judgment was irregular as the Writ of Summons had not been served on him, and the plaintiffs were aware that the Memorandum of Appearance had been wrongly filed by solicitors who were not authorised by him to do so.

15 In his first Affidavit of 22 February 2005, he claimed that he had no idea that these proceedings had been taken out against him. The first time he found out about this action was on or about Saturday, 12 February 2005, when he went to the plaintiffs' present solicitors' office after having received their note dated 7 February 2005 asking him to contact them. The said solicitors did not really explain anything to him. They merely handed to him a statutory demand and a Notice of Change of Solicitors dated 2 February 2005. On perusing the documents back home, the fifth defendant realised that his solicitors were said to be WLAW LLC. He was taken aback as he had never instructed those solicitors and did not even know about the action against him.

16 On Sunday, 13 February 2005, when he opened his mail, he learnt about the default judgment against him. On Monday, 14 February 2005, he called WLAW LLC to find out what was going on and was referred to Ng Hweelon who explained that they had accidentally entered an appearance for him due to a typographical error as they represented only the first, second and fourth defendants. The solicitor also told him that they had since withdrawn as his solicitors. The next day, WLAW LLC sent him a fax enclosing the order of court dated 13 January 2005 wherein it was ordered that "WLAW LLC have ceased to be the solicitors acting for the fifth defendant in the above matter".

17 On 16 February 2005, the fifth defendant instructed his present solicitors to act for him in this action. WLAW LLC have confirmed in writing that they made an error in entering an appearance for him and that they were neither served with a 48-hour notice to file a defence nor the default judgment entered against him.

18 Where the Haig Road address was concerned, the fifth defendant said:

> I should add that I do not own or live at the abovementioned 4 Haig Road. That was my house more than 1 year ago. Further, any such purported service should not have happened since the plaintiffs knew enough to send a letter of demand dated 14 September 2004, as well as the judgment, to my current house at 97A Lorong H Telok Kurau.

19 On the claim under the indemnity, the fifth defendant pointed out that he, together with the fourth and sixth defendants, only agreed to indemnify the first plaintiff for goods supplied by the first plaintiff to the first defendant. However, the first plaintiff never sold and delivered any goods to the first defendant. The invoices pleaded were either issued by the second plaintiff to the first defendant for goods sold and delivered by the second plaintiff at the first defendant's request or related to goods sold and supplied by the third plaintiff to the third defendant.

20 His defence to the claim under the guarantee was that the terms and conditions thereof clearly provided that any amount due and payable was to be paid to the first defendant and not to any of the plaintiffs, whether individually or collectively.

21 In his second Affidavit, the fifth defendant stated that after he had received the letter of demand dated 14 September 2004, he commenced "without prejudice" negotiations with the plaintiffs in his capacity as managing director of the first defendant. As the negotiations were ongoing, he had no reason to suspect that the plaintiffs would commence action at the same time. He maintained that he had no idea that the action had been commenced until the visit on 12 February 2005 to the plaintiffs' present solicitors' office.

22 He also objected to the plaintiffs exhibiting the correspondence of the first defendant between September and November 2004 in the course of negotiations. He claimed that at a meeting, it was explained to the plaintiffs that the amounts claimed were not owing from the first defendant but, as a gesture of goodwill and to avoid litigation costs, the first defendant would settle the amounts owing on behalf of the other defendants. At no time was an agreement reached based on the "without prejudice" correspondence. The negotiations were conducted on behalf of the first defendant anyway and had nothing to do with his personal liability as the fifth defendant.

23 After finding out that proceedings had been commenced against him, the fifth defendant attempted to negotiate an amicable settlement with the plaintiffs. At the meeting held on 16 February 2005, he told the plaintiffs' representative that the default judgment against him was irregular as he had not been served with the Writ of Summons and had not appointed solicitors. He also disputed his

personal liability but was nevertheless willing to propose settlement at one-third of the amounts claimed. As the plaintiffs did not respond to his "without prejudice" letter of 17 February 2005, that letter should not have been referred to.

24 In his third Affidavit, the fifth defendant explained that he was the managing director for only one division (the Multi-Level Marketing Division) of the first defendant and not the managing director of the "whole company". In fact, he was not even a director, an officer or shareholder of any of the three company defendants. His office was in unit #01-03 and not the first defendant's registered office address of #01-01 at 11 Keng Cheow Street. The first plaintiff promised him that he would eventually be given shares in the third defendant and made an officer of that company. The first defendant is a wholly-owned subsidiary of the third defendant. He paid for some shares of the third defendant but has not been allocated any yet. The first and third defendants have also not paid him a substantial portion of his salary. He was refused entry into the office premises at the said #01-01 and #01-03 on 15 December 2004 and since that date, the fourth and sixth defendants have ceased all forms of communication with him. He was therefore unaware of the service of the Writ of Summons on the three company defendants. He had never contacted WLAW LLC in any capacity before February 2005. He claimed that Ng Hweelon informed him that it was the fourth defendant who had instructed WLAW LLC on behalf of the first defendant.

25 The fourth defendant was the managing director for another division (Wholesale Division) in the first defendant. He was listed as a director of the first defendant and he was the one controlling that company. He was also the chief executive officer of the first and third defendants, while the sixth defendant was the chief operating officer of the same.

The decision of the court

26 Order 19 r 9 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) provides:

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

If a default judgment is found to be irregular and incapable of being corrected by varying it or amending any documents, the defendant may have it set aside as a matter of right.

27 Here, the fifth defendant's contentions that the default judgment was irregular rested on two grounds:

(a) the Writ of Summons was served by substituted service at a wrong address;

(b) he did not enter an appearance in this action.

28 The plaintiffs' Affidavit in support of their application for substituted service of the Writ of Summons stated that when an attempt at service was made at the Haig Road address on 22 December 2004, the fifth defendant's maid told the process server that the fifth defendant was not in. That implied that the fifth defendant had a residence there. The fifth defendant claimed in his Affidavit of 22 February 2005 that he did not own or live at the Haig Road address and that the private apartment there ceased to be his home more than one year ago. However, in the guarantee dated 15 June 2004 (only about eight months earlier), the Haig Road address was still used by him, while the indemnity of 22 April 2004 had the Telok Kurau address. No evidence of sale of the apartment or of change of address was adduced by him. Since he appeared to have two residences,

the plaintiffs were free to elect the place where service should be effected. The substituted service at the Haig Road address was therefore not wrong.

29 Appearance may be entered *gratis* by a defendant who has not been served with an originating process yet. Order 10 r 1(3) of the Rules of Court provides:

> Subject to Order 12, Rule 6, where a writ is not duly served on a defendant but he enters an appearance in the action begun by the writ, the writ shall be deemed to have been duly served on him and to have been so served on the date on which he entered the appearance.

30 WLAW LLC's application to court was not to withdraw the Memorandum of Appearance filed on behalf of the fifth defendant but was for an order that they had ceased to be his solicitors, even though the Affidavit in support mentioned the said memorandum. The order of court extracted was in the terms of the application. In any event, no action was taken subsequently to amend the memorandum by deleting the fifth defendant's name. The plaintiffs were entitled to rely on it notwithstanding their consent to its withdrawal because that was not done. As WLAW LLC had ceased to be the solicitors for the fifth defendant by 13 January 2005, there was no question of serving any 48-hour notice on them before the plaintiffs entered the default judgment. Such notice is, in any event, a matter of professional etiquette only. Equally, there was no reason to serve a copy of the default judgment on WLAW LLC.

31 I therefore held that the default judgment was not an irregular one. Even if the plaintiffs were not entitled to rely on the Memorandum of Appearance and therefore should have entered judgment in default of appearance (after substituted service had been effected as indicated at [6] above) instead of default of defence, I would not rule that the judgment was incurably irregular. I would have ordered that the judgment be amended to one entered under O 13 instead of O 19 of the Rules of Court upon compliance with the requirements of O 13 r 7.

32 Should the regular default judgment be set aside anyway? The principles upon which the court should exercise its discretion under O 13 r 8, which is in the same terms as O 19 r 9, were declared by our Court of Appeal in *Abdul Gaffer v Chua Kwang Yong* [1995] 1 SLR 484 at [18] to be as follows:

> (a) it is not sufficient to show merely an arguable defence that would justify leave to defend under O 14; it must both have a real prospect of success and carry some degree of conviction; and
>
> (b) if proceedings are deliberately ignored, this conduct, although not amounting to an estoppel at law, must be considered "in justice" before exercising the court's discretion to set aside the default judgment.

33 I accepted the arguments of counsel for the fifth defendant that the correspondence referred to by the plaintiffs should not be relied upon as admissions by the first defendant as the letters were written on a "without prejudice" basis and were part of negotiations between the first plaintiff and the first defendant. This was notwithstanding the fact that some letters were not explicitly marked "without prejudice" because they were part of ongoing negotiations (see *Rush & Tompkins v General London Council* [1989] 1 AC 1280). I also accepted the arguments that any alleged admission would, in any event, be relevant between the said two parties only.

34 However, "without prejudice" correspondence may be referred to for purposes other than to show admissions. For instance, it may be used to prove that the negotiations resulted in an agreed settlement. Here, I considered the letters dated 24 September 2004, 4 October 2004 and 6 October 2004 to be admissible and relevant for the purpose of showing that the first, second and third defendants drew no distinction among themselves in their dealings with the plaintiffs. Similarly, the said letters indicated that these defendants drew no distinction among the three plaintiffs where the source of the goods was concerned. The letters also showed that the fifth defendant endorsed that position as managing director of the first defendant (even though he was not shown in the company records as being a director) and that, contrary to his assertions on affidavit, there did not appear to have been different managing directors for different divisions.

35 In the light of the above, while a strict legal reading of the guarantee and the indemnity appeared to substantiate the fifth defendant's defences, it was obvious that the parties had been conducting their business on quite a different platform, with no regard for different corporate identities. It appeared that the plaintiffs were one business grouping while the defendants were collectively another business grouping. Whatever was payable under the guarantee to the first defendant would have to be paid to the first plaintiff ultimately anyway.

36 The fifth defendant did not explain why he was suddenly barred from the corporate office on 15 December 2004 and who made the decision to shut him out. He also offered no evidence as to why the fourth and sixth defendants suddenly ceased all communications with him, other than to hint that it could have something to do with the alleged non-payment of his salary. Even though he claimed that the fourth defendant was the one who controlled the first defendant, the letters showed that it was he (the fifth defendant) who was actively negotiating on behalf of the first defendant. There was also a glaring gap in his evidence as to why he did not open his mail at the Telok Kurau address for some two weeks in February 2005, thereby missing the plaintiffs' former solicitors' letter of 28 January 2005 enclosing a copy of the default judgment against him.

37 The fifth defendant's defences and his truthfulness in these proceedings were therefore suspect. Pursuant to the discretion in O 19 r 9, I therefore varied the assistant registrar's decision setting aside the default judgment by adding the condition that the fifth defendant provide security for the sums claimed, either by way of banker's guarantee or in such other form as may be agreed between the parties, within 21 days and that in default thereof, the plaintiffs be at liberty to enter judgment against him for the said sums. I also ordered him to pay the plaintiffs $2,000.00 as costs of the appeal before me.

38 On 20 April 2005, the fifth defendant applied for an extension of the 21-day period on the ground that:

> I have been trying to raise the cash needed for the banker's guarantee, but the sum of $343,277.21 is a very large sum to me, and I need more time to raise the money from friends and family.

On 28 April 2005, I heard his application and dismissed it with costs fixed at $1,800.00 to the plaintiffs.

39 On 29 April 2005, the fifth defendant filed an appeal to the Court of Appeal against my decision in [37] above.

Assistant registrar's order varied.