Wee Yue Chew v Su Sh-Hsyu
[2006] SGHC 244

Case Number : Suit 665/2004, SUM 3286/2006

Decision Date : 26 August 2006

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Lawrence Lee and Tisha Yeo (Aptus Law Corporation) for the plaintiff; Tay Wee Chong and Low Wei Ling (Hee Theng Fong & Co) for the defendant

Parties : Wee Yue Chew — Su Sh-Hsyu

Civil Procedure – Judgments and orders – Application by defendant to set aside judgment due to absence of defendant at trial – Whether sufficient evidence of explanation for defendant's non-attendance existing – Whether such evidence providing sufficient explanation for absence if true – Principles governing exercise of court's discretion to set aside judgment – O 35 r 2(1) Rules of Court (Cap 322, R 5, 2006 Rev Ed)

4 January 2007

Belinda Ang Saw Ean J:

1 This action was due to be tried on 6 July 2006. The defendant, Su Sh-Hsyu ("Su"), did not attend the trial but was represented by her counsel, Mr Foo Say Tun, who was instructed to apply for an adjournment on the morning of the trial. The plaintiff, Wee Yue Chew ("Wee") through his counsel, Ms Lisa Theng, assisted by Ms Tisha Yeo, successfully resisted the application. The trial proceeded in the normal way and judgment was entered against Su with interest and costs.

2 On 20 July 2006, Su applied to set aside the judgment of 6 July 2006 under O 35 r 2(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). Her application was dismissed with costs fixed at $2000 on 28 August 2006. Su has now appealed against my decision.

Application to adjourn the trial

3 It is necessary to first recount the reasons that were given on 6 July 2006 in support of Su's oral application for an adjournment. As stated, the trial, which was fixed for two days, was to begin on 6 July 2006 at 10.00am. Mr Foo was informed on 5 July 2006 that Su and her two witnesses, Hsieh Hsi Mou ("Hsieh") and Shi Bi Xian ("Shi") were not going to be in Singapore for the trial. The ostensible reason given in his letter of 5 July 2006 to the Registrar ("the 5 July letter") was that Su and Hsieh were engaged in last-minute meetings relating to an educational college in Shanghai, the Shanghai Normal University Science Technology & Management College ("SHNU STMC"). This was because SHNU STMC had received an unexpected number of applications for admission. Similarly, Shi, who was charged with the recruitment drive for the same college, had to meet with local educational officers, students and parents in various provinces in China due to the unanticipated influx of applications during this period. Mr Foo had attached to his letter several documents. The first document was a hotel reservation voucher for three nights, beginning 5 July 2006, for Shi and one Yang Yen Huang. There was no hotel reservation for Hsieh and Su. The two other documents, which were supposedly confirmation slips for the air tickets booked for Shi and Hsieh to depart Shanghai on 5 July 2006 for Singapore, could not be relied upon at the hearing as they were written in Chinese and had not been translated into the English language. Nonetheless, Mr Foo had indicated in his letter that air tickets were booked for Shi and Hsieh to depart Shanghai for Singapore on 5 July 2006.

Notably, no such evidence was adduced on behalf of Su herself. The situation called for further explanation in support of the oral application and the court turned to Mr Foo for assistance. It transpired that Mr Foo had not spoken to Su personally regarding her attendance at the trial. He had only spoken to her personal assistant, Amy. He was first apprised of the possible non-attendance of Su and her two witnesses on 3 July 2006 when he was quizzed about what the consequences might be if all of them did not show up for the trial. Talk of vacating the trial dates followed the next day. It was only on the eve of the trial that he was told that Su and her witnesses would not be attending the trial.

4 Wee had come from Australia for the trial and was ready to proceed. He seriously questioned the veracity of Mr Foo's instructions based on the 5 July letter. Ms Theng's instructions were that upon receipt of that letter, Wee had called Su's office in Hong Kong and was informed by one Ms Chew, the accountant-in-charge of the Hong Kong office, that Su was in the United States of America and she would remain there until August 2006. Wee also called Su's Shanghai office and was given the same information. As for Shi and Hsieh, Ms Theng's further instructions were that Wee had called Mr Andrew Chan, the vice-principal of SHNU STMC, and he was told that neither Shi nor Hsieh were involved in the operations of the Shanghai office.

5 Apart from what Wee had learned, the option to turn up or not was contemplated for over two days before instructions were given to Mr Foo to seek an adjournment. This fact discredited the claim of a sudden emergency described in the 5 July letter that prevented Su and her two witnesses from attending the trial. There was also no indication by Su, Hsieh or Shi as to when they would be available for the trial.

6 There was another ostensible reason for the adjournment. It had to do with Su's decision to change legal representation. It was a decision made late in the day. I regarded that excuse as nothing more than an attempt to shore up Su's late application for an adjournment. The first time this reason was mentioned was in the 5 July letter. Prior to that, Mr Foo was expecting to take further instructions on Wee's affidavit of evidence-in-chief after Su and her two witnesses' arrival in Singapore.

7 I declined to adjourn the trial since no credible explanation was given. It should be noted that Su was still represented by Mr Foo at the trial. Mr Mark Cheng of M/s Rajah & Tann sat in at the hearing of the application for an adjournment. He was there to hold a watching brief. He explained that his firm had not advised on the merits of either the adjournment or the claim proper and that his firm was disposed to act for the defendant only if an adjournment was granted. It was against this backdrop that Wee was called upon to prove his claim. Wee took the witness stand and his affidavit of evidence-in-chief was admitted in evidence. Wee was offered for cross-examination as was usual. Mr Foo was unable to cross-examine Wee as he was without instructions. The affidavits of evidence-in-chief filed on behalf of the defence could not be received in evidence in the absence of the deponents. It was in these circumstances that I found that Wee had proved his claim and judgment was duly entered against Su.

The application to set aside the judgment of 6 July 2006

The defendant's arguments

8 The setting aside application was made under O 35 r 2(1) which is based on the absence of a party at trial. It was not Su's case that the court ought to have granted the adjournment sought on 6 July 2006 because of the inability of Su's two witnesses to attend the trial. In her affidavits filed in support of this setting aside application, she had asked the court to forgive her earlier absence.

9 The starting point of the arguments advanced on behalf of Su by her counsel, Mr Tay Wee Chong, was that there was no adjudication on the merits of the claim. Mr Tay listed down eight factors, summarised by Leggatt LJ in *Shocked v Goldschmidt* [1998] 1 All ER 372 (see [21] below), which the court will consider in the exercise of its discretion to set aside a judgment obtained in the absence of a party at trial. The overarching consideration, he argued, was the demands of justice and so long as there was a defence to the action on the merits (*ie* a defence with a real prospect of success and which carried some degree of conviction), the court should set aside the judgment even though the defendant's absence was not accidental or due to a mistake. By this counsel meant that this latter factor –whether or not Su was able to provide a satisfactory explanation for why she did not turn up at the trial – is important but not necessarily decisive. Relying particularly on *Nicolaou v Williams* (unreported decision of the English Court of Appeal dated 27 April 1999), counsel submitted that the court's task was to balance the interests of the plaintiff in pursuing his case in the absence of the defendant and the injustice that might be done to the defendant, given the strength of her defence if no setting aside was granted despite her procedural failure. That was Mr Tay's fallback position. In the main, he submitted that Su's absence was not deliberate. It was due to her foolishness and mistake. The court should therefore not place undue weight on the reasons for her absence, and it should, instead, balance her procedural breach with the other factors such as promptness in filing the application to set aside the judgment; the existence of a good defence and the absence of any prejudice suffered by Wee (see [11] and [12] below).

10 Su explained in her affidavits filed in support of the setting aside application that as early as 16 June 2006, she had instructed Mr Foo to re-schedule the trial dates as the July dates coincided with her two-month course at Harvard University. Nonetheless as a precautionary measure, Hsieh and Shi went ahead to book their air tickets and accommodation for the trial. Meanwhile on 1 July 2006, Su received an urgent notice from a company known as Natural Beauty Bio-Technology Limited ("Natural Beauty") to attend on its behalf an important meeting with a renowned international cosmetic company. That meeting was to be held between 5 and 8 July 2006. The next thing that happened was the adverse publicity SHNU STMU attracted and that was reported in the Shanghai Morning News on 5 July 2006. Hsieh and Shi had to remain in Shanghai to manage the situation. Mr Foo was instructed at the first opportunity to seek an adjournment of the trial. Finally, Su explained that coming from Taiwan, which has a different legal system, she did not realise that adjournments of trial dates were not lightly granted. Attendances of witnesses in Taiwanese courts were "rare" and "reserved only for the most serious of legal proceedings." Thus, she was under the mistaken impression that her affidavit of evidence-in-chief and that of her two witnesses would suffice without having to take the witness stand. As for the reasons stated in the 5 July letter for her absence and her subsequent explanation in her affidavits, which were different, her excuse was that with so much happening at the time, she "may not have been in the best frame of mind to explain all the details then." Moreover, it was Hsieh's assistant, Ms Hou Wei, who conveyed information about Su's absence and that also accounted for an incomplete explanation of Su's inability to travel to Singapore.

11 The short point of the defence to the action was that Wee had been paid in full for his shares. By way of background information, the action herein arose out of a sale of 1000 shares in a company known as Interstellar Intereducational Pte Ltd. Wee sued the defendant for the unpaid balance of the price of those shares in the sum of S$414,200 (the Singapore dollar equivalent of RMB 2 million). Su made payment to an account nominated by Wee. The account holder was one Tung Cheng Yu. Hsieh and Shi had witnessed Wee signing the remittance instructions. Wee had denied giving those instructions and had also disclaimed the signature as his.

12 Finally, the other factors in favour of setting aside the application were as follows. First, Su was ready to pay into court the sum of S$500,000 to demonstrate her genuine desire to defend the

action. In this way, Wee would not be prejudiced should the defendant subsequently lose at the new trial. Second, a new trial would not entail repeating the evidence that had already been adduced. The central dispute related to the authenticity of Wee's written remittance instructions to Su. A handwriting expert had been appointed to assist Su in her defence. Third, Su had applied to set aside the judgment promptly.

The plaintiff's arguments

13 Ms Yeo citied *Vallipuram Gireesa Venkit Eswaran v Scanply International Wood Product (S) Pte Ltd* [1995] 3 SLR 150 ("*Vallipuram*") for the proposition that in a setting aside application under O 35 r 2(1), Su has to satisfy the threshold test which is to first give a credible explanation for her absence at the trial, failing which the application will be dismissed without further consideration. Ms Yeo pointed out that the approach of the English Court of Appeal in *Nicolaou v Williams* was the same. In that case, Hale J with whom Swinton Thomas LJ concurred was satisfied that the facts disclosed gave a credible explanation for the defendant's absence at the trial. It was after making that finding that the court went on to discuss the interests of justice and undertook the exercise of balancing the competing interests of the plaintiff and the defendant.

14 Ms Yeo submitted that Su did not have a good reason for failing to attend the trial. Su was indisputably aware of the trial but she deliberately did not show up. Su's affidavits were riddled with inconsistencies. Hsieh and Hou Wei did not file any affidavit to explain the material differences in the 5 July letter given the subsequent affidavits filed in support of the setting aside application. Ye Hong, the principal of SHNU STMC, referred to an adverse publicity published in the Shanghai Morning News on 5 July 2006 about SHNU STMC. SHNU STMC was accused of breaches of student recruitment policies and obtaining student's particulars without authority. It was claimed that Hsieh and Shi had to remain in Shanghai to manage the situation. The 5 July letter gave a different reason – it had to do with the avalanche of applications for admission to SHNU STMC. Su herself stated that she had an important meeting to attend on behalf of Natural Beauty in New York and that explanation conflicted with the reason given in the 5 July letter which was that Su was required in Shanghai on matters concerning SHNU STMC. Su omitted to explain this glaring discrepancy in her affidavits. Ms Yeo further argued that if indeed there was such a meeting in New York, there was no reason why this could not have been mentioned in that letter, as it was known as early as 1 July 2006. The so-called documentary evidence adduced to prove that Hsieh and Shi had booked air tickets to Singapore for the trial (which was subsequently translated) was dubious without an issue date.

15 As for the merits of the defence to the action, Ms Yeo submitted that the defence's case was internally inconsistent. The defence suggested that the agreed price was US$500,000 but more money was remitted. Su claimed to have remitted the sum of US$508,069 to the account allegedly nominated by Wee. It was pointed out that Su had stated in her defence filed on 13 October 2005 that an agreement to purchase the shares was reached in April 2004. In contrast, she averred in her affidavit dated 1 August 2006 that the agreement was reached in June 2004. Another discrepancy was the 2 July 2004 remittance date averred to in her defence which was different from the Morgan Stanley letter she has produced to prove that remittance was made as instructed to the account given by Wee. The remittance date advised by Morgan Stanley was 28 July 2004.

16 Wee also pointed to several documents that corroborated his version of the events. They were as follows:

(a) Director's resolution of the company dated 23 April 2004, and transfer documents dated 22 May 2004, wherein the price agreed for the sale and purchase of 9000 shares was stated to be RMB 22.5 million or the Singapore dollar equivalent of S$4,659,750.

(b) Document to the Inland Revenue of Singapore signed by a director of the company confirming that the transfer of 1000 shares to Su was for S$517,750.

(c) Letters from Wee to Su and/or Hsieh regarding the payment of the outstanding balance of RMB 2 million to Wee's bank account in Perth.

Discussions and decision

17 Two main categories of cases were discernible from the cases cited by Mr Tay. The first category of cases fell on the side where a judgment was obtained, for instance, in default of appearance, pleadings, or discovery. The second category of cases fell on the other side where a judgment was given after trial in the absence of the other party. In the first category of cases, consideration was given to whether there was a defence on the merits whereas in the case of absence at trial (*ie* the second category), the important consideration was the reason why the party was absent. In the absence of mistake or fault on the part of the absent party, adjudication on the merits would thereupon follow (as to which see Leggatt LJ in *Shocked v Goldschmidt* ([9] *supra*) at 377).

18 A similar distinction was recognised by Judith Prakash J in *Vallipuram* ([13] *supra*) even though *Shocked v Goldschmidt* was not referred to in the former decision. In that case, the defendant obtained leave to issue third party proceedings against a third party, a Malaysian company, who entered an appearance and defended the third party proceedings in the normal way. The third party's counsel was present at the trial. However, on the third day of trial, counsel informed the trial judge that his client could not be contacted for instructions. He tendered a letter from the third party which was dated five days before the trial started. In that letter, the third party had indicated that it would not be attending the trial. Counsel for the third party then sought and was granted a discharge under O 64 r 5(1). The trial proceeded in the absence of the third party. Subsequently, interlocutory judgment was entered against the defendants in the main action and consequently against the third party in the third party proceedings. In dismissing the third party's application to set aside, *inter alia*, the interlocutory judgment, Prakash J, after noting that the application was filed out of time, at 155-156 held:

> *I did not think that it was possible to equate the situation here to a default judgment. Even if it was a default judgment, it was a very special kind of default judgment to which the usual rules would not, in my opinion, apply. The argument … that in the case of a default judgment the important point is the merits of the litigants' case and that the court should give every opportunity to the litigants to put forward their case is, in my view, wholly inappropriate in a situation where without any explanation whatsoever, a litigant has at a very late stage voluntarily decided to end its involvement in the proceedings and has deliberately embarked on a course which would mean that its case would not be put forward to the court.*
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> *In the present instance, the third party had every opportunity to fully explore the merits both of the defendants' case against it and of its own defence. At the eleventh hour, for reasons it did not deign to share with the court, it withdrew from further participation in the proceedings. The third party cannot now come back to the court and insist that the court examines the merits of the third party's case and gives it leave to proceed because it has a meritorious defence without giving any explanation for the course of conduct which led to the judgment against it being given.*
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> [emphasis added]

19 In that case, the applicant's failure to provide any explanation (or for that matter give good reason) for its absence at trial was both critical and decisive. The third party was treated as not appearing for the purpose of O 35 r 1(1) even though his counsel was present and took a minimal part in the trial before he obtained an order for discharge. Notably, interlocutory judgment was entered against the third party in the latter's absence after the order for discharge of the solicitor on record was made. In the present case, Su was represented by Mr Foo when Wee obtained judgment on 6 July 2006. It was not as if Mr Foo appeared only to apply for an adjournment and had no further role. However, no distinction was raised in argument that Mr Foo must be taken to have appeared for the defendant for the purpose of the trial and for the purpose of O 35 r 2(1) (see *PJB Capital Sdn Bhd v Dato' Peh Teck Quee* [2003] MLJU 734) and as such, the defendant could not apply to set aside the judgment of 6 July 2006 under O 35 r 2(1) and that her recourse was to appeal against the refusal of the adjournment. If anything, the appeal would probably be on the basis that the refusal of the adjournment had deprived the court of the evidence of important defence witnesses. As this procedural point was not raised and argued before me, I will have to leave it for the consideration of another forum. It was common ground that Su could invoke O 35 r 2(1) even though Su was legally represented at the trial.

20 Turning to *Shocked v Goldschmidt* ([9] *supra*), the applicant there absented herself from the trial and made no attempt to request an adjournment. The trial proceeded in her absence and judgment was entered against her. In the court below, the judge allowed the application even though the applicant had deliberately refused to attend the trial. She was not barred from seeking to set side the judgment entered against her given her reasonable prospect of making good her case if it went to trial. The appellate court disagreed with the approach of the judge below. Leggatt LJ delivering the judgment of the appellate court drew a clear distinction between default judgments obtained before and after trial in the absence of a party. In explaining the rationale for this distinction, Leggatt LJ at 382 said:

> To equate judgments by default with judgments given after a trial is heretical. If it were correct, a party who chose not to be present at trial could afterwards change his mind, and provided he was prepared to pay the costs thrown away could always procure a rehearing of the matter, however much time of the court had been wasted by his decision, whatever the inconvenience to his opponent, and however little his own conduct merited indulgence. That is not the law. Because it is not, this court must exercise the discretion anew.
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> When she buried her head in the sand, [the applicant] made an election by which she should be bound, in default of special circumstances. There are none. Her explanation for non-attendance show (sic) that it was deliberate; and even if she was in personal difficulties, she has not explained why no application was made for an adjournment. A retrial would require a court to spend a further ten days hearing these proceedings in addition to the four days when judgment was first given, five days on the application to set aside, and one day in this court. So far from finding that [the applicant] enjoyed real prospects of success in a retrial, the deputy judge found merely that 'there must be a reasonable prospect of making some impact by way of defence'. It is true that the delay in applying to set aside was not excessive, but that does not count positively in favour of acceding to the application. [The applicant's] conduct both before and after judgment has been undeserving. On the other hand, the extent to which [the respondent] would be incommoded by a retrial is a relevant factor. Finally, the suggestion that in these circumstances the court should devote a further ten days to proceedings in which it has already made an adjudication is wholly contrary to the public interest.

21 Leggatt LJ helpfully summarized at 381 the various factors drawn from the authorities on setting aside judgment after trial which the court should consider in exercising discretion to set aside a

judgment under O 35 r 2(1). They are:

(a) Where a party with notice of proceedings has disregarded the opportunity of appearing at and participating in the trial, he will normally be bound by the decision.

(b) Where judgment has been given after a trial it is the explanation for the absence of the absent party that is most important: unless the absence was not deliberate but was due to accident or mistake, the court will be unlikely to allow a rehearing.

(c) Where the setting aside of the judgment would entail a complete retrial on matters of fact which have already been investigated by the court the application will not be granted unless there are very strong reasons for doing so.

(d) The court will not consider setting aside a judgment regularly obtained unless the party applying enjoys real prospects of success.

(e) Delay in applying to set aside is relevant, particularly if during the period of delay, the successful party has acted on the judgment, or if third parties have acquired rights by reference to it.

(f) In considering justice between the parties, the conduct of the person applying to set aide the judgment has to be considered: where he has failed to comply with orders of the court, the court will be less ready to exercise its discretion in his favour.

(g) A material consideration is whether the successful party would be prejudiced by the judgment being set aside, especially if he cannot be protected against the financial consequences.

(h) There is a public interest in there being an end to litigation and in not having the time of the court occupied by two trials, particularly if neither is short.

22 As each case depends on its own facts, the weight to be accorded to the factors set out in [21] above will vary accordingly. Of particular relevance to the present application and of predominant consideration is the reason why the party against whom judgment was given absented herself (see per Leggatt LJ at 381). As Jenkin LJ in *Grimshaw v Dunbar* [1953] 1 QB 408 at 415 correctly remarked:

… it must be material for the judge to know why it was that the defendant failed to appear on the proper day when the case came into the list and was heard.

Notably, it is only after the court is satisfied with the applicant's explanation for his absence at trial that it will continue to hear and weigh up the competing factors. Besides considering the interests of the parties such as (a) the prejudice which the plaintiff would suffer if the judgment is set aside; (b) the prejudice which the defendant would suffer if judgment is not set aside and (c) the interests of justice, the court will also have regard to the objectives set out in O 34A (which is the just, expeditious and economical disposal of proceedings), and the public interest element of finality in litigation. As between the parties, the notion of justice also comprises a procedural component, which must be complied with. In a somewhat different context, obedience to procedures are part and parcel of justice, a concern recently highlighted by V K Rajah J in *Rayney Wong Keng Leong v The Law Society of Singapore* [2006] SGHC 179 at [45], where he observed:

> [I]nasmuch as the rule of law is concerned with substance, it also required that where fair and reasonable procedures are put in place to ensure substantive justice, those procedures should be observed in the normal course of events. Otherwise, a blatant mockery will be made not only of those procedures, but also of the processual component of the rule of law.

23 What would constitute a good reason for a party's absence? It is not possible, or wise, to give a definitive list of circumstances justifying absence. Much depends on the circumstances of the case. The validity of the reason proffered will be judged in the context of the factual matrix presented in each particular case. A typical situation is where the defendant asserts that he had no knowledge of the trial date or was mistaken as to it. Instances of a genuine mistake or accidental omissions have been accepted as valid excuses as each falls short of being deliberate in intent. By way of illustration, in *Grimshaw v Dunbar* ([22] *supra*), for instance, the applicant was told by a court official that he was not required to attend the court hearing. In *Hyman v Rowlands* [1957] 1 All ER 321, the English Court of Appeal accepted the explanation that the applicant had misread the date of the hearing. In *Shocked v Goldschmidt*, the absent party had acted deliberately and contumeliously. In *Shahtex Limited v Aboobaker (t/a Highline Clothing Company)* (unreported, 28 February 1997), the court found that the failure of the applicant to appear in court was not wilful but was due to his gross incompetence in failing to keep himself informed of the proceedings.

24 It is now a convenient juncture to discuss the decision of *Nicolaou v Williams* ([9] *supra*) which Mr Tay cited in support of the proposition that a failure to explain or offer a good reason for the party's absence at trial is no bar to setting aside a judgment under O 35 r 2(1) as it is not a decisive consideration. Mr Tay suggested that a balancing approach should be adopted in every case following the dictum of Hale J at p3 of the unreported transcript, 27 April 1999:

> The issue in this case is quite simply how the court should balance the litany of procedural failures by the defendant (which I have to say were added to by his late arrival at this court today) against the strength of the case that an injustice may have been done to the defendant. The case of *Shocked v Goldschmidt* [1998] 1 All ER 372 sets out eight considerations which are relevant in situations of this sort and gives prominence to the reason given for non-attendance. *I have already indicated that there is evidence for an explanation for the defendant's non-attendance on 21 September which may provide a sufficient explanation if it be true.* The interests of justice always have to be balanced and if it appears that there is a substantial possibility that an injustice may have been done, then the court has to balance that against the procedural failures. Of course, one accepts, as was said in the case of Harbhajan Lal (t/a Lal Construction) v Dharam Singh Bimbrah unreported transcript 7 February 1997, the fact that somebody did not turn up at court does not automatically lead to the conclusion that they should be allowed to pursue their case. It is always a question of balancing those two considerations.
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> [emphasis added]

25 The italicised portion of Hale J's dictum distinctly recognised that a good explanation for the absence was first and foremost required and, in that case, it was provided. In agreeing with the decision of *Shocked v Goldschmidt,* Hale J accepted that the reason given for non-attendance was a predominant consideration in deciding whether to set aside the judgment obtained in the absence of the party at trial. In that regard, Mr Tay's submission was not an accurate statement of the law, nor should it be. Wee was required to prove his case, which he did by going into the witness box and affirming the contents of his affidavit as his evidence-in-chief. He was not cross-examined on his testimony as Su's counsel was unable to do so without further instructions. The decision *Ong Cher Keong v Goh Chin Soon Ricky* [2001] 2 SLR 94 was of no assistance to the defendant as it was not a case under O 35 r 2(1).

26 I agreed with Ms Yeo that in a case like this, prominence should be given to the reasons for non-attendance. I would formulate the issue before me in these terms: Was there sufficient evidence of an explanation for the defendant's non-attendance and would that have provided a sufficient explanation if it be true? Given the contradictory evidence before the court, I concluded that the answer to this issue was no. That factor weighed heavily against the exercise of discretion to set aside the judgment.

27 The first reason that was proffered was that Su was in Shanghai and she was unable to travel to Singapore because of problems at SHNU STMC which required her attention and that of the two defence witnesses. It transpired, and it was not disputed at the setting aside hearing, that Su was in fact not in Shanghai but was still in the United States of America. In Su's affidavit dated 1 August 2006, she averred that she had already sought to postpone the trial as early as 16 June 2006 because of her academic commitments. A few paragraphs later, she claimed that she did not turn up because she had an urgent meeting in New York to attend. This was the second reason. She blamed the omission to mention this meeting in the 5 July letter on incomplete communication between her people and her lawyer which still did not explain the discrepancy in the 5 July letter. A third reason emerged in Su's subsequent affidavit dated 24 August 2006. She said that she did not know of the consequences of her failure to attend. She was told by Hsieh that she need not attend the trial. But that was way back in June 2006 when she was going for her short course and before the consequences of non-attendance at the trial was raised with Mr Foo (see [3] above). It was hardly credible that Hsieh would have told Su that she was not required to attend the trial. It also contradicted her instructions to seek an adjournment on the morning of the trial. Hsieh's alleged mistake in telling Su that she was not required to attend the trial also did not sit well with Su's affidavit evidence. I have in mind her claim that instructions were given to Mr Foo to get the trial postponed as the dates clashed with her academic commitments and her affidavit evidence that when she did not hear from Mr Foo on her instructions, she was going to make plans to travel to Singapore for the trial but this did not materialise because of meeting she was asked to attend on behalf of Natural Beauty. I was not persuaded by Mr Tay's attempt to characterise Su's failure to attend the trial as "foolish" and a "mistake". In my judgment, the decision not to attend trial was deliberate. She was clearly notified of the trial date, at least, in June 2006 and had deliberately chosen to absent herself. It is noteworthy (and Ms Yeo had also pointed this out) that Hsieh who was giving instructions on her behalf to Mr Foo had not come forward to explain the apparent discrepancies in the 5 July letter and what was subsequently filed in the affidavits in support of the setting aside application. Even on Su's case that she did not turn up because she had to attend an important meeting on behalf of Natural Beauty (Ms Yeo pointed out that there was no evidence that Su actually went to the meeting), it was plain that Su deliberately chose not to attend the trial. I accepted Ms Yeo's submission that prioritising the meeting on behalf of Natural Beauty above the trial which Su has had ample notice of was not a good reason for Su's non-attendance. There was clearly no mistake to speak of.

28 There was an additional point against the exercise of discretion to set aside. Contrary to Su's claim that she was under the impression that her lawyer could take care of her defence, there was little Mr Foo could have done to protect her interests if he was not given further instructions that would have enabled him to cross-examine Wee on his affidavit of evidence-in-chief. If Hsieh who was involved in the sale transaction had let her down, as Su seemed to have suggested in her affidavits, she was still bound by her decision not to attend the trial. I interpose at this juncture to say that at the outset of the setting aside application, Mr Tay and Ms Yeo were both given an opportunity to consider if they needed Mr Foo's comments on what was said at the hearing for the adjournment of the trial. Counsel on both sides felt that it was not necessary to trouble Mr Foo. According to Mr Tay, it was Hsieh in Shanghai who had communicated with Mr Foo at that the material time. However, an affidavit from Hsieh was not forthcoming.

29 Having come to the conclusion that there was insufficient evidence of an explanation for the defendant's non-attendance, the application was accordingly dismissed. It was therefore not necessary to weigh up the competing factors raised by Mr Tay. However, suffice it to say, in the absence of the two important defence witnesses to rebut Wee's evidence that the signature on the Standard Chartered Bank banking slip was not his, Su's sole defence would have failed. At that stage, no expert witness was appointed. The intention all along was to call Hsieh and Shi for their eye witness account of the incident. A new trial, if any, may not be limited to four witnesses. It is not known whether or not Hsieh and Shi would still be testifying on behalf of Su. Interestingly, no explanation was offered as to why it was necessary to appoint an expert when all the while Su was content to do without one. It was only after judgment was obtained by Wee that the defendant decided to appoint the Centre of Forensic Science to verify Wee's signature on the Standard Chartered Bank banking slip. At the time of the setting aside application, there was no report issued by the Centre of Forensic Science, as it had been appointed not too long ago. I understood from Ms Yeo that Wee had also engaged a handwriting expert following the appointment of the Centre of Forensic Science. Leave of court is necessary before the experts are allowed to testify at the new trial. On a separate note and in passing, I observed that the 6 July 2006 judgment was based on Wee's sworn testimony that the signature on the Standard Chartered Bank banking slip was not his, as he had not signed it. He also denied giving remittance instructions as alleged and in turn had accused Su and her "agents of forgery and fraud". Should her handwriting expert produce a favourable report, it might be opened to Su to impeach the judgment by means of a separate action.

Result

30 For all these reasons, I dismissed the setting aside application with costs fixed at $2,000.