

Panin International Credit (S) Pte Ltd v Ngan Ching Wen
[2010] SGHC 332

Case Number : Suit No 1404 of 1999 (Registrar's Appeal No 600002 of 2010)
Decision Date : 10 November 2010
Tribunal/Court : High Court
Coram : Woo Bih Li J
Counsel Name(s) : Tan Tian Luh (Chancery Law Corporation) and Ng Hweelon (Legal Clinic LLC) for the defendant/appellant; Phua Siow Choon (Michael BB Ong & Co) for the plaintiff/ respondent.
Parties : Panin International Credit (S) Pte Ltd — Ngan Ching Wen

Civil Procedure

10 November 2010

Woo Bih Li J:

Introduction

1 This was an appeal by Ngan Ching Wen ("Ngan") against the decision of Assistant Registrar Jordan Tan ("AR Jordan Tan") in Summons No 600081 of 2010, in which AR Jordan Tan set aside the orders made by Assistant Registrar Then Ling ("AR Then Ling") in Summons No 600063 of 2010, reheard Summons No 600063 of 2010, and ordered, *inter alia*, that the judgment dated 22 December 1999 entered against Ngan in default of Ngan's appearance in Suit No 1404 of 1999 ("the Judgment") be set aside. Panin International Credit (S) Pte Ltd ("Panin") did not appeal against AR Jordan Tan's dismissal of Panin's application for leave to enter a fresh default judgment against Ngan but Ngan appealed against AR Jordan Tan's decision to set aside the Judgment. Summons No 600063 of 2010 was an unusual application by a plaintiff, *ie*, Panin, to set aside a default judgment that the plaintiff itself had entered against a defendant, *ie*, Ngan.

2 I dismissed Ngan's appeal on 29 October 2010.

Background

3 A detailed chronology of events is annexed at Schedule 1 below. This is based on a table of chronology helpfully prepared by counsel for Panin. Crucially, Panin entered the Judgment on 22 December 1999. On 16 February 2000, it applied to register the Judgment in Malaysia. The Judgment was registered in Malaysia on 9 April 2001. Notice of registration of the Judgment was served on Ngan on 6 February 2004. Suit No 1404 of 1999 is a moneylender's action and, pursuant to O 79 r 4 of the Rules of Court (Cap 322, R5, 1999 Rev Ed) in Singapore ("Singapore ROC 1999"), leave of the Court was required before the Judgment could be entered. Panin had not applied for such leave and this irregularity was raised by Ngan on 19 November 2001.

4 Between 2001 and 2009, Ngan contested the registration of the Judgment via an application to strike out Panin's application to register the Judgment and, when this eventually failed, via applications to set aside both the registration of the Judgment and the service of notice of registration of the Judgment. Ngan's applications to set aside both the registration of the Judgment

and the service of notice of registration of the Judgment were dismissed by the Senior Assistant Registrar ("SAR") in Malaysia on 22 December 2004 and Ngan's appeals against the SAR's decision were dismissed by the Malaysia High Court on 15 August 2007. On further appeal by Ngan (in Civil Appeal Nos. W-03-157-2007 and W-03-159-2007), however, the Malaysia Court of Appeal (by a majority) allowed the appeals on 26 November 2009 and set aside the registration of the Judgment. According to Ngan's written submissions dated 20 September 2010 and the affidavit of Panin's Malaysia solicitor filed on 3 June 2010, the reason for the Malaysia Court of Appeal's decision was that the Judgment had been entered without leave of the Singapore High Court, in contravention of O 79 r 4 of the Singapore ROC 1999. Panin's application for leave to appeal to the Malaysia Federal Court was dismissed on 17 May 2010.

5 Panin had also filed a Bankruptcy Notice against Ngan in Malaysia on 28 October 2008 but this was successfully set aside by Ngan before the SAR on 10 September 2009. Whilst Panin had filed an appeal against the SAR's decision, this appeal was withdrawn on 4 February 2010.

6 Whilst the parties had engaged in litigation in the courts of Malaysia on the registrability of the Judgment, between 2001 and 2009, neither party applied to the Singapore High Court to set aside the Judgment. It was only after Panin's application to appeal against the Malaysia Court of Appeal's decision to set aside the registration of the Judgment was dismissed that Panin applied, on 24 May 2010, via Summons No 600063 of 2010 filed in the Singapore High Court, to set aside the Judgment and enter a fresh judgment against Ngan.

7 Ngan did not attend the hearing of Summons No 600063 of 2010 on 7 June 2010 where AR Then Ling set aside the Judgment and granted Panin leave to enter a fresh default judgment against Ngan. On 21 July 2010, Ngan applied, via Summons No 600081 of 2010, for Summons No 600063 of 2010 to be re-heard and for the orders made in Summons No 600063 of 2010 to be set aside. At the hearing of Summons No 600081 of 2010 on 6 August 2010, AR Jordan Tan agreed with counsel for Ngan that there had not been full disclosure of the circumstances of the case to AR Then Ling. For this reason and the fact that AR Then Ling's orders had been granted in Ngan's absence, AR Jordan Tan exercised his power under O 32 r 5(3) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("Singapore ROC") and re-heard Summons No 600063 of 2010. AR Jordan Tan set aside the orders made by AR Then Ling. He then proceeded to set aside the Judgment and dismissed Panin's application to enter a fresh default judgment against Ngan. He also ordered that Ngan be given an extension of time until 5 October 2010 to file a Memorandum of Appearance and that upon the filing of a Notice of Appeal against his decision by Ngan, the filing of a Defence would be stayed with the timelines for filing the Defence to be decided by the Judge hearing the appeal.

Decision

8 Ngan did not question the court's jurisdiction to set aside a default judgment even when the application to do so was made by a plaintiff. The court has an unfettered discretion (pursuant to O 13 r 8 of the Singapore ROC) to set aside the Judgment on such terms as it thinks fit. This discretion is very wide and the concern of the court is the justice of the case (see, eg, *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR(R) 907 ("*Mercurine*") at [35], [72], [76] and [99]; *MacQuarie Bank Ltd v Beaconsfield and Others* [1992] 2 VR 461 at 466; *Cannan v Reynolds* 119 ER 493 at [305] – [306]).

9 The underlying reason for Panin's application to set aside the Judgment appeared to be to allow Panin to obtain a judgment that would be enforceable in Malaysia. In my opinion, subject to considerations of prejudice to the defendant, there is good reason for setting aside a default judgment where the default judgment is not capable of being enforced in the foreign jurisdiction in

which the defendant's assets are located such that the plaintiff's claim would effectively be lost. In this regard, I would adopt the reasoning of the English High Court in *Messer Griesheim GmbH v Goyal MG Gases PVT Ltd* [2006] EWHC 79 (Comm) ("*Messer Griesheim*") where the court set aside a default judgment and entered summary judgment against the defendant instead because the default judgment was not capable of being enforced in India where the defendant's assets were located. Langley J stated:

48 ... The question is whether or not, as a matter of discretion, the court should set aside a judgment which is of no commercial value to Messer to enable Messer to achieve its objective of obtaining a judgment which it believes it would be able to enforce in India.

49 The notes to the White Book state ... that the discretionary power to set aside is unconditional and "the purpose of the power is to avoid injustice". It is for that reason that, where a defendant does demonstrate a real prospect of defending the claim notwithstanding delay in seeking to set aside a default judgment, the court will nonetheless usually set aside such a judgment. The corollary, Mr Foxton submits, is that *a claimant which demonstrates that it has a good, indeed in this case unanswerable, claim on the merits which will effectively be lost unless a default judgment is set aside, should be taken to have shown a good reason why the judgment should be set aside*. I agree. There is obvious injustice to Messer if the judgment is not set aside.

...

53 *I do not think Goyal was at any time entitled to conduct its affairs on the basis it had no liability to Messer on the claim. Messer had made it clear it asserted and intended to pursue the claim. It made no contrary representation. There was a regular judgment on the claim entered in the Courts of the forum chosen by the parties to resolve the claim. There is no injustice to Goyal in setting aside the judgment and so, in principle, enabling it to put forward such defences as it might have on the merits. **It is not an attractive stand to maintain that a valid court order will not be met but can be relied upon as discharging liability which gave rise to it**.*

...

[emphasis added in italics and bold italics]

The decision in *Messer Griesheim* applied r 13.3(1)(b) of the Civil Procedure Rules 1998 (SI 1998 No 3132) (UK) ("CPR 1998") which states that "the court may set aside or vary a [default judgment] if ... it appears to the court that there is good reason why the judgment should be set aside or varied". Notwithstanding that O 13 r 8 of the Singapore ROC is worded differently in that it states that the court "may, on such terms as it thinks just, set aside or vary any [judgment entered in default of appearance]", I was of the view that the reasoning in *Messer Griesheim* should still apply in the present case. In particular, I noted that Part 13 of the CPR 1998 has not effected any change in practice under O 13 r 9 of the Rules of Supreme Court 1965 in force in the UK before the CPR 1998 was introduced (see *Civil Procedure, The White Book Service 2010*, vol 1 (London: Sweet & Maxwell, 2010 ed) at p 397) and that O 13 r 9 of the Rules of Supreme Court 1965 is worded in a similar manner to O 13 r 8 of the Singapore ROC.

10 I noted that a long delay may not be procedurally incurable or fatal to a setting-aside application (*Mercurine* at [37]). In the present case, Panin had given satisfactory explanation for not applying to set aside the Judgment earlier. The real cause for the application to set aside the Judgment was not the fact that the Judgment was irregular but that it had become unenforceable in Malaysia because it was irregular. The Judgment was validly registered in Malaysia as at 9 April 2001

and continued to be so until 26 November 2009. Although Ngan had raised the issue of irregularity of the Judgment in April 2001, the unenforceability of the Judgment in Malaysia only became clear and conclusive to the parties when Panin was refused leave to appeal to the Federal Court on 17 May 2010. Ngan was not entitled to complain that Panin only applied to set aside the Judgment after its efforts at enforcement had failed. At all material times, Ngan himself could have taken out an application to set aside the Judgment in Singapore. Moreover, Ngan was awarded costs of the appeals and below by the Malaysia Court of Appeal when he succeeded in setting aside the registration of the Judgment in Malaysia. Therefore, the argument by Ngan that he had incurred substantial legal costs to resist steps taken by Panin in reliance on the Judgment carried little weight.

11 The Judgment was a valid one until it was set aside. While it may have been risky, and arguably unwise, for Panin to proceed with an irregular judgment, that was a course of action it was not precluded from taking. After all, an irregular judgment will not necessarily be set aside (see *Mercurine*).

12 The long delay in Panin applying to set aside the Judgment was not because it was doing nothing. It was taking steps in Malaysia which were rigorously resisted by Ngan.

13 Ngan submitted that he would be prejudiced if the Judgment was set aside because he was entitled to rely on the limitation period of six years for the registration of a judgment as set out in the Malaysia Reciprocal Enforcement of Judgments Act 1958 (Act 99) ("the Malaysia REJA 1958"). Section 4 of the Malaysia REJA 1958 states:

Application for and effect of registration of judgment

4. (1) A person, being a judgment creditor under a judgment to which this Part applies, may apply to the High Court at any time within six years after the date of the judgment, or, where there have been proceedings by way of appeal against the judgment, after the date of the last judgment given in those proceedings, to have the judgment registered in the High Court, and on any such application the court shall, subject to proof of the prescribed matters and to the other provisions of this Act, order the judgment to be registered ...

It was assumed that s 4 of the Malaysia REJA 1958 applied to the Judgment and any subsequent judgment which Panin may eventually obtain in Singapore. In the present case, Panin had applied to register the Judgment in 2001, within six years of the date the Judgment was granted. If the Judgment is set aside and a new judgment is subsequently entered, Panin would, under s 4 of the Malaysia REJA 1958, be required to register that new judgment within six years after the date of that new judgment. The only "prejudice" Ngan would suffer would be that Panin may obtain a new judgment that is registrable in Malaysia within another six years. For the reasons given above, the justice of the case clearly favoured the setting aside of the unenforceable Judgment.

14 Ngan also raised arguments of election and approbation and reprobation against Panin. The principle of election at common law prevents a claimant who, with full knowledge, has made an *unequivocal choice* between two inconsistent *rights* from afterwards pursuing the abandoned right (see *Halsbury's Laws of England* vol 16(2) (Butterworths, 4th Ed Reissue, 2003) at para 962; *Nexus Communications Group Limited v Michael Lambert, Pamela Rosemary Lambert, Kenneth James Munn* [2005] EWHC 345 (Ch) ("*Nexus Communications Group Limited*") at [66] – [67]). The principle of equitable election and the doctrine of approbation and reprobation preclude a person who has exercised a *right* from exercising another right which is alternative to and inconsistent with the *right* he has exercised (*Treasure Valley Group Ltd v Saputra Teddy and another (Ultramarine Holdings Ltd, intervener)* [2006] 1 SLR(R) 358 at [31]) and prevent a person from accepting and rejecting the same

instrument or judgment, for example by taking the benefit of an instrument or judgment without taking its accompanying burden or later contending that the instrument or judgment is invalid (*Nexus Communications Group Limited* at [28]). Contrary to Ngan's submission, in my opinion, the principle of election (both at common law and in equity) and the doctrine of approbation and reprobation did not apply in the present case. Panin's failure to comply with O 79 r 4 of the Singapore ROC 1999 did not nullify the Judgment (see O 2 r 1 of the Singapore ROC 1999). There was no inconsistency between Panin's decision to seek to enforce the irregular (but valid) Judgment and its application to set aside the Judgment once it became clear that it did not have the right to enforce the Judgment in Malaysia. Panin consistently sought to enforce the Judgment in Malaysia and did not give Ngan the impression that it would abandon its claim against Ngan if its efforts at enforcing the irregular Judgment failed. Moreover, Panin did not derive any benefit from the Judgment as it was unable to enforce the Judgment against Ngan in Malaysia and the Bankruptcy Notice it filed against Ngan in Malaysia had also been set aside.

15 Counsel for Ngan referred me to the Malaysia Court of Appeal decision of *Macquarie (Malaysia) Sdn Bhd v HSBC Bank Malaysia Berhad and Anor* (Civil Appeal nos. W-03-10-2006 and W-03-11-2006) ("*Macquarie*") in which the Malaysia Court of Appeal did not allow a plaintiff to set aside a judgment that it had entered 47 months ago. In *Macquarie*, the plaintiff had entered a regular default judgment against the second of two defendants. After the sealed default judgment was extracted, the first defendant applied to amend its defence to plead the defence of election. The first defendant averred that the plaintiff had elected to claim against the second defendant and was estopped from claiming against the first defendant. The plaintiff contested the first defendant's application to amend its defence but its leave to appeal to the Federal Court against the Court of Appeal's decision to allow the amendment was eventually dismissed. The plaintiff then filed an application to set aside the default judgment against the second defendant. The Malaysia Court of Appeal noted (at [54]) that the application to set aside the default judgment was made for the purpose of forestalling, pre-empting or preventing the first defendant from raising the issue of election in its amended defence at trial and that if the application was allowed, this would have the effect of stifling or negating the earlier order of the Court of Appeal which allowed the first defendant to amend its defence. The Malaysia Court of Appeal stated that this was "an obvious illustration of an abuse of the process of the court which should not be permitted". The Malaysia Court of Appeal further held (at [58]) that the act of the plaintiff's solicitors in obtaining the default judgment could "hardly be construed as a mistake" since the plaintiff's solicitors must have properly and meticulously considered the implications of the default judgment when they obtained and perfected it and the plaintiff's solicitors made no effort to set aside the default judgment timeously. The facts of *Macquarie* are very different from those in the present case. Unlike in *Macquarie*, the Judgment that Panin obtained in this case was irregular and such irregularity had clearly arisen by mistake. Moreover, to allow the Judgment to be set aside in the present circumstances would not stifle or negate, and in no way contradicts, the Malaysia Court of Appeal's decision not to allow registration of the Judgment on the ground that it was irregular.

16 Ngan has pointed out that the affidavit of Panin's Singapore counsel, filed on 24 May 2010 in support of Summons No 600063 of 2010, erroneously stated, at paragraph 5, that the irregularity in the Judgment (see [3] above) was brought to Panin's attention "in or about 2008". Counsel for Ngan drew my attention to [34] of the Court of Appeal's decision in *Mercurine* which cited the decision of this court in *Lee Theng Wee v Tay Chor Teng* [2003] SGHC 173 ("*Lee Theng Wee*") as an example of a case where the defendant's delay in making a setting-aside application was not looked upon kindly by the court. The defendant in *Lee Theng Wee* had "some prospect of success" in establishing his defence but the High Court held that his very long delay before making his setting-aside application, coupled with the absence of a valid reason for the delay, was fatal to his application. A further reason for the High Court's decision to uphold the assistant registrar's dismissal of the defendant's

setting-aside application in *Lee Theng Wee* was that the defendant had not been truthful in the supporting affidavit which he filed for his setting-aside application. Whilst a failure to disclose material facts and/or the truth in a supporting affidavit for a setting-aside application may result in a dismissal in the application, the circumstances must be looked at in the round. In my opinion, the error in the supporting affidavit of Panin's counsel in the present case did not outweigh the justice of the case in favour of setting aside the Judgment.

17 With regards to Ngan's allegation that he has repaid the amount claimed by Panin, that is an issue going to the merits of Panin's claim. Panin has been denied a regular judgment and Ngan will have his day in court.

Conclusion

18 For the above reasons, I dismissed the appeal and ordered Ngan to pay the costs of the appeal fixed at S\$3,000 to Panin. If Ngan files and serves an appeal to the Court of Appeal by 5pm of 12 November 2010, the filing of his defence is deferred until further order by any court or otherwise agreed by the parties in writing.

Schedule 1

Chronology of events as discussed at the hearing on 14 October 2010 and based on the table exhibited in Panin's written submissions dated 8 October 2010.

No.	Date	Description
		Action in Singapore
	24.9.1999	Panin filed writ of summons against Ngan.
	23.11.1999	Writ of Summons served on Ngan at 10 th Floor, Wisma Central, Jalan Ampang 50450, Kuala Lumpur Malaysia.
	22.12.1999	Judgment in default of Ngan's appearance entered against him ("the Judgment").
		Action in Malaysia
	16.2.2000	Panin filed Originating Summons No R2-24-23-2000 to register the Judgment in Malaysia.
	08.5.2000	Ngan filed application to strike out the registration application.
	11.5.2000	Ngan filed application for security for costs against Panin.
	17.7.2000	Application for security for costs heard and by consent, Panin furnished security in the sum of RM 25,000.00.

	09.4.2001	Panin's registration application and Ngan's summons to strike out the registration application action heard together and the Court allowed the registration and struck out Ngan's application. Court granted Ngan liberty to set aside the registration within 14 days of service upon him of Notice of such registration if he had grounds for doing so.
	10.4.2001	Ngan filed 2 notices of appeal (against the above 2 decisions) to the judge.
	19.11.2001	Ngan filed summons-in-chambers for leave to adduce fresh evidence. The fresh evidence to be adduced was that the Judgment was irregular as it was entered without leave of court pursuant to O 79 r 4 of the Singapore ROC 1999.
	12.12.2001	Ngan's 2 appeals and his summons-in-chambers were heard and dismissed by the High Court.
	20.2.2002	Ngan appealed against the decision of the the High Court (in No 8 above).
	21.5.2002	Ngan applied to the Court of Appeal for a stay of execution.
	15.7.2002	The Court of Appeal granted Ngan's stay application pending the hearing of his appeal.
	14.8.2002	Panin filed a Notice of Motion (to the Federal Court) to set aside the stay order.
	28.10.2003	The Federal Court, at the hearing of the motion to set aside the stay order, expressed the view that Ngan had taken the wrong procedure in applying to strike out the registration application and thereafter appealing against that order. The Federal Court directed Ngan to withdraw his appeal and to employ the correct procedure as prescribed in the Malaysia REJA 1958. The stay order was set aside and leave was granted to Panin to proceed with its action against Ngan.
	4.11.2003	Panin issued a Notice to Judgment Debtor of Registration of Foreign Judgment ("Notice of Registration of Foreign Judgment").
	6.2.2004	Notice of Registration of Foreign Judgment served on Ngan.
	19.2.2004	Ngan filed application to set aside the service of Notice of Registration of Foreign Judgment.
	15.3.2004	Ngan withdrew appeal pursuant to directions of Federal Court made on 28.10.2003 and a consent order was entered into to allow Ngan to re-ventilate all issues again.
	16.4.2004	Ngan filed application to set aside registration of judgment dated 9 April 2001.
	22.12.2004	Both applications (in Nos 16 and 18 above) were heard before the Senior Assistant Registrar ("SAR") and dismissed.

	24.12.2004	Ngan filed appeals against the dismissal of both applications.
	15.8.2007	Both appeals were heard and dismissed by the High Court.
	29.8.2007	Ngan filed appeals to the Court of Appeal.
	6.12.2007	Panin filed application for leave to execute judgment against Ngan.
	23.5.2008	Panin's application was heard and granted.
	28.10.2008	Panin filed Bankruptcy Notice in Bankruptcy No D3-29-3203-2008 against Ngan.
	19.12.2008	Ngan filed application for stay of execution of judgment of 9 April 2001.
	13.1.2009	Ngan filed application to set aside Bankruptcy Notice.
	1.7.2009	Ngan filed appeal against order granting leave to execute judgment against him.
	10.9.2009	Ngan's application to set aside the Bankruptcy Notice was heard before the SAR and granted.
	16.9.2009	Panin filed appeal against the setting aside of the Bankruptcy Notice.
	28.10.2009	The SAR dismissed Ngan's application for a stay of execution.
	26.11.2009	The Court of Appeal heard Ngan's appeals (filed on 29 August 2007) and allowed the appeals and set aside the registration of foreign judgment made on 9 April 2001.
	23.12.2009	Panin filed application for leave to appeal to Federal Court.
	4.2.2010	Panin withdrew appeal against setting aside of Bankruptcy Notice (see No 30 above).
	17.5.2010	Panin's application was heard and dismissed.
		Action in Singapore
	24.5.2010	Panin filed Summons No 600063 of 2010 to set aside the Judgment and enter a fresh default judgment against Ngan.
	26.5.2010	Application served by post on Ngan at 10 th Floor, Wisma Central, Jalan Ampang 50450, Kuala Lumpur Malaysia.
	3.6.2010	Panin filed and served affidavit by Panin's Malaysia solicitors on Ngan at the same address.
	7.6.2010	Summons No 600063 of 2010 heard before AR Then Ling. Ngan did not attend this hearing. AR Then Ling set aside the Judgment and granted Panin leave to enter a fresh default judgment against Ngan.

	21.7.2010	Ngan filed Summons No 600081 of 2010 to apply for the court to re-hear Summons No. 600063 of 2010 and to set aside orders made on 7.6.10.
	20.9.2010	Ngan's application was heard before AR Jordan Tan who set aside the orders made by AR Then Ling on 7.6.10 and re-heard Summons No 600063 of 2010. He set aside the Judgment and granted leave to Ngan to file his appearance in this action. He dismissed Panin's application for leave to enter a fresh default judgment against Ngan.
	29.9.2010	Ngan filed the present appeal to a judge in chambers.

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