

LAST FLIGHT OF THE EAGLE: NEW PRINCIPLES GOVERNING THE SETTING ASIDE OF JUDGMENTS IN DEFAULT

In one of the most important judgments on civil procedure in recent years, the Court of Appeal in *Mercurine Pte Ltd v Canberra Development Pte Ltd*¹ substantially revised the approach of the court towards applications to set aside regular and irregular judgments in default of appearance. This article examines these developments and considers their likely impact on civil litigation.

Jeffrey PINSLER SC
*LLB (Liverpool), LLM (Cambridge), LL.D (Liverpool);
Barrister (Middle Temple), Advocate & Solicitor (Singapore);
Professor, Faculty of Law, National University of Singapore.*

I. Introduction

1 A fundamental feature of civil litigation is its progression towards final resolution either by eventual settlement or adjudication at trial. Litigants are constantly faced with the option of responding to each other's steps in the action or facing sanctions so that the proceedings are not stultified and an impasse is avoided. The default judgment is a primary mechanism in this respect as it compels the defendant to respond to the plaintiff's claim by way of appearance and defence,² and avoids wastage of the court's and the parties' resources by bringing uncontested proceedings to a conclusion. The default judgment, as the terminology suggests, is not a judgment on the merits but an administrative act effected by the submission of documents to a court when certain procedural conditions have been satisfied.³ As a judgment has been entered against the defendant, the case on liability terminates unless he makes a successful application to set it aside.

1 [2008] 4 SLR 907.

2 See O 13 and O 19 of the Rules of Court ("RC") concerning judgments in default of appearance and defence respectively. The same principles would apply to the plaintiff's failure to file a defence in response to the defendant's counterclaim (O 19 r 8 (RC)).

3 In the case of a judgment in default of appearance, these conditions include (but are not limited to) the expiry of the period for entering an appearance, the production of a certificate of non-appearance, proof of service of the writ (see O 13 r 7 (RC)).

2 This article is concerned with the principles governing an application to set aside a judgment in default. A variety of questions arise in this difficult area of procedural law. For example, should a distinction be made between regular and irregular judgments (irregular in the sense that the plaintiff has failed to comply with a rule of procedure or committed some other impropriety in entering his judgment)? With regard to a regular judgment, how strong a case must the defendant present in order to succeed in his application? Must the defendant satisfactorily explain his failure to enter an appearance in time? To what extent should the court take into account the defendant's delay in making an application to set aside the default judgment? As for an irregular judgment in default, does the defendant have an automatic right to set it aside on the basis that it was entered prematurely or for an excessive amount or because of some other error? Does the defendant need to show that he has a meritorious case? If so, is the merits test for setting aside a regular judgment different to that pertaining to an irregular judgment? How significant is the conduct of the parties in respect of an application to set aside an irregular judgment? Does the incidence of the burden of proof on certain issues vary according to whether the application is to set aside a regular or irregular judgment?

3 Many of these questions were addressed by the Court of Appeal in *Mercurine Pte Ltd v Canberra Development Pte Ltd* ("Mercurine"),⁴ which has substantially revised the court's approach to applications to set aside both regular and irregular judgments. The case⁵ involved claims by the plaintiff landlord for rental arrears and possession of the premises which had been leased to the defendant. The defendant failed to enter an appearance and a judgment was entered in default of appearance. The defendant applied to set aside the judgment more than 15 months later. The judgment was irregular because it had been entered for an excessive sum (in respect of the rental arrears) and the plaintiff had failed to produce a certificate required by O 13 r 4(1) (in respect of the claim for possession). Other related issues between the parties concerning settlement of the dispute and declarations relating to the lease were the subject of separate suits.⁶

II. General rule governing applications to set aside a judgment in default

4 The questions posed in para 2 of this article raise a variety of complex issues which go to the heart of procedural philosophy.

4 [2008] 4 SLR 907.

5 A brief summary of the facts is given here. They will be elaborated upon as necessary in the course of the article.

6 See [2008] 4 SLR 907 at [15]–[16], [22]–[23], [102]. The Court of Appeal's decision in the case is considered in para 46 of this article.

Order 13 r 8 and O 19 r 9, which concern applications to set aside a judgment in default of appearance and defence respectively, are identical:

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

5 The rule⁷ does not distinguish between the principles governing the setting aside of regular and irregular judgments although, as will be seen, there are important conceptual differences justifying specific approaches. The phraseology of this rule suggests that a court should set aside a default judgment if it is able to impose terms which would compensate or take into account any losses or harm suffered by the plaintiff (particularly the costs which he incurred in entering the default judgment and in resisting the application to set it aside). A more restrictive rule would, it is submitted, have decoupled the primary element (“may ... set aside”) from the incidental phrase (“on such terms as it thinks just”) and have repositioned the words so that the terms of the order to set aside, being subsidiary to the decision to set aside, would have been placed at the end of the sentence. It is also interesting that justice (“just”) is only expressed in the context of the terms. Although the rule does not expressly state that the decision to set aside must be “just”, this is clearly implied by the word “may”, which requires the court to consider whether setting aside the judgment would be in the interest of justice. *Prima facie*, it would be in the interest of justice to set aside the judgment (which has been obtained by default and not given on the merits), if the defendant has some basis for defending the claim against him, and the court is able to impose terms which sufficiently take into account the loss or harm suffered by the plaintiff.⁸ This interpretation is consistent with the judicial culture at the time of the introduction of the rule in England. In *Cropper v Smith*,⁹ Bowen LJ considered it to be “a well-established principle that the object of the courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights”. This approach was echoed by Lord Atkin in *Evans v Bartlam* (“*Evans*”)¹⁰ in the specific context of a judgment in default of appearance:

The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that

7 Henceforth, all references to O 13 r 8 (RC) include a reference to O 19 r 9 (RC).

8 The significance of the defendant’s attitude or misconduct to his application to set aside is considered at paras 16–35 of this article.

9 (1884) 26 Ch D 700 at 710.

10 [1937] AC 473 at 480.

has only been obtained by a failure to follow any of the rules of procedure.¹¹

6 Although *Evans* was decided 72 years ago, it has been regularly cited as a leading case on the standard of merits which the defendant is required to meet in order to succeed in his application to set aside a regular default judgment. However, a discordant interpretation of the House of Lords' pronouncements in *Evans* by the Court of Appeal in *Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc*¹² ("*The Saudi Eagle*") in 1986 had the effect of requiring the defendant to satisfy an inappropriately strict standard in order to succeed on his application to set aside the default judgment. Unfortunately, *The Saudi Eagle* test was applied by the Singapore courts without objective consideration in 1992 and continued to govern proceedings here for a period of 16 years until it was recently abandoned by the Court of Appeal in *Mercurine*. These developments will be examined with a view to determining the criteria which now govern the defendant's application to set aside.

III. Development of the merits test for setting aside a regular judgment in default

7 In *Evans*, Lord Atkin, Lord Russell and Lord Wright used different phrases to describe the nature of the case which the applicant must put forward in order for the court to set aside a regular default judgment. Nevertheless, a close examination of their respective speeches reveals a clear principle: if the defendant can raise a defence or an issue in contention which would affect adjudication on the merits at trial, it would be just (subject to other considerations)¹³ to set aside the judgment. Lord Atkin stated that the applicant "must produce to the court evidence that he has a prima facie defence". Lord Russell considered that the court must determine "whether any useful purpose could be served by setting aside the judgment, and obviously no useful purpose would be served if there were no possible defence to the action". His Lordship also pointed out that the applicant would ordinarily need to show "how it came about that [he] found himself bound by a judgment regularly obtained, to which he could have set up some serious defence".¹⁴ The words "serious defence" (which are consistent with Lord Atkin's expression, "prima facie defence") mean that it must not be a fanciful defence or a facade but a case which raises a real issue or valid basis of contention which affects the merits. If the applicant has a valid basis on which to challenge the plaintiff's claim,¹⁵ the obvious

11 This proposition is analysed from para 17 of the article onwards.

12 [1986] 2 Lloyd's Rep 221.

13 To be reviewed subsequently.

14 [1937] AC 473 at 482.

15 Or, in Lord Russell's words, "some serious defence" ([1937] AC 473 at 482).

purpose of setting aside the judgment would be to ensure that there is proper adjudication on the merits at trial. As Lord Wright said: “The primary consideration is whether [the applicant] has merits to which the court should pay heed; if merits are shown the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication.”¹⁶ His Lordship’s conclusion on the facts of the case is telling: “[The applicant] clearly shows an issue which the court should try.”¹⁷ Nowhere in any of these pronouncements is there any indication that the applicant must establish that he is likely to succeed in challenging the plaintiff’s claim or that his case has a particular degree of force over and above an arguable case on the merits. It is sufficient that the applicant raises one or more issues of contention which justify a trial on the merits. The question is whether the case should be tried, not whether the applicant has a sufficiently strong case to win at trial. This approach was applied without question in England until 1986¹⁸ when the Court of Appeal in *The Saudi Eagle* applied the following guidelines based on its interpretation of the speeches in *Evans*:¹⁹

... bearing in mind that ‘in matters of discretion no one case can be authority for another’:²⁰

(i) a judgment signed in default is a regular judgment from which, subject to (ii) below, the plaintiff derives rights of property;

(ii) the Rules of Court give to the judge a discretionary power to set aside the default judgment which is in terms ‘unconditional’ and the court should not ‘lay down rigid rules which deprive it of jurisdiction’ [*ibid*, at 486];

(iii) the purpose of this discretionary power is to avoid the injustice which might be caused if judgment followed automatically on default;

(iv) the primary consideration is whether the defendant ‘has merits to which the court should pay heed’ [*ibid*, at 489], not as a rule of law but as a matter of common sense, since there is no point in setting aside a judgment if the defendant has no defence and if he has shown ‘merits’ the—

... court will not, prima facie, desire to let a judgment pass on which there has been no proper adjudication [*ibid*, at 489 and 482].

(v) Again as a matter of common sense, though not making it a condition precedent, the court will take into account the explanation as to how it came about that the defendant—

16 [1937] AC 473 at 489.

17 [1937] AC 473.

18 See, for example, *Burns v Kondel* [1971] 1 Lloyd’s Rep 554 at 555.

19 [1986] 2 Lloyd’s Rep 221 at 223.

20 Cited from *Evans v Bartlam* [1937] AC 473 at 488.

... found himself bound by a judgment regularly obtained to which he could have set up some serious defence [*ibid*, at 482].

8 Regarding “the primary consideration” in guideline (iv), the Court of Appeal did not accept the argument that the standard to be met by a defendant in challenging an application for summary judgment pursuant to O 14 (RC) (*ie*, an arguable case/an issue which ought to be tried) is the same as that which had been contemplated by the House of Lords in *Evans*. Sir Roger Ormrod explained:²¹

All of [their Lordships] clearly contemplated that a defendant who is asking the court to exercise its discretion in his favour should show that he has a defence which has a real prospect of success ... it would be surprising if the standard required for obtaining leave to defend (which has only to displace the plaintiff’s assertion that there is no defence) were the same as that required to displace a regular judgment of the court and with it the rights acquired by the plaintiff. In our opinion, therefore, to arrive at a reasoned assessment of the justice of the case the court must form a provisional view of the probable outcome if the judgment were to be set aside and the defence developed. The ‘arguable’ defence must carry some degree of conviction.

9 The phrase “real prospect of success” is ambiguous. If it means that the defence has some validity as opposed to being fanciful and unrealistic, then this approach would be consistent with the speeches of the House of Lords in *Evans*. If, however, “real” is construed to the effect that the applicant must, in addition to raising an issue which justifies adjudication at trial, establish that he has a good case or is likely to succeed at trial, this goes beyond the pronouncements of their Lordships in *Evans*. In *The Saudi Eagle*, the Court of Appeal favoured the latter interpretation as indicated by its statement that a determination must be made as to whether the applicant will succeed at trial: “... to arrive at a reasoned assessment of the justice of the case the court must form a provisional view of the probable outcome if the judgment were to be set aside and the defence developed.”²² It is not sufficient to raise an “arguable defence” for the defence “must carry some degree of conviction”.²³ Therefore, according to the court, the applicant must establish more than a defence or issue which should be adjudicated: he must raise a defence which is likely to succeed at trial.²⁴

21 [1986] 2 Lloyd’s Rep 221 at 223.

22 [1986] 2 Lloyd’s Rep 221 at 223.

23 [1986] 2 Lloyd’s Rep 221 at 223.

24 In *Canberra Development Pte Ltd v Mercurine Pte Ltd* [2007] SGHC 107 at [47], the assistant registrar, when considering *The Saudi Eagle*, stated that the two phrases “a real prospect of success” and “some degree of conviction” are not synonymous when taken in their normal and literal sense: “... the former sets a far higher
(cont’d on the next page)

10 The approach in *The Saudi Eagle* is inconsistent with the speeches in *Evans* and is inherently problematic. The following observations in a secondary source were endorsed by the Singapore Court of Appeal in *Mercurine*:²⁵

The approach in *Saudi Eagle Shipping* [*ie, The Saudi Eagle*] is not free from difficulty. In the first place, the higher standard requires the court to enter into an evaluation of the evidence to determine the likely outcome of the case. This task may be compromised by the inconclusiveness of the affidavits, and allegations in the pleadings which have yet to be substantiated by evidence tested on oath ...

Secondly, it may be unjust to deprive a defendant who can raise a genuinely triable issue (as opposed to a sham defence) of his opportunity to challenge the plaintiff's case at trial. In *Saudi Eagle Shipping*, the [English] Court of Appeal sought to justify the distinction between the standard required to displace a regular judgment in default, and that applicable to resist an application for summary judgment, on the basis that in the former situation an actual judgment of the court has been obtained, and with it, the rights of property acquired by the plaintiff ([1986] 2 Lloyd's Rep 221, at 223). This distinction may be far less significant when one considers that in both situations the defendant is seeking to avoid early judgment without trial (whether summary or by default). Accordingly, if the defendant is able to raise a triable issue which might prevent judgment at trial, the default judgment should not be allowed to stand (in the same way, summary judgment would not be granted in these circumstances) ... No doubt, where the defendant is responsible for the default judgment, and seeks to inconvenience the court by applying to set it aside, the court's displeasure may be expressed by penalising him in costs and by imposing appropriate conditions as part of its order.

11 In England, *The Saudi Eagle* did not escape criticism. Only a year later, Hobhouse J, in *The Ruben Martinez Villena*,²⁶ refused to accept that the law had been changed: "If in that passage [Sir Roger Ormrod] is intending to say that the court must do its best to predict the outcome of the action if the judgment is set aside, and should only set aside a judgment if it is satisfied that the outcome of the action will, on a better

standard than the latter, and there may be cases where a defence has 'some degree of conviction' but nevertheless, a judge would be hesitant to say that there is a real prospect of success." The Court of Appeal endorsed this view in *Mercurine*, at [2008] 4 SLR 907 at [49].

25 *Mercurine*, at [58]. The observations appear in J Pinsler, *Singapore Court Practice 2006* (LexisNexis, 2006) at para 13/8/9. Also see Chia Jin Chong Daniel, "Setting aside a regular default judgment: What is a good defence on the merits – real prospect of success or arguable, triable issue?" (1996) 17 Sing LR 221; *Lim Quee Choo v David Rasif* [2008] SGHC 36.

26 [1987] 2 Lloyd's Rep 621 at 624. The case is considered by the Court of Appeal in *Mercurine* [2008] 4 SLR 907 at [52]–[54].

than 50–50 chance, be a judgment in favour of the defendants, then I consider that the statement goes beyond the law as it has been laid down in the authorities.” Dillon LJ, who delivered the judgment of the Court of Appeal in *Allen v Taylor*,²⁷ thought it “impossible to be dogmatic about the extent to which the court must be satisfied of the validity of the suggested defence”, and that “there must be numerous cases where the issue will turn entirely on the assessment of the facts at trial”. His Lordship said with regard to the suit before him that both parties’ cases carried conviction and that the court could not, without conducting a trial, say which would succeed. This conclusion contrasts with the unqualified direction of the Court of Appeal in *The Saudi Eagle* that “the court must form a provisional view of the probable outcome if the judgment were to be set aside and the defence developed”.²⁸ Ward LJ was no less critical of *The Saudi Eagle* approach in *Day v Royal Automobile Club Motoring Services Ltd* (“*Day v RAC*”):²⁹

[I]t is usually easy to identify the case which is hopeless and say ‘There is *no* real prospect of success.’ I add the emphasis to make the point that one is looking at the matter *negatively*. The approach is distorted if one uses ‘real prospects of success’ as a *positive* test. That wrongly encourages a test of judging fact[s] on affidavit[s] and then coming to a provisional view of the probable outcome. I agree ... that *the arguable case must carry some degree of conviction but judges should be very wary of trying issues of fact on evidence where the facts are apparently credible and are to be set ... against the facts being advanced by the other side. Choosing between them is the function of the trial judge, not the judge on the interlocutory [setting-aside] application, unless there is some inherent improbability in what is being asserted or some extraneous evidence which would contradict it. I would therefore be a little hesitant to elevate the test into ... ‘a real likelihood that a defendant will succeed’.*

12 The question as to whether *The Saudi Eagle* applied in Singapore was uncertain for a time. Two cases decided within a period of three months of each other, and reported in 1992, generated different conclusions by the High Court. In *Singapore Gems Co v The Personal Representatives for Akber Ali (deceased)* (“*Singapore Gems*”),³⁰ the High Court ruled, on the basis of a statement in para 13/9/5 of the English *Supreme Court Practice (1991)*, that the applicant who seeks to set aside a regular judgment “need only disclose an arguable or triable issue”. Strangely, there was no mention of *The Saudi Eagle* in para 13/9/5, which only referred to previous authorities for the proposition adopted

27 [1992] PIQR 255. The case is considered by the Court of Appeal in *Mercurine* [2008] 4 SLR 907 at [55].

28 See para 9 of this article.

29 [1999] 1 WLR 2150 at 2157. Emphasis by the Court of Appeal in *Mercurine* [2008] 4 SLR 907 at [57].

30 [1992] 2 SLR 254 at [21].

in *Singapore Gems*. Accordingly, the decision in *Singapore Gems* may well have been fortuitous as it is possible that the High Court would have applied *The Saudi Eagle*, had this case been included in para 13/9/5.

13 Any doubt as to whether *The Saudi Eagle* applied in Singapore was dispelled by the decision of the High Court in the other case reported in 1992, *Hong Leong Finance Ltd v Tay Keow Neo* (“*Hong Leong*”).³¹ Although *Hong Leong* was decided three months earlier than *Singapore Gems*,³² there is nothing in the High Court’s judgment in *Singapore Gems* to indicate that *Hong Leong* was presented in the course of argument.³³ *Hong Leong* was the first case to endorse *The Saudi Eagle* in this country. The High Court applied Sir Roger Ormrod’s set of five guidelines³⁴ and concluded that “the defendants have not shown that they have a defence which had any reasonable prospect of success ...”.³⁵ *The Saudi Eagle*’s application to Singapore was confirmed by the Court of Appeal in 1995 in *Abdul Gaffer v Chua Kwang Yong* (“*Abdul Gaffer*”),³⁶ in which it stated: “[I]t 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.”³⁷

14 This continued to be the position for the next 13 years until the Court of Appeal reversed its position in *Mercurine*.³⁸ The Court of Appeal considered its position in *Abdul Gaffer* and observed that *The Saudi Eagle* had been “approved without any analysis”³⁹ and that “[t]here was no attempt to explain why the older *Evans v Bartlam* test needed re-assessment in the Singapore context”.⁴⁰ Furthermore, “*Abdul Gaffer* seems to suggest (incorrectly) that there is a single test for all types of setting aside applications, regardless of whether the default judgment is regular or irregular”.⁴¹ The Court of Appeal in *Mercurine* formulated the standard which is now applicable to the setting aside of regular default judgments:⁴²

31 [1992] 1 SLR 205.

32 The reports show that *Hong Leong* was decided on 28 November 1991 and that *Singapore Gems* was decided on 28 February 1992.

33 Assuming that it was available for this purpose.

34 See para 7 of this article.

35 [1992] 1 SLR 205 at [61].

36 [1995] 1 SLR 484.

37 [1995] 1 SLR 484 at [18]. There is a second limb to the Court of Appeal’s pronouncement concerning the applicant’s conduct, which will be considered in the following section of this article.

38 This case involved an application to set aside an irregular judgment in default. The facts are considered at [2008] 4 SLR 907 at [3], [25], and [46].

39 [2008] 4 SLR 907 at [50].

40 [2008] 4 SLR 907 at [50].

41 [2008] 4 SLR 907 at [50].

42 [2008] 4 SLR 907 at [60] and [95].

[I]n deciding whether to set aside a regular default judgment, the question for the court is whether the defendant can establish a prima facie defence in the sense of showing that there are triable or arguable issues. It is, in our view, rather illogical to hold that the test for setting aside a regular default judgment should be any stricter than that for obtaining leave to defend in an O 14 application. In both instances, there has been no hearing on the merits. This is not to say that the position in both instances is completely identical or symmetrical. When a regular default judgment has been entered, there would have been a prior default or lapse on the part of the defendant. There are, however, other means of dealing with such procedural default or lapses, including the imposition of adverse costs orders or the making of a setting-aside order which is conditional on appropriate terms being met

15 Accordingly, the defendant is no longer required to show that he has a sufficiently forceful defence which is likely to succeed at trial. He merely has to raise an issue which ought to be adjudicated at trial. However, the Court of Appeal's observations in *Mercurine* should not be read as restricting the scope of O 13 r 8,⁴³ which is broad enough to contemplate an order setting aside a regular judgment in any situation if this outcome is just. For example, where the defendant is unable to raise a triable or arguable issue, but nevertheless satisfies the court that the circumstances of the case demand a comprehensive assessment of the facts which can only be undertaken at trial.⁴⁴ The significance of the defendant's conduct to his application to set aside, which is indicated in the final part of the above extract⁴⁵ (and considered in other parts of the judgment of the Court of Appeal in *Mercurine*), will be examined in the following section of this article.⁴⁶

IV. Impact of defendant's conduct on his application to set aside a regular judgment in default

16 To what extent does a defendant's conduct affect his application to set aside a regular judgment? Order 13 r 8⁴⁷ merely states that the court may "set aside or vary any judgment" on "such terms as it thinks just". The rule enables the court to take into account the defendant's conduct in determining whether the judgment should be confirmed or

43 See para 4 of this article.

44 Such a principle applies in applications for summary judgment. See O 14 r 3(1) (RC), which contemplates the situation in which "there ought for some other reason to be a trial".

45 See para 14 of this article.

46 Also see para 24 of this article concerning the operation of the balancing test which takes into account the merits of the defendant's case and other relevant considerations.

47 The rule is set out in para 4 of this article.

set aside and, if set aside, what the appropriate terms should be. Conduct may feature in various ways. The defendant may have acted improperly in the manner he allowed the judgment in default to be entered and/or he may have been guilty of undue delay in making his application to set aside the judgment.⁴⁸ These circumstances may be exacerbated by behaviour which is calculated to deceive the plaintiff or, more seriously, by dishonesty towards the court hearing the application. This is a difficult area primarily because of the vagueness of O 13 r 8 and the absence of a more systematic judicial approach. Although the courts have repeatedly stated that the discretion must not be fettered,⁴⁹ and that “no one case can be an authority for another”,⁵⁰ a formulation of broad principles is necessary to clarify the law.

17 The starting point is Lord Atkin’s oft-cited pronouncement about the subjection of procedural compliance to substantive rights:⁵¹

The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

18 This proposition does not mean that every procedural default will be excused in favour of enabling a proper adjudication of the substantive merits of a case. In *Evans*, the defendant, who faced a judgment in default of his appearance, requested, and was given, time to pay the judgment sum. Subsequently, the defendant successfully applied to set aside the judgment on the basis that his case had some merit.⁵² Apart from his failure to enter an appearance in time, there was no delay or other impropriety on his part.⁵³ There was no egregious breach of the rules in this case which may have defeated his application to set aside the judgment. The question of whether non-compliance with procedure will affect a party’s substantive rights must depend on the nature of the impropriety. As Bowen LJ stated in *Cropper v Smith*:⁵⁴

48 Although O 13 r 8 does not specify a period for the application, the courts have always assumed that it should be made within a reasonable time. Section 52 of the Interpretation Act (Cap 1, 2002 Rev Ed) states: “Where no time is prescribed or allowed within which anything shall be done, that thing shall be done with all convenient speed and as often as the prescribed occasion arises.”

49 *Evans v Bartlam* [1937] AC 473 at 488; *The Ruben Martinez Villena* [1987] 2 Lloyd’s Rep 621 at 223.

50 *Evans v Bartlam* [1937] AC 473 at 488; *The Ruben Martinez Villena* [1987] 2 Lloyd’s Rep 621 at 223.

51 *Evans v Bartlam* [1937] AC 473 at 480.

52 The defendant had raised a triable issue ([1937] AC 473 at 489).

53 [1937] AC 473 at 489. The House of Lords determined that his change of position from proposing settlement to defending the action did not bar him from relief.

54 (1884) 26 Ch D 700 at 710–711.

I think it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights ... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy ...⁵⁵

19 By referring to “mistakes” or “errors” which are “not fraudulent or intended to overreach”,⁵⁶ Bowen LJ indicated that the court’s response to non-compliance will not invariably be to impose costs and other incidental sanctions. Where a party has deliberately conducted himself in a manner which is intended to deceive the other party, or has dishonestly misrepresented the facts to the court, or has otherwise offended the administration of justice, his substantive rights may be affected. Similarly, while considering the newly introduced principles which empowered the court to rectify irregularities and errors in procedure pursuant to O 2 r 1 of the English Rules of the Supreme Court,⁵⁷ Lord Denning remarked in *Harkness v Bell’s Asbestos and Engineering Ltd*⁵⁸ that “it is not possible for an *honest*⁵⁹ litigant in Her Majesty’s Supreme Court to be defeated by any mere technicality, any slip, any *mistaken*⁶⁰ step in his litigation”.⁶¹ It is clear from the words “honest” and “mistaken” that his Lordship did not contemplate that dishonesty or deception could be disregarded in the context of substantive justice.

20 Bowen LJ’s comment that “the courts do not exist for the sake of discipline”⁶² should not be read as relegating all misconduct to a state of immateriality. The nub of the issue is whether the conduct is so serious that it impinges upon the overall justice of the case. As the Singapore Court of Appeal has pointed out in two recent decisions, procedural and substantive justice are inextricably linked. In *Lee Hsien Loong v Singapore Democratic Party*,⁶³ Andrew Phang JA repeated his earlier observations in *United Overseas Bank v Ng Huat Foundations*:⁶⁴

55 Bowen LJ’s view was endorsed by the Singapore Court of Appeal in *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR 537 at [81].

56 “Overreach” may be defined as deceitful conduct intended to improperly take advantage of the other party.

57 As they stood in 1965.

58 [1966] 2 QB 729.

59 Emphasis by the author.

60 Emphasis by the author.

61 [1966] 2 QB 729 at 735–736.

62 In the quote above.

63 [2008] 1 SLR 757 at [32].

64 [2005] 2 SLR 425 at [8]. His Honour’s observations are set out at [4]–[9] of this case.

The quest for justice, therefore, entails a continuous need to balance the procedural with the substantive. More than that, it is a continuous attempt to ensure that both are *integrated*, as far as that is humanly possible. Both *interact* with each other. One cannot survive without the other. There must, therefore, be – as far as is possible – a fair and just procedure that leads to a fair and just result. This is not merely abstract theorising. It is the *very basis* of what the courts do – and ought to do. When in doubt, the courts would do well to keep these bedrock principles in mind. This is especially significant because, in many ways, this is how, I believe, laypersons perceive the administration of justice to be. The legitimacy of the law in their eyes must never be compromised. On the contrary, it should, as far as is possible, be enhanced.⁶⁵

21 In the same vein, V K Rajah JA stated in *Lee Chee Wei v Tan Hor Peow Victor*:⁶⁶

The rules of court practice and procedure exist to provide a convenient framework to facilitate dispute resolution and to serve the ultimate and overriding objective of justice. Such an objective must never be eclipsed by blind or pretended fealty to rules of procedure. On the other hand, a pragmatic approach governed by justice as its overarching aim should not be viewed as a charter to ignore procedural requirements. In the ultimate analysis, each case involving procedural lapses or mishaps must be assessed in its proper factual matrix and calibrated by reference to the paramount rationale of dispensing even[-]handed justice.

22 The operation of these principles in the specific context of an application to set aside a judgment in default was not formalised until the decision of the Court of Appeal in *Mercurine*. In its earlier judgment in *Abdul Gaffer*,⁶⁷ the Court of Appeal was concerned with the conduct of the defendant in deliberately ignoring service of the writ and allowing the judgment in default of appearance to be entered. The court adopted the position taken in *The Saudi Eagle* by holding that such conduct “must be considered in justice” when determining whether a judgment should be set aside.⁶⁸ This phrase was too vague to be useful because it did not address prioritisation in the relationship between the substantive merits of the defendant’s case and his non-compliance with the rules of procedure. In subsequent cases, the High Court, following the lead of the Court of Appeal in *Abdul Gaffer*, appeared to take into account the merits of the applicant’s defence and his defaults or misconduct in a general balance of “equities” or “justice” between the parties. For example, in *Lee Theng Wee v Tay Chor Teng* (“*Lee Theng*

65 Emphasis by the High Court. Also see paras 28 and 31 of this article.

66 [2007] 3 SLR 537 at [82].

67 See paras 13–14 of this article.

68 *Abdul Gaffer* [1995] 1 SLR 484 at [18], citing *The Saudi Eagle* [1986] 2 Lloyd’s Rep 221 at 225.

Wee”),⁶⁹ Woo Bih Li J upheld the registrar’s dismissal of an application to set aside a judgment in default more than three years after it had been entered because of the defendant’s “very long delay”, his failure to offer satisfactory reasons for his late application and his failure to be truthful in his affidavit.⁷⁰ His Honour indicated that although the applicant might succeed at trial on a particular argument, “the equities or the justice of the case were clearly not in [his] favour”.⁷¹

23 *Ang Kim Soon v Sunray Marine Pte Ltd*⁷² (“*Ang Kim Soon*”) is another case in point. The plaintiff sued his employer (“Sunray”) in respect of injuries he sustained from an explosion while he was carrying out work on board a ship. Meanwhile, Sunray had brought proceedings for an indemnity against the shipowner (in respect of liability for the accident). Sunray ignored repeated requests by the plaintiff to file its defence. Eventually, the plaintiff entered judgment in default. Sunray did not apply to set aside the judgment until the proceedings against the shipowner had been concluded in Sunray’s favour (almost six months after the judgment had been entered). Therefore, Sunray, having been exonerated for the explosion, had a real prospect of success against the plaintiff. Sunray’s explanation that it was inappropriate to apply to set aside the judgment until the conclusion of its action against the shipowner was not accepted by the court. Choo Han Teck J took into account the chronology of the events and the conduct of the parties and opined: “Once liability [was] disputed, [Sunray] was bound to set aside the interlocutory judgment at the earliest opportunity. It should not play a cat-and-mouse game with the ship owner using the plaintiff as cheese.”⁷³ His Honour concluded that “on a balance of equities”, the judgment should not be set aside.⁷⁴

24 It is now clear that the test (“the *Mercurine* balancing test”) for determining whether a default judgment should be set aside balances the merits of the defendant’s case (the primary consideration) against other relevant considerations. Having determined that the standard of merits which a defendant must establish is that of a triable or arguable issue,⁷⁵ V K Rajah J stated:

[T]he merits of the defence do not constitute the sole consideration that a court takes into account in deciding whether to set aside a regular default judgment. While this factor is certainly highly

69 [2003] SGHC 173.

70 [2003] SGHC 173 at [17]. Also see the judgment of the Court of Appeal in *Mercurine* [2008] 4 SLR 907 at [34].

71 [2003] SGHC 173 at [17]. Also see para 35 of this article.

72 [1997] 3 SLR 619.

73 [1997] SLR 619 at 16.

74 The court determined that the plaintiff had been prejudiced by the defendant’s conduct ([1997] 3 SLR 619 at [21]). Also see para 35 of this article.

75 See para 14 of this article.

significant in its own right, it also has to be assessed against other relevant considerations – at the end of the day, a balancing exercise is involved. As this court recently reiterated in [*Su Sh-Hsyu v Wee Yue Chew* [2007] 3 SLR 673 at [43]]: ‘[T]he question of whether there is a defence on the merits is the dominant feature to be weighed against the applicant’s explanation both for the default and for any delay, as well as against prejudice to the other party ...’

25 The merits of the defence are the primary consideration for the court which must be taken into account together with other considerations (subsidiary though they may be) in determining whether it is just to set aside the judgment. These other considerations include the reasons why the default judgment was entered and the applicant’s explanation for this outcome, whether there was any delay (including its degree) in making the application⁷⁶ and any other circumstances which should be assessed in reaching a just decision. If the applicant has deliberately withheld filing his application in order to obtain some advantage in the litigation, the application will, in the words of the Court of Appeal in *Mercurine*, “*prima facie* be viewed uncharitably”.⁷⁷ With regard to delay, the Court of Appeal stated: “A long delay may not be procedurally incurable or fatal to a setting aside application.”⁷⁸ Ultimately, it is a question of whether the delay is inexcusable (notwithstanding the explanation offered) on the facts presented to the court.⁷⁹ The court will also consider the impact of the applicant’s

76 Order 13 r 8 (RC) does not prescribe a time limit for an application to set aside a judgment in default. Section 52 of the Interpretation Act (Cap 1, 2002 Rev Ed) states: “Where no time is prescribed or allowed within which anything shall be done, that thing shall be done with all convenient speed and as often as the prescribed occasion arises.” Accordingly, the issue of whether the delay was justified must be considered in the circumstances of the case. The court will “closely scrutinise the reasons for the delay” ([2008] 4 SLR 907 at [32]).

77 [2008] 4 SLR 907 at [32]. The Court of Appeal also said (at [61]) that the following proposition in *The Saudi Eagle* (at 225) “can still provide some useful guidance”: “The conduct of the defendants in ... [*inter alia*] *deliberately deciding not to give notice of intention to defend* because it suited the interests of the group to let the plaintiffs proceed against these defendants is a matter to be taken into account in assessing the justice of the case.” [emphasis added by the court] Also see para 35 of this article.

78 [2008] 4 SLR 907 at [37].

79 The Court of Appeal also stated ([2008] 4 SLR 907 at [35]): “... we would emphasise that procedural rules must not occasion injustice by unfairly depriving a party of an opportunity to argue its case. On the other hand, the indolent cannot as a matter of course be awarded the same measure of justice as the diligent.” The court endorsed Warren L H Khoo J’s observation in *European Asian Bank v Chia Ngee Thuang* [1995] 3 SLR 171 at [21]: “In exercising its discretion [to set aside default judgments], the two important factors which the court considers are the merits of the defendant’s case and, if there has been a delay in approaching the court, any explanation which the defendant has proffered for the delay.” Also see *Mercurine* [2008] 4 SLR 907 at [32]: “Needless to say, where a defendant delays in
(cont’d on the next page)

conduct on the opposing party, particularly if the latter would suffer injustice if the judgment is set aside. In *Mercurine* itself, the defendant only applied to set aside a judgment in default of appearance 15 months after it had been entered.⁸⁰ The Court of Appeal in *Mercurine* disagreed with the High Court's conclusion⁸¹ that the application to set aside had been made too late to justify relief. On the facts, there was certainly no intention to delay the application in order to obtain some benefit in the case. There was also evidence that the defendant believed that it had negotiated a compromise with the plaintiff and that it intended to honour this agreement. Furthermore, the defendant satisfactorily explained that it was seeking to settle the case out of court in the interests of the ultimate shareholders which both parties had in common.⁸² The fact that the defendant had made its own application to the court⁸³ for declarations regarding the parties' settlement negotiations and related matters⁸⁴ did not detract from this finding.⁸⁵

26 V K Rajah JA's formulation of principles in *Mercurine* suggests that the decisions in *Lee Theng Wee* and *Ang Kim Soon* are justifiable today. It may well be that a future court faced with the same conduct will regard it as sufficiently serious to deny the applicants any relief even in the face of clear merits. These may be cases in which the subsidiary considerations have a significance which outweigh the primary consideration of substantive merits. The Court of Appeal cited both decisions without criticism⁸⁶ and held *Ang Kim Soon* up as a paradigm example of cases "where the defendant's conduct calls for the court to be less than ready to exercise its setting-aside jurisdiction".⁸⁷ His Honour reiterated the opposing tenets that "procedural rules must not occasion injustice by unfairly depriving a party of an opportunity to argue its case" and "the indolent cannot as a matter of course be awarded the same measure of justice as the diligent".⁸⁸ The learned judge went on to consider the formula to be applied where there has been delay in an application to set aside a judgment.⁸⁹ His Honour referred to the Federal Court's conclusion in *Tuan Haji Ahmed Abdul Rahman v Arab-*

making a setting-aside application, the court will in every case have to closely scrutinise the reasons for the delay."

80 Although the default judgment was irregular ([2008] 4 SLR 907 at [101]), the Court of Appeal's observations on delay in making the application to set aside apply to both regular and irregular default judgments ([2008] 4 SLR 907 at [97]).

81 *Canberra Development Pte Ltd v Mercurine Pte Ltd* [2008] 1 SLR 316.

82 [2008] 4 SLR 907 at [40].

83 Eleven months after the entry of the default judgment.

84 [2008] 4 SLR 907 at [15].

85 [2008] 4 SLR 907 at [41].

86 [2008] 4 SLR 907 at [33]–[34].

87 [2008] 4 SLR 907 at [61].

88 [2008] 4 SLR 907 at [35].

89 Also see para 25 of this article.

*Malaysian Finance Bhd*⁹⁰ (“*Tuan Haji*”) that it had the discretion to set aside a judgment if it was satisfied that:

- (a) no one had suffered prejudice by reason of the defendant’s delay; or
- (b) if such prejudice had been sustained, it could be met by an appropriate order as to costs; or
- (c) it would constitute oppression to let the judgment stand.

27 The Court of Appeal considered these principles to be “essentially sound, albeit not necessarily exhaustive”. Paragraphs (a) and (b) express the traditional approach of the common law to non-compliance with rules of procedure. The court normally considers the innocent party’s position in order to determine whether, if his judgment is set aside, he would suffer such harm that it could not be remedied by costs and/or other terms. If there can be no compensation for such harm, paras (a) and (b) would dictate that the judgment would not be set aside. Although para (b) contemplates that prejudice (as opposed to mere inconvenience) could be sufficiently compensated by costs, it leaves open the question of what degree of prejudice (injustice) would be necessary for the court to dismiss the application to set aside the judgment. A distinction must also be made between inconvenience (which can be compensated for by costs) and prejudice which affects the substantive rights of the innocent party.

28 Paragraphs (a) and (b) do not expressly contemplate the interests of the administration of justice in the proper conduct of litigation, although “no one” at the beginning of the sentence could be construed broadly to include this concern. Even so, the words “other relevant considerations” in the *Mercurine* balancing test⁹¹ can be read to include the interests of the administration of justice in “the balancing exercise”.⁹² It also bears repeating that V K Rajah JA’s assessment of the *Tuan Haji* formulation as “essentially sound, albeit not necessarily exhaustive”⁹³ leaves it open for the courts to interpret or extend paras (a) and (b) in accordance with the interests of justice. In *Lee Theng Wee*,⁹⁴ the defendant failed in his application to set aside a judgment in default of appearance even though he had a real prospect of success.⁹⁵ The High Court decided to rule against him because the application was made after unjustifiable delay and because the defendant “had not been

90 [1996] 1 MLJ 30 at 42.

91 [2008] 4 SLR 907 at [24].

92 [2008] 4 SLR 907 at [24].

93 [2008] 4 SLR 907 at [27].

94 See para 22 of this article.

95 [2003] SGHC 173 at [17].

truthful in his supporting affidavit”⁹⁶. Although the court did not expressly say so, it seems to be clear (certainly with regard to the defendant’s untruthfulness), that it took into account the purposes and integrity of the administration of justice. The rationale for this approach is clear. A party who seeks justice by applying to set aside a judgment must not be permitted to denigrate justice by impugning (through his misconduct) the very system from which he seeks relief. In *Cropper v Smith*,⁹⁷ Bowen LJ specifically excluded conduct which is “fraudulent or intended to overreach” when considering the role of the court in remedying procedural breaches in the interest of the parties’ substantive rights. The Singapore Court of Appeal has very recently stated on two occasions⁹⁸ that procedural and substantive justice are an integrated whole which the court must acknowledge “in order that justice in its fullest orb may shine forth”⁹⁹.

29 As to ground (c) of the *Tuan Haji* formulation, the Court of Appeal considered “that the greater the delay on the defendant’s part in applying to set aside the default judgment, the more cogent the explanation must be as to why it would be oppressive to let the judgment stand”¹⁰⁰. It is clear from this proposition that delay which is not sufficiently explained may result in the dismissal of the application to set aside (subject to the *Mercurine* balancing test). The Court of Appeal also preferred to replace the concept of “oppression” in ground (c) with the more clearly expressed requirement that the applicant must show that a miscarriage of justice would be occasioned if the default judgment is permitted to stand.¹⁰¹ Therefore, it should be sufficient if the applicant can establish that the judgment, as it stands, unfairly disregards his rights. For example, where an irregular judgment should be set aside *ex debito justitiae*¹⁰² or where the application to set aside is made inexcusably late and after the plaintiff has reasonably acted upon the judgment (so that he would suffer substantive injustice if it is set aside). However, it should be noted that the *Tuan Haji* formulation must be read subject to the *Mercurine* balancing test. Therefore, although a defendant could argue that a judgment would be oppressive in the face of his clearly meritorious defence (so that para (c) enables the court to set aside the judgment on this ground alone), the *Mercurine* balancing test would dictate that this is just a “highly

96 [2003] SGHC 173 at [17].

97 See para 18 of this article.

98 See paras 20–21 of this article.

99 *United Overseas Bank v Ng Huat Foundations* [2005] 2 SLR 425 at [9] (cited by the Court of Appeal in *Lee Hsien Loong v Singapore Democratic Party* [2008] 1 SLR 757 at [32]).

100 [2008] 4 SLR 907 at [36].

101 [2008] 4 SLR 907 at [36].

102 [2008] 4 SLR 907 at [67]–[94].

significant” factor in the balancing exercise and not the sole consideration.

30 After *Mercurine*, consideration will have to be given to the standing of English cases concerning the significance of the applicant’s conduct. A comparison of *Vann v Awford* (“*Vann*”)¹⁰³ and *JH Rayner (Mincing Lane) Ltd v Cafenorte SA Importadora E Exportadora SA* (“*Rayner*”)¹⁰⁴ with *Lee Theng Wee*¹⁰⁵ and *Ang Kim Soon*¹⁰⁶ reveal that the respective judicial philosophies on the matter of the defendant’s conduct are not identical. In *Vann*, the second defendant decided not to give notice of intention to defend (a procedure which corresponds to entry of appearance in Singapore) and judgment in default of appearance was entered against him. Damages were then assessed. He did nothing until the plaintiffs issued garnishee proceedings and obtained charging orders against his property. He then applied to set aside the judgment and the assessment. The High Court judge (“the judge”) dismissed the application to set aside the judgment and the assessment on account of the defendant’s dishonesty in explaining his failure to give notice of intention to defend, his inability to justify the delay in making his application, and because it was too late for such relief to be granted. The Court of Appeal disagreed and determined that the judge’s decision was inconsistent with Lord Atkin’s statement in *Evans*. Dillon LJ said: “Even for lying and attempting to deceive the court, a judgment for £53,000 plus¹⁰⁷ is an excessive penalty if there are arguable defences on the merits.” Nicholls LJ agreed: “The court is concerned to do justice between the parties with regard to the plaintiffs’ claim [and] not to punish the defaulting defendant, inexcusable though his conduct may have been.” Accordingly, the judgment was set aside.

31 It has been argued in this article that *Evans* should not be interpreted as standing for the proposition that procedural non-compliance, irrespective of its seriousness, will always be excused in the interest of substantive justice.¹⁰⁸ Such a view flies in the face of a rational system of litigation, which is entirely dependent on the parties’ good faith and honour. It contradicts the Singapore Court of Appeal’s statements concerning the integration of procedural and substantive justice and the court’s responsibility to ensure that “justice in its fullest orb may shine forth”.¹⁰⁹ Having considered *Lee Theng Wee* and *Ang Kim Soon*, it is difficult to envisage the High Court in those cases deciding *Vann* in the same way as the English Court of Appeal. In *Lee Theng Wee*,

103 *The Times* (23 April 1986).

104 [1999] 2 Lloyd’s Rep 750.

105 See para 22 of this article.

106 See para 23 of this article.

107 *Ie*, the amount of the default judgment.

108 See from para 17 of this article.

109 See, in particular, paras 20, 21 and 28 of this article.

despite the defendant's meritorious case, the default judgment was not set aside because of the defendant's delay in making the application, his failure to satisfactorily explain the delay, and the untruthfulness of his affidavit. The High Court's ruling was primarily based on the defendant's conduct. In *Ang Kim Soon*, the defendant had argued that the primary consideration was whether there was a real prospect of success and that his preceding behaviour should not be taken into account unless it could be classified as "gross misconduct" or as having caused "extreme prejudice" to the plaintiff.¹¹⁰ The defendant relied on *Vann*, in which the judgment was set aside even though the misconduct of the defendant in that case was more serious (because of the defendant's dishonesty towards the court) than that of the defendant in *Ang Kim Soon*. The High Court in *Ang Kim Soon* did not comment on *Vann* but seemed to disregard that case by emphasising the defendant's failure to conduct the proceedings properly and the consequential prejudice to the plaintiff.¹¹¹

32 In *Rayner*, an application to set aside a judgment in default of notice of intention to defend was made seven years after its entry. The Court of Appeal concluded that the defence had a real prospect of success and that the judgment should not be set aside merely because of long delay. Although the plaintiff alleged that the defendant's decision not to file a notice of intention to defend and to allow the default judgment to be entered amounted to a deliberate strategy which should disqualify the defendant from any relief, the Court of Appeal concluded that such a factor, even if true,¹¹² could not defeat the defendant's application to set aside the judgment. Waller LJ, in delivering the judgment of the Court of Appeal, commented that if "there was a defence on the merits which carried some degree of conviction, it is the very strong inclination of the court to allow a default judgment to be set aside even if strong criticism could be made of the defendant's conduct".¹¹³ His Lordship went on to state that "once a defence on the merits to the requisite standard is identified it must take some very special feature for the court to conclude that still the default judgment should not be set aside".¹¹⁴

33 The decision of the English Court of Appeal in *Vann* to ignore the defendant's dishonesty (despite its direct impact on the plaintiff's case) and its pronouncements in both *Vann* and *Rayner* should now be

110 [1997] 3 SLR 619 at [14].

111 See para 23 of this article. The learned judge preferred to rely on the statement of Ormrod LJ in *The Saudi Eagle* to the effect that the defendant's conduct is to be taken into account in assessing "the justice of the case" ([1997] 3 SLR 619 at [15]).

112 The Court of Appeal indicated that it had doubts about this.

113 [1999] 2 Lloyd's Rep 750 at 764. This statement is referred to in *Mercurine* [2008] 4 SLR 907 at [63].

114 [1999] 2 Lloyd's Rep 750 at 764.

considered in the light of the *Mercurine* balancing test, which requires conduct to be taken into account in the balancing of the primary and subsidiary considerations.¹¹⁵ Although the Court of Appeal in *Mercurine* referred to the English authorities as cases in which “the appropriate response *might*¹¹⁶ be to grant the defendant leave to defend on appropriate terms”,¹¹⁷ it is submitted that this proposition must be applied in the context of the other pronouncements in its judgment (including, in particular, the balancing exercise), the approaches of the Singapore High Court in *Lee Theng Wee* and *Ang Kim Soon* (which were identified by the Court of Appeal as appropriate examples of how a court is to respond to the defendant’s conduct), and the general statements of principle concerning the integration of procedural and substantive justice recently articulated by the Court of Appeal.¹¹⁸ The use of the word “might” (as opposed to “must”) in the above proposition suggests that a Singapore court should apply its own values and considerations of justice and not simply continue adopting English cases without objective analysis of the law.¹¹⁹

34 It is possible that the English courts, faced with a convincing defence (in accordance with the real prospect of success test in *The Saudi Eagle*), may have been more tolerant (perhaps unconsciously) of the defendant’s non-compliance with the rules (even their abuse), so as not to prevent him from putting forward a potentially successful case at trial. If this is true, a Singapore court is unlikely to be affected in quite the same way now that a defendant only has to raise an arguable case or a triable issue.¹²⁰ The differing approaches of the High Court and the Court of Appeal in *The Saudi Eagle* are perhaps indicative of the English approach to conduct prior to and after the decision in that case. The dispute concerned a breach of charterparty involving the plaintiff as charterer and the defendant as owner. The defendant provided security (in the form of a bond) to release the vessel from arrest. The defendant did not file notice of intention to defend and the plaintiff entered judgment in default. There was no question that the defendant had deliberately ignored the proceedings because, having sold its only ship and asset, it believed that the plaintiff’s judgment could not be enforced. However, when the defendant remembered shortly afterwards that it had provided a bond for the plaintiff’s claim, it made an application to set aside the judgment. Staughton J determined that the defendant had

115 [2008] 4 SLR 907 at [65]. See para 24 of this article. It may be significant that V K Rajah JA endorsed Waller LJ’s first statement but made no reference to the second statement.

116 Emphasis by author.

117 [2008] 4 SLR 907 at 63.

118 See paras 20–21 of this article.

119 In this respect, note the views of the Court of Appeal in *Mercurine* [2008] 4 SLR 907 at [50] concerning the decisions in *Hong Leong* and *Abdul Gaffer*.

120 See para 14 of this article.

raised an “arguable point” (though “not by any means a meritorious one”)¹²¹ as to whether the plaintiff had sued the right party. Although Staughton J would have been prepared to set aside the judgment on this ground, the judge dismissed the application because of the defendant’s “insouciance” and its treatment of the court “with contempt”. His Lordship concluded: “... the defendants are not deserving of the court’s exercise of its discretion in their favour.”¹²²

35 The Court of Appeal, which dismissed the application to set aside in the absence of a real prospect of success, would not (unlike Staughton J) have regarded the defendant’s conduct as being sufficiently serious to defeat the application (had a real prospect of success been established). Indeed, Sir Roger Ormrod attacked Staughton J’s judgment as “a two-pronged moral judgment on the behaviour of the defendant to the court rather than an assessment of the justice of the case as between the parties”. Nevertheless, the Court of Appeal was prepared to accept that the defendant’s conduct “is a matter to be taken into account in assessing the justice of the case”.¹²³ Although this proposition was acknowledged by the Court of Appeal in *Mercurine*,¹²⁴ it did not, in contrast to Sir Roger Ormrod’s approach, make any distinction between a defendant’s conduct towards the court and the plaintiff. In any event, such a distinction is untenable because conduct which abuses or manipulates the court’s process or is dishonest invariably affects the opposing party’s case. According to *Mercurine*, all the circumstances of the case may be taken into account by the court in exercising its unfettered discretion.¹²⁵ And in both *Lee Theng Wee* and *Ang Kim Soon*, which were cited in *Mercurine* as illustrations of judicial approaches to conduct, the defendant’s actions (which included manipulation of the court process and dishonesty),¹²⁶ were taken into account in determining “the equities of justice”¹²⁷ or the “balance of equities”¹²⁸ respectively and proved to be determinative on the facts.

V. Setting aside irregular judgments in default

36 Although this article is primarily concerned with the principles governing the setting aside of a regular default judgment, it would be incomplete if it did not account for the Court of Appeal’s equally

121 Staughton J’s comments are referred to by the Court of Appeal in *The Saudi Eagle* [1986] 2 Lloyd’s Rep 221 at 222–223.

122 [1986] 2 Lloyd’s Rep 221 at 223.

123 [1986] 2 Lloyd’s Rep 221 at 225.

124 [2008] 4 SLR 907 at [61]. Also see para 25 of this article.

125 [2008] 4 SLR 907 at [99].

126 In the case of *Lee Theng Wee*.

127 The wording in *Lee Theng Wee* [2003] SGHC 173 at [18].

128 The wording in *Ang Kim Soon* [1997] 3 SLR 619 at [22].

important pronouncements in *Mercurine* on setting aside an irregular judgment. The default judgment was irregular in two respects: the defendant had not complied with the requirements under O 13 r 4(1) (RC) and had claimed an amount in excess of its entitlement.¹²⁹ The Court of Appeal advocated the following sequential approach towards an application to set aside an irregular default judgment:

- (a) Whether the irregular judgment is to be set aside *ex debito justitiae* (ie, set aside automatically as a matter of right)?
- (b) If not, should it be set aside on any other ground?
- (c) If the judgment is to stand, how it is to be rectified?

A. *Whether the irregular judgment is to be set aside ex debito justitiae*

37 In *Mercurine*, the Court of Appeal declared that the starting point is for the court to determine whether the judgment should be set aside *ex debito justitiae*. Order 2 r 1(2) (RC) provides the court with an unfettered discretion for this purpose:

[T]he Court may, on the ground that there has been such failure as is mentioned in paragraph (1) [ie, any failure to comply with the rules of court], and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part ... any ... *judgment* or order therein or exercise its powers under these rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.¹³⁰ [emphasis added]

38 The Court of Appeal clarified that an irregular judgment is only to be set aside *ex debito justitiae* if there has been egregious procedural injustice to the defendant.¹³¹ For this purpose, the Court of Appeal adopted *mutatis mutandis* the four sets of circumstances in r 13.2 of the English Civil Procedure Rules (“the CPR”) in which an irregular judgment is required to be set aside:¹³²

- (a) the time limit for filing an acknowledgement of service or a defence (as the case may be) had not expired at the time the default judgment was entered (see r 13.2(a) read with r 12.3(1), as well as r 13.2(b) read with r 12.3(2));
- (b) an application by the defendant for summary judgment against the claimant or for the striking out of the claimant’s

129 The facts are set out at paras 3, 25 and 46 of this article.

130 This rule was cited by the Court of Appeal in *Mercurine* [2008] 4 SLR 907 at [69].

131 [2008] 4 SLR 907 at [96].

132 [2008] 4 SLR 907 at [75].

statement of case was pending when the default judgment was entered (see rr 13.2(a) and 13.2(b) read with r 12.3(3)(a));

(c) the defendant had satisfied the whole claim before the default judgment was entered (see r 13.2(c)); and

(d) where judgment on a claim for money is concerned, the defendant had filed or served on the claimant an admission of liability to pay all of the money claimed together with a request for time to pay (see rr 13.2(a) and 13.2(b) read with r 12.3(3)(c)).

39 There are certain primary considerations which a court must take into account:¹³³

[T]he key question for the court, when it decides whether to adhere to or depart from the *ex debito justitiae* rule, is whether there has been such an egregious breach of the rules of procedural justice as to warrant the setting aside of the irregular default judgment as of right. In addressing this issue, the court should consider, *inter alia*:

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

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

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

(d) where a judgment is irregular because of the plaintiff's breach of procedural rules (which would be the case for the majority of irregular default judgments), whether the breach was committed in bad faith.

40 With regard to para (a), the Court of Appeal warned that "[t]he court will be particularly ready to set aside an irregular default judgment where the judgment was entered prematurely or where the defendant had no notice of the proceedings against him ... as these are plain instances of injustice that offend the essence of due process".¹³⁴ It added: "In these instances, given that the essence of due process has not been observed, the court is *not* minded, on policy grounds, to depart from the *ex debito justitiae* rule."¹³⁵ Paragraphs (b) and (c) also raise O 2 r 2(1) (RC), which states: "An application to set aside for irregularity any ... judgment or order ... shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity." Delay in the

133 [2008] 4 SLR 907 at [76]. Also see [96].

134 [2008] 4 SLR 907 at [76].

135 [2008] 4 SLR 907 at [96].

application to set aside the judgment is a factor which the court will take into account: "... although [delay is] potentially prejudicial to the defendant's chances of having the irregular default judgment set aside, [it] is not invariably fatal."¹³⁶ Delay "is a relevant consideration and may be determinative."¹³⁷ The principles governing delay in an application to set aside a regular default judgment apply equally to irregular default judgments.¹³⁸ The Court of Appeal also regarded the following factors as being germane to a court's discretion to set aside: the blameworthiness of the respective parties (eg, whether there has been undue delay on the defendant's part in making its setting-aside application); whether the defendant has admitted liability under the default judgment; and whether the defendant would be unduly prejudiced if the irregular default judgment is allowed to stand.¹³⁹ Apart from the factors listed above (which "are by no means exhaustive"),¹⁴⁰ the court may take into account any other consideration in determining whether or not to set aside the judgment.¹⁴¹

B. *If the court decides that the irregular judgment should not be set aside ex debito justitiae, should it be set aside on any other ground?*

41 If the court determines that the judgment should not be set aside *ex debito justitiae*, its next step is to consider whether it should be set aside on any other ground. At this point, the merits (if any) of the defence come into issue.¹⁴² In an important development, the Court of Appeal in *Mercurine* endorsed the judgment of the English Court of Appeal in *Faircharm Investments Ltd v Citibank International plc* ("*Faircharm*"),¹⁴³ which essentially stands for the proposition that if the defendant is "bound to lose" the case, the judgment should stand. The rationale of the principle is that it would be purposeless to set aside a judgment and permit the proceedings to continue despite the inevitable outcome against the defendant.¹⁴⁴ According to the Court of Appeal in *Mercurine*, *Faircharm* "is in line with the goal of efficient case and resource management that [the] courts continuously strive towards".¹⁴⁵

136 [2008] 4 SLR 907 at [76].

137 [2008] 4 SLR 907 at [97].

138 [2008] 4 SLR 907. The Court of Appeal referred (at [76]) to its pronouncements at [30]–[36] concerning regular default judgments. The principles are considered in paras 16–35 of this article.

139 [2008] 4 SLR 907 at [96].

140 [2008] 4 SLR 907 at [76], [96].

141 [2008] 4 SLR 907.

142 [2008] 4 SLR 907 at [77], [92].

143 [1998] EWCA Civ 171.

144 Also see *Standard Chartered Bank v Chip Hong Machinery (S) Pte Ltd* [1990] SLR 1230 in this regard.

145 [2008] 4 SLR 907 at [87].

42 The Court of Appeal considered the *Faircharm* principle as being particularly beneficial where the plaintiff does not enter the default judgment prematurely or in bad faith and/or the defendant was not prejudiced by the irregularity.¹⁴⁶ The point here is that the plaintiff will not be permitted to abuse the *Faircharm* principle by taking advantage of its breach of the rules of procedure. If the plaintiff believes that the defendant is bound to lose, he could deliberately enter a default judgment in an irregular manner (for example, by entering it prematurely) in the expectation that it will be upheld on the basis of the *Faircharm* principle. This might even be a preferred approach to an application for summary judgment under O 14 (RC) which would ordinarily take longer to obtain. The Court of Appeal in *Mercurine* explained:

The main concern that has been expressed about *Faircharm* is the possible erosion of the defendant's right to raise its defence. Of particular concern is the risk that the plaintiff may get away with entering a default judgment prematurely and thereby obtain judgment in its favour earlier than it could have done if it had taken out an O 14 application against the defendant ... In the event that (a) the plaintiff enters an O 13 default judgment or an O 19 default judgment prematurely (*ie*, before the relevant timeline stipulated in O 13 or O 19, as the case may be, has expired) and (b) the defendant's application to set aside that irregular default judgment is dismissed on the basis of the 'bound to lose' test, judgment would effectively be entered against the defendant without its having been given a chance to exercise, to the full extent, its rights, as set out in the Rules of Court, to present its defence ... Although we do not think that it would be easy for the plaintiff in this scenario – *viz*, where the defendant applies to set aside a default judgment which is irregular because it was entered prematurely – to satisfy the requirement of showing that the defendant is 'bound to lose' (*per* Sir Staughton in *Faircharm*) given that the defence has not even been filed yet, the court should nevertheless be alert to this avenue for potential abuse of the default judgment procedure. This is also why, as mentioned earlier (at [76] above), the court will be particularly ready to set aside as of right a prematurely-entered default judgment.¹⁴⁷

43 The application of *Faircharm* to Singapore means that the defendant should file an affidavit in support of his application showing

146 [2008] 4 SLR 907 at [87].

147 [2008] 4 SLR 907 at [85]. The Court of Appeal also stated (at [90]): "An undesirable outcome (where the plaintiff is not penalised and, in fact, gains an advantage from entering an irregular default judgment) could result if the *Faircharm* approach is rigidly applied regardless of the nature of the irregularity and the overall justice of the case. As such, it is essential that the courts adopt a nuanced approach when applying the 'bound to lose' test." (Also note the Court of Appeal's reference (at [85]) to the English *Supreme Court Practice* 1999 at para 13/9/8.

the nature of his case.¹⁴⁸ Although it is for the plaintiff to prove that the defendant is bound to lose,¹⁴⁹ the defendant would be expected to raise some evidence that he has even a very slight chance of success. If one were to use the traditional common law terms “legal burden” (the duty to positively prove) and “evidential burden” (the responsibility to adduce evidence), the plaintiff has the legal burden¹⁵⁰ and the defendant has the evidential burden. What must the plaintiff do to discharge his burden? The Court of Appeal distinguished between the arguable or triable issue test which now applies to an application to set aside a regular default judgment and the lower standard “bound to lose” test applicable to the setting aside of irregular default judgments.¹⁵¹ Although the Court of Appeal did not elaborate on the exact meaning of “bound to lose”, it should be clear that this phrase means that the defendant has no chance at all of succeeding or that it is absolutely certain he would lose. Therefore, if the defendant raises a defence or an issue which could be a sham but the court has the slightest doubt about whether the defendant would lose, the *Faircharm* principle would not apply. The primary concern of the *Faircharm* principle is to avoid the purposeless continuation of proceedings; *ie*, when the defendant has not even a glimmer of hope in challenging the plaintiff’s action.¹⁵²

C. *Rectification of irregular judgment which is not set aside*

44 If the judgment is ordered to stand (because the irregularity is not egregious and the defendant is bound to lose), the court may cure any error by ordering the appropriate amendments pursuant to O 13 r 8 and O 2 r 1(2) (RC). “Clerical mistakes ... or errors arising ... from any accidental slip or omission” may be corrected by the court pursuant to O 20 r 11 (RC). The Court of Appeal explained:¹⁵³

[W]e should point out that where the court decides to uphold an irregular default judgment while, at the same time, amending the judgment so as to rectify the irregularity therein, the court may invoke O 20 r 11 only if the irregularity consists *specifically* of a clerical mistake or an accidental slip or omission in the judgment (*eg*, misstatement of the quantum of the judgment sum due to an inadvertent typographical error; see also *Philip Securities (Pte) v Yong Tet Miaw* [1988] SLR 594). Where the irregularity is not occasioned by

148 [2008] 4 SLR 907 at [83].

149 [2008] 4 SLR 907 at [92], [98].

150 As pointed out by the Court of Appeal at [2008] 4 SLR 907 at [98].

151 [2008] 4 SLR 907 at [92], [98].

152 See *BCCI v Habib Bank* [1999] 1 WLR 42, in which an irregular judgment was not set aside because the defendant admitted liability. Although *Faircharm* is not mentioned in the judgment, the same principle is applied. The case is considered by the Court of Appeal in *Mercurine*, at [94]. Also see *Marjorie Joyce Cusack v Agostino De Angelis* [2007] QCA 313 at [33].

153 [2008] 4 SLR 907 at [93].

an accidental or a clerical error, O 20 r 11 is not applicable (see, eg, *Malayan United Bank Bhd v Mohammed Salleh bin Mohammed Yusoff* [1988] 3 MLJ 165); the court would then have to invoke O 2 r 1(2) or, alternatively, depending on whether the irregular default judgment is an O 13 default judgment or an O 19 default judgment, either O 13 r 8 or O 19 r 9 respectively.

45 Accordingly, where the irregularity is not simply a minor/typographical mistake contemplated by O 20 r 11, the court will exercise its power of amendment (if this is appropriate) via O 2 r 1 and O 13 r 8. Pursuant to O 13 r 8, the court may “vary any judgment entered” and make its order “on such terms as it thinks just”.¹⁵⁴ Order 2 r 1(2) permits the court, *inter alia*, to amend the judgment “on such terms as to costs or otherwise”.¹⁵⁵ The power to amend is untrammelled by the rules and limited only by the principles and guidelines expressed in *Mercurine*. Now that *Faircharm* is applicable in Singapore (so that judgments will be upheld where the defendant is bound to lose and there has been no abuse of this principle by the plaintiff),¹⁵⁶ the power is likely to be exercised more frequently in the future.

D. Court of Appeal’s decision in *Mercurine*

46 It will be recalled that an irregular judgment in default was entered for rental arrears (“the money judgment”) and possession of the premises (“the possession order”) in respect of a lease.¹⁵⁷ The possession order was irregular because the plaintiff failed to obtain a certificate (required by O 13 r 4(1) (RC)) and the money judgment was defective because the amount claimed exceeded the plaintiff’s entitlement. The High Court reinstated the default judgment (which had been set aside by the assistant registrar) on the basis of the defendant’s unjustifiable delay in making the application to set aside (more than 15 months after the entry of the default judgment).¹⁵⁸ The Court of Appeal disagreed and ruled that the defendant had given satisfactory reasons for not making its application sooner.¹⁵⁹ It also concluded that as the irregularities did not result in egregious procedural injustice to the defendant, the default judgment should not be set aside *ex debito justitiae*. Furthermore, the defendant had not suffered prejudice as a result of the plaintiff’s breach of O 13 r 4(1) and the claim for the excessive amount (the defendant did not dispute that it owed a certain sum to the plaintiff).¹⁶⁰ The Court of

154 The rule is set out in para 4 of this article.

155 The rule is set out in para 37 of this article.

156 See para 42 of this article.

157 See para 3 of this article.

158 [2008] 1 SLR 316 at [41]–[44].

159 These reasons are set out in para 25 of this article.

160 The defendant conceded that it owed \$725,116.81 whereas the default judgment claimed \$864,338.31 ([2008] 4 SLR 907 at [10] and [101]).

Appeal stated that it would not be appropriate for it to go to the next stage of actually considering the merits (if any) of the defence (*ie*, the bound to lose test) because of the impact its comments could have on the pending trial of the consolidated suit (concerning related issues in dispute).¹⁶¹ It did point out that if the defence to the claim for possession of the premises was not bound to fail, the possession order would ordinarily have been set aside. The money judgment would have been upheld on the basis of the *Faircharm* test as the defendant was clearly bound to lose to the extent of the amount it admitted to be due. The judgment could have been amended to reflect the proper amount.¹⁶² However, as the possession order and money judgment were not severable and the defence applied to both claims, the court ordered that “the default judgment as a whole would be deemed to be set aside if [the defendant] succeeds in the consolidated suit”.¹⁶³

VI. Comparative analysis of applications to set aside regular and irregular judgments and the respective cost consequences

47 *Mercurine* has redefined the principles governing applications to set aside regular and irregular judgments. In conclusion, it is apt to compare the approaches which the court will now take towards these two types of application.¹⁶⁴ The issue of whether the defence has merit is pertinent to both an application to set aside a regular judgment as well as an irregular judgment (where the *ex debito justitiae* rule is not followed). Where the default judgment is regular, the defendant bears the burden of proving an arguable or triable issue. In the case of an irregular default judgment, the defendant only needs to prove the irregularity (whether it takes the form of an inaccurate fact in the content of the judgment or non-compliance with a rule). If the defendant fails to prove that the judgment is irregular, the principles governing an application to set aside a regular judgment in default will apply. If the court is persuaded that the judgment is irregular, the plaintiff then has the burden of proving why the judgment should not be set aside *ex debito justitiae*. This is not the full extent of the plaintiff’s obligation, for even if he successfully argues that the *ex debito justitiae* rule should not operate, he will have to convince the court that the defendant is bound to lose in any event. In the future, counsel for the defendant should take note that even though it is for the plaintiff to prove that the defendant is bound to lose, the latter should file an

161 See para 3 of this article.

162 [2008] 4 SLR 907 at [102]. Note the Court of Appeal’s qualification in [103] that it had no intention of “endorsing a pro-amendment approach towards every default judgment entered for an excessive amount which the plaintiff later attempts to amend by substituting the correct sum”.

163 [2008] 4 SLR 907 at [102]. Also see [107].

164 The following summary is derived from *Mercurine* [2008] 4 SLR 907 at [98].

affidavit of merits as a matter of prudence.¹⁶⁵ The conduct of the parties is relevant to both applications to set aside regular and irregular judgments and will be taken into account by the court.¹⁶⁶

48 In determining whether to set aside, maintain or amend a regular or irregular judgment, the court has a broad discretion to take into account any matter which it considers to be relevant in addition to the factors brought up by the Court of Appeal in *Mercurine*: “We do not wish to lay down determinative guidelines as to which of these factors ought to prevail so as not to impose any fetters on the court’s discretion ...”¹⁶⁷ The court illustrated the application of this unlimited discretion where the plaintiff’s procedural default offends the essence of due process and the defendant’s defence is bound to fail.¹⁶⁸ An earlier part of the judgment indicated that an irregular default judgment would normally be set aside *ex debito justitiae* if the plaintiff’s conduct has resulted in egregious procedural injustice to the defendant.¹⁶⁹ However, as indicated by the Court of Appeal, this is obviously not a fixed rule. In a situation where the defendant is bound to lose, the court might cite practical reasons for upholding the judgment. In the view of the author, the saving of expense and judicial time cannot be justified if the outcome would be to compromise the integrity of the legal process. A plaintiff who has acted in bad faith or has otherwise acted unjustly should not be heard to say that his conduct should be overlooked on the basis that the defence has no merits. Such an approach would encourage any means to an end even to the extent of compromising the integrity of the law.

49 The principles established by *Mercurine* have an important impact on costs in applications to set aside both regular and irregular judgments. The Court of Appeal explained:¹⁷⁰

Typically, if a *regular* default judgment is set aside because the defence has sufficient merit, the *defendant* bears the costs of the setting-aside application. Conversely, the *plaintiff* would usually be liable for costs when an *irregular* default judgment is set aside. If an irregular default judgment is not set aside, however, it does not follow that the defendant must therefore bear the costs of the failed setting-aside application. Without wishing to set inflexible guidelines that could stymie the discretion of the lower courts, we would suggest that, as a

165 [2008] 4 SLR 907 [83] and [98].

166 [2008] 4 SLR 907 at [76], [96]. Also see paras 16–35, 39–40 of this article.

167 [2008] 4 SLR 907 at [99]. “At the end of the day, given the court’s wide discretion as to whether to set aside, uphold or vary a default judgment, the list of factors which the court may take into account when ruling on a setting-aside application is open-ended.”

168 [2008] 4 SLR 907.

169 [2008] 4 SLR 907 at [96]. Also see paras 38–40 of this article.

170 [2008] 4 SLR 907 at [105]–[106].

general principle, the usual rule that costs follow the event should *not* be the starting point in an application to set aside an *irregular* default judgment. Depending on the nature of and the reasons for the irregularity, it may well be appropriate to order the plaintiff to bear the costs of the setting-aside application – or, perhaps, even to make no order as to costs where, *inter alia*, the court upholds the irregular judgment because the defendant has not been prejudiced by the plaintiff's procedural breach (if any) and is 'bound to lose' (*per* Sir Staughton in *Faircharm* ([77] *supra*)) if the matter is re-litigated (a similar position obtains where an irregular default judgment is upheld because the defendant has acknowledged liability notwithstanding the plaintiff's procedural breach).

VII. Ethical considerations

50 *Mercurine* raises ethical issues affecting the relationships between a lawyer and the court and his client. For example, the Court of Appeal raised a general point pertaining to the construction of judicial pronouncements. V K Rajah JA expressed concern about the failure of both lawyers and judges to acknowledge that the differences in language between one judge and another may be the consequence of distinct factual scenarios.¹⁷¹ Pursuant to their responsibility to present the law accurately,¹⁷² lawyers should not argue that a new or different legal principle has been developed where it is absolutely clear that the court is simply adapting a pre-existing principle to a specific set of facts. Another ethical issue arises from the Court of Appeal's adoption of the *Faircharm* principle.¹⁷³ It would be grossly improper for the plaintiff's lawyer to deliberately enter an irregular default judgment on the assumption that the court will uphold it (if it finds that the defendant is "bound to lose" the case).¹⁷⁴ Such an abuse of process would be inconsistent with the lawyer's duties to "assist in the administration of justice",¹⁷⁵ to act in a manner which does "not conflict with the interests of justice, public interest and professional ethics",¹⁷⁶ and to "assist the court ... in arriving at a just decision".¹⁷⁷ Finally, the liability to pay costs

171 [2008] 4 SLR 907. His Honour referred to Ward LJ's proposition in *Day v RAC* [1999] 1 WLR 2150 at 2157: "[I]t would be better if the differences in language in these cases could be viewed as the emphasis [given] in a particular case to the particular facts of the case."

172 See J Pinsler, *Ethics and Professional Responsibility: A Code for the Advocate and Solicitor* (Academy Publishing, 2007) at paras 04-027–04-029.

173 See para 41 of this article.

174 See para 42 of this article.

175 The Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2000 Rev Ed) r 2(2)(a).

176 The Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2000 Rev Ed) r 54.

177 The Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2000 Rev Ed) r 55(c).

in a default judgment scenario may be complicated for the layman as there is a range of possible outcomes depending on the specific circumstances of the case.¹⁷⁸ As it is appropriate in such a situation to “evaluate with a client whether the consequence of a matter justifies the expense or the risk involved”,¹⁷⁹ the client must be properly advised so that he can make an informed decision on how to proceed.¹⁸⁰

178 See para 49 of this article.

179 The Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2000 Rev Ed), r 40.

180 For a recent article on this ethical duty, see J Pinsler, “Litigation and the Client’s Right to Make an Informed Choice” (2008) 20 SAclJ 21. For an analysis of the ethical duties applicable to the presentation of the case in chambers, see J Pinsler, “Ethics in Chamber Hearings: Observations on Certain Practices” (2008) 20 SAclJ 746.