



DREW & NAPIER

Perils of Foreign Litigants Not Participating in Singapore Proceedings

*U Myo Nyunt @ Michael
Nyunt v First Property
Holdings Pte Ltd [2021] SGCA
73*

11 August 2021

LEGAL UPDATE

In this Update

In the case of *U Myo Nyunt @ Michael Nyunt v First Property Holdings Pte Ltd* [2021] SGCA 73, judgments were entered into against a foreign litigant who failed to participate in the Singapore proceedings. The foreign litigant sought to set aside the judgments only after he failed in resisting their registration.

The Court of Appeal held that in an application to set aside two judgments pursuant to both O 13 r 8 and O 35 r 2 of the Rules of Court, the Court's discretionary power to set aside the judgments under both procedural rules would be considered concurrently and the Court will embark on a two-stage balancing exercise.

This update discusses the decision.

03
INTRODUCTION

03
BACKGROUND

04
THE COURT OF
APPEAL'S DECISION

05
COMMENTARY

INTRODUCTION

In the recent decision of *U Myo Nyunt @ Michael Nyunt v First Property Holdings Pte Ltd* [2021] SGCA 73, the Court of Appeal had to consider a case where a default judgment as well as a subsequent judgment on damages were entered into against a foreign litigant. The Court of Appeal held that when an application is to set aside two judgments pursuant to both O 13 r 8 and O 35 r 2 of the Rules of Court (“**ROC**”), the Court’s discretionary power to set aside the judgments under both procedural rules would be considered concurrently. The Court, in such a situation, would need to embark on a two-stage balancing exercise.

This update discusses the decision of *U Myo Nyunt v First Property*.

BACKGROUND

A dispute concerning a joint venture arose between U Myo Nyunt and First Property Holdings Pte Ltd. First Property Holdings Pte Ltd commenced proceedings against U Myo Nyunt in Myanmar and Singapore. The proceedings in Myanmar were determined in U Myo Nyunt’s favour. With regard to the Singapore proceedings commenced in June 2015, an order granting leave to serve out of jurisdiction to Australia (“**Service Order**”), where U Myo Nyunt resided, was issued. U Myo Nyunt did not enter appearance and default judgment (“**Default Judgment**”) was entered. Part of the Default Judgment provided for further damages to be assessed (“**Interlocutory Judgment**”). U Myo Nyunt did not take part in the hearing on assessment of damages. U Myo Nyunt was found liable for about \$66m in damages (“**Assessment Judgment**”). First Property Holdings Pte Ltd then registered the Default Judgment and the Assessment Judgment (collectively, “**Singapore Judgments**”) in Australia. U Myo Nyunt challenged the registration but failed.

U Myo Nyunt then applied to the Singapore High Court to set aside the Service Order and Singapore Judgments. The High Court only set aside part of the Default Judgment for a specified amount of a loan from First Property Holdings Pte Ltd to U Myo Nyunt. U Myo Nyunt appealed to the Court of Appeal.

The issue for the Court of Appeal’s consideration in this appeal was whether the Court’s discretionary power under the two procedural rules of the ROC should be exercised to set aside the Singapore Judgments obtained by First Property Holdings Pte Ltd. In answering this question, the Court of Appeal also considered the applicable test/exercise to be applied in cases involving an application to set aside two judgments under two separate procedural rules.

THE COURT OF APPEAL'S DECISION

The Court of Appeal found that that the equities of the case pointed overwhelmingly against setting aside the Singapore Judgments and dismissed U Myo Nyunt's appeal.

The Court of Appeal noted that U Myo Nyunt had applied to set aside not one, but two judgments in the same application (*ie*, the Interlocutory Judgment and the Assessment Judgment). The setting aside of the Interlocutory Judgment was governed by O 13 r 8, while the setting aside of the Assessment Judgment was governed by O 35 r 2 of the ROC. In considering both, the Court of Appeal held that the Court must look at the entirety of the evidence. It would be incomplete and artificial to focus on the Interlocutory Judgment without looking at the subsequent events that led to the Assessment Judgment, and vice versa, because the Court's discretionary power is to be exercised by reference to all the circumstances of the case.

KEYPOINT

The Court, in such a situation, would need to embark on a two-stage balancing exercise.

The Court would need to embark on a two-stage balancing exercise, as follows:

- (a) identify and assess the seriousness and significance of the defaults and reasons behind the procedural breaches; and
- (b) balance the considerations in (a) against all the other relevant factors, keeping in mind two competing interests, namely finality in litigation on the one hand, and the interest of justice to prevent a miscarriage of justice that may be occasioned if the relief sought is not granted on the other.

The Court of Appeal considered the facts of this case and held that U Myo Nyunt's procedural breaches in failing to enter appearance and participate at the assessment hearing were deliberate and part of his litigation strategy. His decision stemmed from the advice of his lawyers in Myanmar that a Singapore judgment could not be enforced in Myanmar. The Court of Appeal stated that this decision alone would be a strong factor for the Court not to exercise its discretion to set aside the Singapore Judgments.

The Court of Appeal also noted that:

- (a) U Myo Nyunt was also running parallel proceedings in Myanmar to undermine the Singapore proceedings. His overall conduct was inexcusable;

- (b) U Myo Nyunt's application to set aside was brought 3.5 years after the Default Judgment was obtained and 3 years after the Assessment Judgment was obtained. In all the circumstances, the delay in applying to set aside the judgments was the result of a conscious decision by U Myo Nyunt to stay away from the Singapore proceedings and the Singapore Judgments for as long as possible; and
- (c) while U Myo Nyunt's defence raised triable issues, he ought to have canvassed the merits in accordance with the rules of the Court and not at his whim and preference as to timing.

As a result of the above, the Court of Appeal held that U Myo Nyunt's failure to enter appearance to participate in the Singapore proceedings was deliberate and inexcusable. Further, his delay in applying to set aside the judgments was substantial and deliberate. Even though there were some triable issues raised in U Myo Nyunt's defence, the equities of the case pointed overwhelmingly against setting aside the Singapore Judgments.

COMMENTARY

Foreign litigants should be wary of the potentially adverse consequences of deliberately failing to participate in proceedings in Singapore. Given that there is a risk that a party may successfully enforce a judgment obtained in Singapore in a foreign jurisdiction where the foreign litigant carries on business/resides, litigants should participate in proceedings taking place in Singapore and raise any defences in a timely manner.

The content of this article does not constitute legal advice and should not be relied on as such. Specific advice should be sought about your specific circumstances. Copyright in this publication is owned by Drew & Napier LLC. This publication may not be reproduced or transmitted in any form or by any means, in whole or in part, without prior written approval

If you have any questions or
comments on this article, please
contact:



Woo Shu Yan
Director, Dispute Resolution

T: +65 6531 4103
E: shuyan.woo@drewnapier.com

Drew & Napier LLC
10 Collyer Quay
#10-01 Ocean Financial Centre
Singapore 049315

www.drewnapier.com

T : +65 6535 0733
T : +65 9726 0573 (After Hours)
F : +65 6535 4906

 **DREW & NAPIER**