BETWEEN

MASHHOR GENERAL CONTRACTOR SDN BHD **Appellant/ Plaintiff**

AND

TOP IBRA NOOREEN SDN BHD **Respondent/ Defendant**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 2 of 2025)

Steven Chong, C.J., Lunn and Sir Peter Gross JJAs
Date of Hearing: 9 June 2025.
Date of Judgment: 14 July 2025.

Headnote:

- *Default judgment regularly obtained – Allowing appeal from Registrar, Judge set default judgment aside; O. 13, r.8*
- *Test in law in Brunei for setting aside default judgment regularly obtained – without fettering Judge's wide discretion and save very exceptionally, a default judgment regularly obtained will not be set aside unless the defendant demonstrates a defence with a 'real prospect of success' – there is no point otherwise in setting aside the default judgment*
- *Test derived from application of English and Brunei authorities – Application of Laws Act (Cap. 2) considered*
- *Judge mis-stated test but any error of law on the part of the Judge was neither material nor, still less, crucial*
- *Judge erred in fact in determining that: there was a triable issue; Appellant bore burden of proving existence of Sub-Contract between parties; Appellant was required to do so at trial. The Appellant having adduced the Sub-Contract in evidence, and the Judge having rejected the allegation of forgery, there was nothing to impugn its existence.*
- *Court of Appeal entitled to intervene*
- *Appeal allowed – default judgment restored*

Ms Aziemah Binti Haji Shahrum and Mr Czar Cabading Calabazaron (M/S Rudi Lee, Annie Kon & Associates) for Appellant/Plaintiff.
Lt Col(R) Hj Harif Bin Hj Ibrahim and Ms Nur Khairunnisa@Masarah Binti Hj Haji Hanapiah (M/S Lt. Col. (Rtd) Harif Ibrahim Advocates and Solicitors) for Respondent/Defendant.

Cases cited:
Hackney LBC v Driscoll [2003] EWCA Civ 1037; [2003] 1 WLR 2602
The Saudi Eagle [1986] 2 Lloyd's Rep. 221, at p.223
Evans v Bartlam [1937] AC 473, at p. 489
Swain v Hillman [2001] 1 All ER 91
ED & F Man Liquid Products Ltd v Patel and Another [2003] EWCA Civ 472, at [7] – [9].
Alisan Jaya v Wing Wah (COACV No. 6 of 2013)

Sir Peter Gross, J.A.:

INTRODUCTION

1. The Plaintiff/Appellant ("the Appellant") appeals to this Court from the Judgment dated 15 February 2025, of the Intermediate Court Judge, Pg Masni Pg Hj Bahar ("the Judge" and "the Judgment"), allowing the Defendant/Respondent's ("the Respondent") appeal from the Ruling of the Registrar encapsulated in the Registrar's Ruling dated 26 November 2024 ("the Registrar" and "the Registrar's Ruling") and setting aside the Judgment in Default in this matter obtained on 8 June 2024 ("the default judgment"). The Appellant submits that the Judgment cannot stand; the Respondent asks this Court to uphold the Judgment.

2. The Appeal raises the question of the test for setting aside a default judgment regularly obtained, together with the decisive question whether the Judge's decision to set aside the default judgment was sustainable on the facts of this case.

THE FACTUAL HISTORY

3. The facts, as alleged by the Appellant are concisely introduced in the Registrar's Ruling:

> "*…The Plaintiff and Defendant had a business relationship, which later led to disputes over a Sub-Contract Agreement. The Plaintiff explains that the agreement was formed after the Defendant was appointed as Main Contractor under a Development Agreement with another party. Under the contract, the Plaintiff was to provide consultation and financial assistance of BND$153,208.84, which the Defendant agreed to repay, along with BND$50,000 for investment profit, by 2 December 2020. The Plaintiff claims the Defendant has failed to pay the remaining amount and legal fees, totalling BND$107,258.84…*"

4. Pausing there the Appellant relies on an agreement dated 1 September 2020, referred to as "*the Sub-Contract*". Recitals A to C to the Sub-Contract are consistent with the Appellant's case, providing, as they do, as follows:

> "*A. The 1st Party* [i.e., the Respondent] *has been appointed by the Main-Contractor (hereinafter referred to as 'the Awarder') for…certain work order pursuant to a Development Agreement dated 10th June, 2020.*
>
> *B. The 1st Party is desirous to subcontract the part of the works to the 2nd Party* [i.e., the Appellant] *and the 2nd Party has agreed to carry out consultancy services and finance the project.*

C. The 1st Party and 2nd Party has agreed to undertake and perform the said services with the following terms and conditions…"

5. Clauses 3 and 7 of the Sub-Contract provide for financing and payment, as summarised in the Registrar's Ruling. On the face of it, the Sub-Contract was signed on behalf of the Respondent by a Director (or Managing Director) who has signed other documents in the proceedings on behalf of the Respondent. It also bore the Respondent's stamp which appears to match the stamp on the post-dated cheques (see below)

6. In the events which happened, in September 2020 the Appellant made payments to the Respondent, by way of two cheques, in the total amount of BND$153,208.84, thus in accordance with the terms of the Sub-Contract. Both cheques were acknowledged as received, again, apparently, by the same Director of the Respondent.

7. On 2 December 2020, the Appellant invoiced the Respondent ("the invoice") in the (Sub-Contract) amount of BND$203,208.84, under the heading "*Work Order as per Sub-Contract Agreement dated 1st September 2020*". As asked, the Respondent acknowledged receipt of the invoice; the signature, on the face of it, appears to be the same.

8. As recorded in the Registrar's Ruling, the Respondent thereafter issued four post-dated cheques, totalling the amount demanded in the invoice. Upon presentation for payment, however, the cheques were dishonoured.

9. A letter of demand followed, issued by the Appellant's solicitors. Subsequently, on 4 June 2021, the Respondent made a payment of BND$100,000 into the Appellant's account. On the Appellant's case, that leaves an outstanding balance of BND$103,208.84 due and owing from the Respondent.

10. The Respondent admits the payment of BND$100,000 but asserts that it did not relate to the Sub-Contract and that it was made in respect of another project. As set out in the Recorder's Ruling:

    "*The Defendant…disputes the Plaintiff's claims, asserting that no Sub-Contract Agreement or Development Agreement exists between the and the Plaintiff. Instead, the Defendant explains that the only agreement they are party to with the Plaintiff is related to a different project entirely, specifically the Brunei Food Industry Development (BFID) Project*."

11. The subsequent history need not detain us save to record that the default judgment was obtained (as already noted) and that, on 31 July 2024, the Respondent applied by Summons to set aside the default judgment.

THE REGISTRAR'S RULING

12. The Registrar dismissed the Respondent's Application, holding to begin with that the default judgment was entered regularly.

13. On that footing, the Registrar's essential reasoning was as follows:

"*Judgment in default may be set aside if there are triable issues and merit in the defendant's case. The defendant must show the Court that he has a meritorious defence and an actual prospect to succeed with the said defence. The Defendant's defence can be summarised as follows:*

- *The Sub-Contract Agreement and Development Agreement do not exist.*
- *The only agreement between the parties pertains to the BFID Project.*

…According to the Defendant, any obligations or terms mentioned by the Plaintiff pertain to this separate project, not to the Sub-Contract Agreement. The Defendant maintains that since the Sub-Contract Agreement claimed by the Plaintiff does not exist, there can be no breach of contract on their part.

The Plaintiff presented the Sub-Contract Agreement…which included the signatures and stamp of both parties. In response, the Defendant raised an allegation, claiming their signature on the agreement was forged. Notably, the Defendant did not raise this issue at the outset of the case. The defence raising this claim in response to the Plaintiff's submission shows that it does not carry enough weight to demonstrate its urgency to the Court. It comes across more as a secondary issue rather than a central concern in the Defendant's case. As such, I believe that there is a Sub-Contract Agreement between the parties. With respect to the agreement on [the] BFID Project, I consider this to be a separate agreement…"

14. The Registrar ordered that the Respondent pay the Appellant's costs of the application.

THE JUDGMENT OF THE JUDGE

15. The Respondent appealed to the Intermediate Court against the Ruling of the Registrar.

16. The Judge began by concluding that the default judgment was not irregular. There is no appeal to us from that conclusion.

17. Next, on the basis that the default judgment was regular, the Judge held (at [22] of the Judgment) that the test for setting it aside required the Respondent "*…to demonstrate a prima facie defence by showing the existence of triable or arguable issues. …There is little reason to set aside a judgment if the defendant cannot present a strong and arguable case.*"

18. The Judge recorded (at [23]) that the Respondent had put forward two arguments. The first, was that the Sub-Contract did not exist; no valid agreement had ever been formed between the parties; and that the (Respondent's) signature on the Sub-Contract had been forged.

19. Dealing firstly with the allegation of forgery, the Judge noted (at [25]) that it had not been mentioned in the Respondent's affidavit. Nor (at [33]) had the Respondent included any supplementary affidavit to support this claim. The defence of forgery thus rested (at [34]) on submissions from the Bar, unsupported by affidavit. Accordingly, the Judge rejected the forgery defence.

20. Finally (at [35]), the Judge turned to the Respondent's other ground of defence, in essence the existence or not of the Sub-Contract. The Judge said only this (*ibid*):

"*With regards to the issue regarding the alleged sub-contract agreement, the plaintiff bears the burden of proof. Consequently, I conclude that the defendant has established a triable issue. This necessitates that the plaintiff to provide evidence to support their allegations during the proper trial.*"
On this ground, the Judge concluded that the Respondent had demonstrated a triable issue.

21. The Judge ordered that the Appellant should pay the Respondent's costs of the appeal to the Intermediate Court.

THE RIVAL CASES ON THE APPEAL

22. The *Appellant's* submissions on the Appeal, ably presented by Ms Aziemah, proceeded as follows. First, the Judge erred in law as to the test for setting aside a default judgment regularly obtained. The Judge, notably at [35], postulated the need to establish a "*triable issue*" suggesting that a merely arguable defence sufficed, whereas the requirement was to show a "*real prospect of success*". To the extent that the Malaysian authorities relied on by the Respondent suggested a less demanding test (of an arguable defence), the English and Bruneian authorities were to be preferred and applied.

23. Secondly, the Judge erred in fact insofar as she held that the Appellant failed to establish the existence of the Sub-Contract. In this regard, the Judge had been plainly wrong. As expressed in the Appellant's written submissions:

"*Had the LJ properly taken into account the Sub-Contract Agreement and its contents, as well as the conduct of the parties, evidenced by the issuance of cheques and monetary payments made by the D, the LJ would have found that the P had discharged its burden of proof in establishing the existence of the contract. Consequently, the burden would have shifted to the D to prove that the Sub-Contract Agreement does not exist and that their defence has a real prospect of success. It was therefore incorrect for the LJ to conclude that 'the P bears the burden of proof' when, on the evidence, that burden had already been discharged.*"

The allegation of forgery was not entitled to any weight (as the Judge held); it was unsupported by any *evidence*.

24. Thirdly, the Respondent's assertion, that the post-dated cheques and the payment of BND$100,000 were referable to the alleged BFID Project, was untenable. The Respondent failed to put in evidence any agreements relating to the BFID Project; the total value of the cheques corresponded precisely to the sum stipulated in the Sub-Contract; and the dates of the alleged BFID Project did not match the dates of the cheques. In that regard, the Appellant's written submissions said this:

"*The D alleges that the cheques and payments were made pursuant to the alleged BFID Project. However, as evident from the …draft Defence [and]…the D's Affidavit in support, the BFID Project was a six-month initiative that commenced around March 2021. …The D claims that the post-dated cheques were issued as returns on investment for the BFID Project …yet these cheques are dated prior to the commencement of the BFID Project. It is both unreasonable and illogical for the D to have issued the cheques*

before the BFID Project had even commenced, particularly when cheques are valid only for 6 months from their respective dates…"

25. The *Respondent's* case was presented with care and attractive realism by Colonel Harif. Very properly, Colonel Harif accepted that if the Court accepted that the Sub-Contract existed as alleged by the Appellant, then that would be an end to the matter. However, in his submission, the parties had not entered into the Sub-Contract or a Development Agreement as the Appellant alleged. Instead, on 1 March 2020, the parties entered into a *Memorandum of Understanding* ("MOU") concerning the BFID Project. The Respondent's written submissions alleged that the Appellant was to provide an operating licence and financial facilities for this joint venture arrangement, beginning around March 2021; the Respondent was to secure the BFID Project and source overseas partners and consultants; the parties had agreed to a 50:50 profit-sharing arrangement in relation to the BFID Project. In oral argument, Colonel Harif indicated that he could produce a copy of what he understood to be the MOU at the Appeal hearing. The Respondent's defence had a real prospect of success regarding: the formation of the relevant contractual relationship; the true nature of the parties' commercial dealings and whether any legally enforceable obligation existed in the terms alleged by the Appellant. All these matters required full evidential scrutiny at trial. The Judge had neither erred in law nor fact and the Judgment should be upheld.

26. We did not call upon Ms Aziemah to reply.

DISCUSSION AND CONCLUSIONS

27. *Introduction:* Two principal Issues arise:

    (I) Did the Judge err in law as to the test for setting aside a default judgment regularly obtained? ("*Issue I: The test in law*")

    (II) Did the Judge err in fact in setting aside the default judgment? ("*Issue II: Error of fact*")

28. *Issue I: The test in law:* As already recorded, the Judge adverted to the test in two places in the Judgment, namely, at [22] and [35]. She emphasised the existence of "*triable or arguable issues*" but she also observed (at [22]) that there was "*…little reason to set aside a judgment if the defendant cannot present a strong and arguable case*".

29. We begin by formulating the test for setting aside a default judgment regularly obtained, noting as we do that the Judge mis-stated it, though we do not think that that misstatement was material, still less crucial, to the outcome. We do, however, think it necessary to clarify the test to provide guidance for the future.

30. In our judgment, the correct test for setting aside a default judgment regularly obtained, originating in English law and as applied in Brunei, is as follows:

    (1) The starting point is that the plaintiff derives a right of property from a default judgment, regularly obtained.

    (2) Even so, a Judge has a discretionary power to set aside such a judgment, the purpose of this power being to avoid the injustice which might otherwise result.

(3) Aside from any other considerations impacting on the exercise of the discretion (for example, delay) and save very exceptionally, a default judgment regularly obtained will not be set aside unless the defendant demonstrates a defence with a real prospect of success. As a matter of common sense, there is no point setting aside the default judgment if the defendant cannot show he has a defence with a real prospect of success.

In the paragraphs which follow we explain our formulation of this test.

31. *First,* in Brunei law the Court has a discretionary power to set aside or vary, on such terms as it thinks just, any judgment entered in default of appearance ("a default judgment"): see, *Brunei Supreme Court Rules, Cap. 5, O.13, r.8.* This is a wide discretion, to be exercised on a principled basis but not to be fettered.

32. *Secondly,* a distinction is to be drawn between default judgments obtained *regularly* and *irregularly*. The present case is solely concerned with a default judgment *regularly* obtained. By contrast, where a default judgment is obtained *irregularly*, involving a failure to comply with the rules of court (e.g., as to service or time), the Court's discretion under O.13, r.8 is bound to be approached differently. At least in the generality of cases, if perhaps not in all cases, the defendant is entitled as a matter of right to have an irregularly obtained default judgment set aside: *Hackney LBC v Driscoll* [2003] EWCA Civ 1037; [2003] 1 WLR 2602. We say no more about default judgments *irregularly* obtained with which we are not concerned.

33. *Thirdly*, in English law, in the case of a default judgment regularly obtained (and without fettering the Court's wide discretion), the primary consideration is whether the defendant has merits "*to which the Court should pay heed*": *The Saudi Eagle* [1986] 2 Lloyd's Rep. 221, at p.223, citing *Evans v Bartlam* [1937] AC 473, at p. 489. The common sense reason is that there is no point in setting aside a default judgment regularly obtained where the defendant has no defence. As to establishing merits to which the Court should pay heed, to persuade the Court to exercise its discretion in his favour, the defendant must show that he has a defence "*which has a real prospect of success*"; a mere "*arguable case*" is insufficient; the "*arguable case*" must "*carry some degree of conviction*": *The Saudi Eagle, supra*.

34. *Fourthly*, the "*real prospect of success*" test comprises settled English law, regarding an application by a defendant seeking to set aside a default judgment regularly obtained. It may, however, be noted that the distinction drawn in *The Saudi Eagle* between (i) the "*real prospect of success*" test applicable when applying to set aside a default judgment regularly obtained and (ii) the suggestion that a mere "*arguable case*" defence sufficed for a defendant seeking to resist summary judgment, is no longer sustainable. As appears from later authorities such as *Swain v Hillman* [2001] 1 All ER 91, the Court has the power to dispose summarily of claims and defences which have "*no real prospect of success*". A real prospect of success directs the Court to consider whether there is a "*realistic*" as opposed to a "*fanciful*" prospect of success: *Swain v Hillman*, at p.92; the words "*real*" and "*realistic*" are interchangeable. Accordingly, in English law, the same test now applies when seeking to resist summary judgment or applying to set aside a default judgment regularly obtained, the only significant difference being the incidence of the (overall) burden of proof: *ED & F Man Liquid Products Ltd v Patel and Another*

[2003] EWCA Civ 472, at [7] – [9]. To reiterate, however, none of this impacts on the applicability of the "*real prospect of success*" test to an application by a defendant to set aside a default judgment regularly obtained.

35. *Fifthly,* the English law *Saudi Eagle* test of a "*real prospect of success*" when considering whether to set aside a default judgment regularly obtained, has been adopted by the Court in Brunei. Thus, in *Low & Lim v Hua Chan Nam* (HCCS No. 39 of 2004), the High Court (Dato Paduka Steven Chong, J, as he then was) dismissed the defendant's application to set aside the default judgment entered against him; in doing so, the Court (at [14] – [23]) referred in terms to the *Saudi Eagle* and held (at [22]) that the defendant had not "*shown the defence has a real prospect of success or carries some degree of conviction*".

36. In *Alisan Jaya v Wing Wah* (COACV No. 6 of 2013), Leonard JA, giving the Judgment of this Court expressed the matter this way:

> "*For the purpose of setting aside a regular default judgment the defendant must show that he has a meritorious defence. The test described in…[The Saudi Eagle]… is currently applied in Brunei. It is not sufficient to show a merely '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'. The Appellant has argued for a less stringent standard to be adopted … We are satisfied, without feeling the need to add to the existing volume of semantic disputation, that where a defendant in default asks the court to exercise its undoubted and unfettered discretion in his favour and the court, having considered all the circumstances, applying its judicial experience and common sense, takes the view that the proposed defence does not meet the Saudi Eagle test the judgment should not be set aside. Indeed to do so would be unjust to the plaintiff. It is relevant to consider the explanation for any delay…but the principal question is whether there is a meritorious defence on the basis described above.*"

37. We respectfully adopt this valuable passage in *Alisan Jaya* as correctly stating the law in Brunei, subject only to the following observations:

    (1) The distinction drawn between applications to set aside a default judgment and applications for summary judgment, derived from the *Saudi Eagle* is no longer good law, for the reasons already set out. That development, however, makes no difference to the adoption and application of the *Saudi Eagle* test in the default judgment context.

    (2) We struggle somewhat with the notion that carrying "*some degree of conviction*" adds anything to the requirement of a "*real prospect of success*". The requirement of carrying some degree of conviction may have been helpful had the test merely required demonstrating an arguable case but, as it seems to us, a defence with a real prospect of success necessarily carries some degree of conviction. We therefore prefer to state the test in terms of a "*real prospect of success*" *simpliciter*, which does not involve any substantive departure from the law as stated in *Alisan Jaya.* Further elaboration is unnecessary and would simply add to the *"volume of semantic disputation*" which *Alisan Jaya* rightly deprecated.

(3) We entirely agree with the reminder in *Alisan Jaya* that the interests of the plaintiff are also to be considered – not only those of the defendant. A plaintiff should not be required to incur the time and cost of further proceedings and possibly a trial where a regular default judgment has been obtained and the defendant is unable to demonstrate a defence with a real prospect of success.

38. *Sixthly*, it is unnecessary to take time over the Malaysian decisions cited by the Respondent. While obviously approached with respect, insofar as they propose a lesser or different test to that set out in Bruneian and English law, it is the Bruneian and English test which governs. So far as concerns the standing of English law, Ms Aziemah drew our attention to the provisions of the (Bruneian) *Application of Laws Act (Cap. 2)*, described in its long title as (*inter alia*) an "*...Act to regulate the application in Brunei Darussalam of the common law of England...*". S.2 of the Application of Laws Act provides as follows:

"*Subject to the provisions of this Act and save in so far as other provision has been or may hereafter be made by any written law in force in Brunei Darussalam, the common law of England and the doctrines of equity, together. with statutes of general application, as administered or in force in England at the commencement of this Act, shall be in force in Brunei Darussalam: Provided that the said common law, doctrines of equity and statutes of general application shall be in force in Brunei Darussalam so far only as the circumstances of Brunei Darussalam and of its inhabitants permit and subject to such qualifications as local circumstances and customs render necessary.*"

As is clear from the Bruneian decisions, there is no basis for qualifying the application of the *Saudi Eagle* test in Brunei.

39. Reverting to the Judgment of the Judge, we respectfully think that her focus (at [22] and [35]) on "*triable or arguable issues*" mis-states the correct test as we have articulated it. That said, the Judge observed (at [22]) that there was little reason to set aside a default judgment "*if the defendant cannot present a strong and arguable case*". This suggests the Judge having in mind that an arguable case of itself would not suffice; it had to be "*a strong*" and arguable case. Accordingly, we are not persuaded that any error of law on the part of the Judge was material, still less crucial. Like this Court in *Alisan Jaya* we have no wish to add to the volume of "*semantic disputation*".

40. As to substance, the test in Brunei for consideration of setting aside a default judgment regularly obtained should now be as we have stated it, namely, a defendant must show a defence with a "*real prospect of success*". If yes, the Court *may* set aside the judgment; if no, at least save very exceptionally, an application to set aside a default judgment regularly obtained will fail.

41. Issue II: Error of fact: Here, with respect, we think that the Judge did go wrong and plainly so; this Court is therefore entitled to intervene. Our reasons can be briefly expressed.

42. First, we address the dispute as to the existence of the Sub-Contract. Following careful consideration, the Judge dismissed the forgery allegation (at [25] – [34]). As it seems to us, the Judge was plainly right to regard the forgery allegation as entitled to no weight, unsupported as it was by any evidence; in any event, there is no appeal from that conclusion. On that footing, the Judge was left with the Sub-Contract – which was

before her and which she had been considering - untainted by the forgery allegation. Accordingly, the Appellant was justified in submitting (as set out above) that any burden resting on it (of establishing the existence of the Sub-Contract) had been discharged; there was nothing more for the Appellant to do in this regard. The Judge's conclusion to the contrary (at [35], also set out above)) cannot stand. We agree with the Registrar's Ruling in this connection.

43. Expressed more analytically and formally, the Appellant having obtained the default judgment, it was for the Respondent to satisfy an *evidential* burden by raising a defence with a real prospect of success. If it did so, then the Appellant would be required to satisfy the *legal* burden of proof of establishing the existence of the Sub-Contract. As, however, the Respondent failed to satisfy the evidential burden – the forgery allegation having no real prospect of success - there was no basis for setting aside the default Judgment on this ground. Having put in evidence the document in question which manifestly gave every appearance of being the Sub-Contract, the Appellant was entitled to the benefit of the default judgment; with the collapse of the forgery allegation, there was nothing else to stand between the Appellant and a conclusion in its favour on the existence of the Sub-Contract.

44. By whichever route, therefore, there is no basis for impugning the existence of the Sub-Contract. Of itself, we are minded to think that this conclusion is sufficient to decide Issue II in the Appellant's favour, but matters do not end there.

45. *Secondly,* we address the Respondent's contention that, in summary, the parties' commercial dealings related to the MOU and BFID Project, rather than the Sub-Contract and Development Agreement. Here, the Respondent faced insuperable difficulties. To begin with, the Respondent failed to produce a copy of the MOU; Colonel Harif's valiant offer to produce what he understood to be a copy of the MOU during the Appeal hearing came far too late and we had no hesitation in declining the offer. Next, the signatures on behalf of the Respondent, the use of the Respondent's stamp, the acknowledgments of receipt, the payment amounts and dates, all pointed overwhelmingly to the parties' conduct relating to the Sub-Contract, as contended by the Appellant; the precise correspondence between the parties' conduct and the Sub-Contract cannot otherwise be plausibly explained. In short, the Respondent's contentions in this regard, again comprising essentially assertion from the Bar, do not disclose a defence having a real prospect of success or, we cannot avoid saying, even come close to doing so. For this reason too, the Judgment cannot stand.

OVERALL CONCLUSION AND DISPOSAL

46. It follows that the Appellant's appeal succeeds; the default judgment must be restored; there was no proper basis for the Judge to set it aside.

47. As to Costs: (1) the Registrar's Ruling as to costs must be restored; (2) the Judge's order as to costs must be set aside; (3) the Respondent must pay the Appellant's costs of the proceedings before the Registrar, of the appeal before the Judge, and of this Appeal, within 42 days of the date of this Judgment, to be assessed by the Registry is not agreed.

STEVEN CHONG, C.J.

LUNN, J.A.

SIR PETER GROSS, J.A.