IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 177

Admiralty in Rem No 126 of 2018
(Registrar's Appeal No 145 of 2019)

Between

Hansa Safety Services GmbH

… *Plaintiff*

And

The Owner of the Vessel, the "King Darwin"

… *Defendant*

Hendrik Gittermann

… *Intervener*

JUDGMENT

[Civil Procedure] — [Inherent powers] — [Striking out] — [Notice of Discontinuance] — [Claim for wrongful arrest outside an *in rem* action]

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The "King Darwin"

[2019] SGHC 177

High Court — Admiralty in Rem No 126 of 2018 (Registrar's Appeal No 145 of 2019)
Vincent Hoong JC
8 July 2019; 3 July 2019

30 July 2019 Judgment reserved.

Vincent Hoong JC:

Introduction

1 By Summons No 1453 of 2019, the Intervener applied to strike out the Plaintiff's Notice of Discontinuance ("NOD") of Admiralty in Rem No 126 of 2018 ("the Action") on the ground that it is necessary to prevent injustice or an abuse of the process of the Court: O 92 r 4, Rules of Court (Cap 322, R5, 2014 Rev Ed) ("ROC").

2 The Senior Assistant Registrar ("SAR") granted the Intervener's application. This appeal is concerned solely with whether the SAR was correct in striking out the NOD.

3 Having heard the parties' submissions, I agree that this is an appropriate case for the court to exercise its inherent powers to strike out the NOD. Accordingly, I dismiss the Plaintiff's appeal and uphold the SAR's order to

strike out the NOD. However, to strike a balance between the parties' respective positions, I also impose terms (at [36]) in the striking out order.

Facts

4 The facts to the extent that they are material to the striking out application are as follows. The Plaintiff commenced the Action against the Defendant on 13 November 2018[1] for the sum of EUR 5,864.00 ("the Outstanding sum"), which the Plaintiff claimed was the sum remaining unpaid for services which it had rendered to the vessel, the "King Darwin". The vessel is owned by the Defendant.[2]

5 On the same day, the Plaintiff arrested the vessel pursuant to a warrant of arrest.[3] The vessel was subsequently released on 19 November 2018,[4] after the Defendant had furnished a Letter of Undertaking providing security to the Plaintiff.[5]

6 On 21 January 2019, after the Intervener was granted leave to intervene in the Action in his capacity as the Insolvency Administrator of the Defendant,[6] he filed Summons No 365 of 2019, seeking, among others, to set aside the warrant of arrest and damages for wrongful arrest of the vessel from the Plaintiff.[7]

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1 Plaintiff's Bundle of Cause Papers ("PBCP") Tab 3.

2 PBCP Tab 6, para 5.

3 PBCP Tab 2.

4 PBCP Tab 4.

5 Hendrik Gittermann Affidavit ("Gittermann") para 34(8) and Tab HG-4.

6 Gittermann para 50.

7 Summons for HC/SUM 365/2019, paras 1 and 3.

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7 On 21 March 2019, the Plaintiff served the NOD, which it had filed on 7 February 2019.[8] On 22 March 2019, the Intervener applied to strike out the NOD.[9] The SAR granted the application.

My decision

Principles in applications to set aside NODs

8 Under O 21 r 2(1) of the ROC, a plaintiff may, without the leave of the court, discontinue his action, or withdraw any particular claim made by him therein at any time not later than 14 days after service of the defence on him by filing and serving a NOD on the defendant(s). While leave is not required, the plaintiff's right to discontinue his action or withdraw his claim is subject to the inherent powers of the court, and the NOD may be set aside if the purported discontinuance amounts to injustice or an abuse of process: *Singapore Court Practice 2017* vol I (Jeffrey Pinsler gen ed) (LexisNexis, 2017) at para 21/2/3.

9. In an application to set aside a plaintiff's NOD, a helpful consideration is whether the court would have granted unconditional leave to serve the NOD had leave been required: *Castanho v Brown & Root (UK) Ltd and another* [1981] AC 557("*Castanho*") at 572.

10 If such unconditional leave would not have been granted, it may be appropriate for the court to exercise its inherent powers to set aside the NOD. However, not every case is deserving of the exercise of the court's inherent powers. It should only be exercised in special circumstances; the essential

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8 PBCP Tab 16, p 2, line 18; Plaintiff's Written Submissions, para 20; Intervener's Written Submissions, para 5(8) (the date of service is not disputed).

9 Summons for HC/SUM 1453/2019.

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touchstone being that of "need": *Roberto Building Material Pte Ltd and others v Oversea-Chinese Banking Corp Ltd and another* [2003] 2 SLR(R) 353 at [16]. In *Wee Soon Kim Anthony v Law Society of Singapore* [2001] 2 SLR(R) 821, Chao Hick Tin JA (as he then was), who delivered the judgment of the Court of Appeal, observed at [27] and [30]:

> 27 It seems to us clear that by its very nature, how an inherent jurisdiction, whether as set out in O 92 r 4 or under common law, should be exercised should not be circumscribed by rigid criteria or tests. In each instance the court must exercise it judiciously. … this jurisdiction may be invoked when it is just and equitable to do so and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression and to do justice between the parties. Without intending to be exhaustive, we think an *essential touchstone is really that of "need"*. …
>
> …
>
> 30 The question might well be asked, what prejudice would the intervention cause to the complainant/applicant. But we do not think that that is the correct approach upon which to invoke the court's inherent jurisdiction. It may well be that the question of prejudice is relevant to determine whether intervention should be allowed in the circumstances of a case. But that is not to say that once no prejudice is shown, the court should invoke that jurisdiction. *There must nevertheless be reasonably strong or compelling reasons showing why that jurisdiction should be invoked.*
>
> [emphasis added]

11 Examples of when there would be a need to strike out a NOD include instances where:

(a) a plaintiff sought to discontinue the English proceedings after benefiting from two interim payments and an admission of liability on the defendant's part, in the hope of obtaining a greater scale of damages before the Texan courts: *Castanho*;

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(b) a plaintiff who had been ordered by the English court to terminate its Sierra Leone action sought to discontinue the English proceedings, in an attempt to continue with the Sierra Leone suit: *Fakih Brothers v A P Moller (Copenhagen) Ltd and others* [1994] 1 Lloyd's Rep 103; and

(c) a plaintiff sought to discontinue an action after representing to the defendant that it would not do so. The result of the discontinuance was that the defendant's counterclaim would have been time-barred: *Ernst & Young (a firm) v Butte Mining Plc* [1996] 1 WLR 1605.

12 Alternatively, where a defendant would be deprived of some advantage which he has gained in litigation by the discontinuance of the action, the court may, as an alternative to setting aside the NOD, allow the discontinuance with terms to preserve such advantages: see *Covell Matthews & Partners v French Wools Ltd* [1977] 1 WLR 876 ("*Covell Matthews*") at 879. Ultimately, the appropriate order has to be guided by the facts of each case. As the court observed in *UMCI Ltd v Tokio Marine & Fire Insurance Co (Singapore) Pte Ltd and others* [2006] 4 SLR(R) 95 at [92], "in looking at the question of necessity in the context of the court's inherent jurisdiction, one must take a sensible approach that has regard to all the circumstances of the case". It is therefore to the facts that I now turn.

Claim for wrongful arrest outside of in rem *proceedings*

13 The Intervener submits that by discontinuing the Action, the Plaintiff would deprive the Intervener of his right to pursue his claim for wrongful arrest, which must be pursued in the context of the arresting party's *in rem* action. In *The "Xin Chang Shu"* [2016] 1 SLR 1096 ("*Xin Chang Shu*") at [24], Steven

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Chong J (as he then was) ("Chong J") set out four methods for bringing a claim for wrongful arrest:

> Based on the above discussion, damages for wrongful arrest can be pursued in at least three ways. [1] Typically and most commonly, it is brought in conjunction with an interlocutory application to strike out the writ and as a consequence of the successful striking out, the warrant of arrest would fall away as well … [2] Next, there are instances where the shipowner does not seek to strike out the *in rem* writ because the claim is brought within the [High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed)]. However, due to non-disclosure of material facts which led to the issuance of the warrant of arrest, the shipowner applies *only* to set aside the warrant of arrest and seeks damages for wrongful arrest … [3] The third mode which is less common is for the shipowner to provide security and defend the merits of the claim at the trial (as was done in [*Fal Energy Company Limited v Owners of the Ship or Vessel "Kiku Pacific"* [1998] SGHC 370] and to seek damages for wrongful arrest as a counterclaim following the dismissal of the claim … [4] In fact, [*The "Trade Resolve"* [1999] 2 SLR(R) 107] suggests that there could perhaps be a fourth way to pursue a claim for damages for wrongful arrest at the interlocutory stage without first applying to strike out the writ or even set aside the warrant of arrest. … [emphasis in original]

14 The common thread of the four methods, according to the Intervener, is that a claim for wrongful arrest has to be made *in the context* of the arresting party's *in rem* action. On this basis, the Intervener submits that he would be prejudiced if the Action was discontinued as he would not be able to pursue his claim for wrongful arrest "via the proper procedural route" (*ie,* within the Action).[10]

15 However, a review of the authorities shows that the discontinuance of the Action (an *in rem* action) will not prohibit the Intervener from pursuing his claim for wrongful arrest.

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10 Intervener's Written Submissions, paras 45 – 48.

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16 As a starting point, the four methods in *Xin Chang Shu* which Chong J set out must be read in its proper context. In *Xin Chang Shu*, the assistant registrar ("AR") had set aside the *in rem* writ but had declined to set aside the warrant of arrest as the AR found that there was no material non-disclosure by the plaintiff. Accordingly, damages for wrongful arrest were not awarded. The defendant appealed against, *inter alia*, the AR's decision in not awarding damages for wrongful arrest. Before dealing with the merits of the defendant's claim for damages for wrongful arrest, Chong J found it necessary to examine the issue of "whether damages for wrongful arrest can be awarded if the warrant of arrest was not first set aside" (*Xin Chang Shu* at [19]).

17 In seeking to resolve *that* issue, Chong J considered the methods in which damages for wrongful arrest may be pursued. The methods led Chong J to conclude that "the setting aside of a warrant of arrest is not a prerequisite to pursuing a claim for damages for wrongful arrest" (*Xin Chang Shu* at [25]), thereby resolving the issue at hand. Read in that context, it is clear that the four methods were not intended to exhaustively set out the procedural means by which a shipowner may claim damages for wrongful arrest, as that was not an issue before the court in *Xin Chang Shu.*

18 Indeed, in *The Walter D Wallet* [1893] P 202 ("*Walter D Wallet*"), the court allowed the *plaintiff's* claim for the wrongful arrest of a ship, and awarded nominal damages to the plaintiff. Significantly, the means adopted by the plaintiff in pursuing its claim was not one of the four methods stipulated in *Xin Chang Shu*, as the claim had been brought independently of any *in rem* action by the arresting party.

19 Similarly, in *Best Soar Ltd v Praxis Energy Agents Pte Ltd* [2018] 3 SLR 423 ("*Best Soar*"), the owner of a vessel commenced an action in Singapore

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against the defendant seeking, among others, a declaration that the defendant had wrongfully arrested its vessel in Lebanon and for damages to be assessed.

20 Chua Lee Ming J ordered a stay of the action on the ground of *forum non conveniens*. Nonetheless, in arriving at his decision, it was recognised that the owner's claim for wrongful arrest was a claim in tort: *Best Soar* at [20]. This is consistent with *Congentra AG v Sixteen Thirteen Marine SA (The "Nicholas M")* [2009] 1 All ER (Comm) 479 ("*Nicholas M*"), where it was recognised at [22] that there exists the tort of wrongful arrest under English law.

21 Collectively, these cases demonstrate that the Intervener may mount a claim under the tort of wrongful arrest *independently* of the Action, should the Action be discontinued.

Test for wrongful arrest outside an* in rem *action is uncertain

22 However, were the Intervener to pursue a claim for wrongful arrest independently of an *in rem* action, the Intervener submits that the appropriate test to be applied is unclear.

23 If the claim were pursued under the Action, the test would be that as set out in *The Evangelismos* (1858) 12 Moo PC 352 ("*The Evangelismos*"), which was held to be of continuing application by the Court of Appeal in *The "Vasiliy Golovnin"* [2008] 4 SLR(R) 994 ("*Vasiliy Golovnin*") at [134]. The question would simply be whether the Plaintiff's action "was so unwarrantably brought, or brought with so little colour, or so little foundation, that it rather implies malice on the part of the Plaintiff, or that gross negligence which is equivalent to it": *The Evangelismos* at 359. In *The "Kiku Pacific*" [1999] 2 SLR(R) 91 ("*Kiku Pacific*") at [30], M Karthigesu JA, delivering the judgment of the Court of Appeal, expressed the test in this way:

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> … [W]e were of the view that the test to be proved by the owners was not whether there was reasonable or probable cause in bringing the action or in rejecting the security offered in March 1996. Instead the test is that laid down by the Rt Hon T Pemberton Leigh in *The Evangelismos* of *mala fides* or gross negligence implying malice. …

24 Conversely, if the claim were to be pursued independently of an *in rem* action, the test would arguably be that applied in *Walter D Wallet.* That is the only case cited where a shipowner had successfully claimed damages for wrongful arrest *independently* of an arresting party's *in rem* action. In *Walter D Wallet*, nominal damages were awarded to the shipowner as the arresting party's action was held to be "in common law phrase, without reasonable or probable cause; or, in equivalent Admiralty language, the result of *crassa negligentia*, and in a sufficient sense *mala fides*" (*Walter D Wallet* at 208).

25 However, the Court of Appeal has questioned the appropriateness of the test adopted in *Walter D Wallet* on two occasions, as the common law aspect of the test only requires that the arrest was "without reasonable or probable cause". This arguably excludes the requirement of malice on the part of the arresting party, which is a requirement under *The Evangelismos* test: see *Kiku Pacific* at [26] and *Vasiliy Golovnin* at [127]. As explained in *Vasiliy Golovnin* at [127]:

> … the ***importation of the term "reasonable or probable cause" would cause confusion and, more importantly, dilute the threshold required for an action in wrongful arrest to succeed.*** Interestingly, we note that [in *The "Ohm Mariana" ex "Peony"* [1992] 1 SLR(R) 556 ("*The Ohm Mariana ex Peony*")] Selvam JC had imported "without reasonable or probable cause", one of the required elements of malicious prosecution, into the action for wrongful arrest, but not the other element of malice … He appeared to take the view that the phrase "without reasonable or probable cause" would also encompass *crassa negligentia* or *mala fides* in the admiralty context … Nevertheless, Selvam JC had also referred to the Rt Hon T Pemberton Leigh's famous passage in *The Evangelismos* approvingly (at [44]) and nowhere in his judgment did he hint that the threshold set by the *Evangelismos* test was too high.

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> The award of damages in *The Ohm Mariana ex Peony* for wrongful arrest was also based on Selvam JC's finding that there was malice on the part of the plaintiffs (at [53]). As such, in our opinion, ***it is doubtful if Selvam JC had, in the first place, intended to lay down a less stringent test in The Ohm Mariana ex Peony based on without reasonable or probable cause*** … That aside, we note that counsel for FESCO, Mr Steven Chong SC, has not attempted to argue before us that the present high threshold set by the *Evangelismos* test has been problematic for the ship-owning community. [emphasis added in bold italics]

26 Although it may be argued that the applicable test for pursuing a claim for wrongful arrest if the Action were discontinued and a fresh action initiated is uncertain because of the Court of Appeal's observations in *Kiku Pacific* and *Vasiliy Golovnin*, such uncertainty in and of itself is in my view insufficient to set aside the NOD. This is in particular as the passage in *Vasiliy Golovnin* above makes clear that the threshold would almost certainly be that of malice, rather than "without reasonable or probable cause", as suggested in *Walter D Wallet*.

Deprivation of advantages gained in litigation

27 However, if the Plaintiff is allowed to discontinue the Action, the Intervener would also be deprived of the advantages which he has gained over the course of the Action, which include:

(a) the Intervener's successful application to intervene in the Action,[11] and to claim for damages for the wrongful arrest of the vessel on the Defendant's part.;[12]

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11 Minute Sheet – HC/SUM 285/2019.

12 Summons for HC/SUM 365/2019.

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(b) ready access and reference to the affidavits and Notes of Evidence in relation to the hearing on 13 November 2018, pursuant to which the Plaintiff obtained the warrant of arrest.[13] These could be relevant for supporting the Intervener's claim that the arrest of the vessel was wrongful as there was material non-disclosure on the Plaintiff's part;[14] and

(c) the right to claim for damages for the wrongful arrest of the vessel within the Action, without having to commence a fresh suit and obtaining leave to serve a writ out of jurisdiction on the Plaintiff, a German entity.

28 I am mindful that the deprivation of advantages *per se* is not a bar to discontinuance, as the loss of such advantages may be prevented by attaching terms to the discontinuance order, as seen in *Covell Matthews*. There, the tenant had issued an originating summons seeking the grant of a new tenancy from the landlord. Subsequently, the tenant applied to withdraw its originating summons. The landlord contested the tenant's withdrawal, as the landlord contended that the tenant had already entered into a binding tenancy agreement on substantially higher rent than the previous tenancy agreement. The court granted the tenant leave to withdraw the originating summons, on the following terms: (a) the tenant should not make a fresh application for a new tenancy, (b) the grant of leave be without prejudice to the landlord's contention that a binding agreement had been reached between the parties, and (c) an appropriate order for costs against the tenant. The terms sought in essence to prevent the tenant from

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13 Gittermann, para 57; HC/WA 33/2018.

14 Summons for HC/SUM 365/2019, para 1.

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rescinding from the position it had taken in discontinuing its originating summons, and to prevent injustice to the landlord.

29 Similarly, in *Hanhyo Sdn Bhd v Marplan Sdn Bhd & Ors* [1992] 1 MLJ 51 ("*Hanhyo*"), the plaintiff commenced a suit against three defendants in respect of the same sum. After the plaintiff obtained a judgment in default of appearance and defence against the second defendant, it filed a notice of discontinuance with respect to its suit against the first defendant. The first defendant objected to the discontinuance as, among others, it had sought an order to stay the proceedings on the ground that the matter ought to be referred to arbitration instead. The court held that the advantage obtained by the first defendant in seeking such an order was certainly insufficient to compel the plaintiff to continue its action against the first defendant, as the plaintiff already had a judgment against the second defendant in respect of the sum claimed for. In the circumstances, the action against the first defendant was discontinued, subject to the following conditions: (a) the plaintiff should not institute a fresh action against the first defendant on the same matter set out in the suit, (b) the grant of leave to discontinue was given without prejudice to the first defendant's right to institute arbitration proceedings, and (c) other consequential cost orders. Like *Covell Matthews*, *Hanhyo* was a case whereby the plaintiff was entitled to discontinue its action as the loss of advantages on the defendant's part that flowed from the discontinuance could be counteracted with terms.

30 However, unlike *Covell Matthews* and *Hanhyo*, the advantages which the Intervener has gained in this Action cannot be preserved easily by attaching terms to the discontinuation order. Should the Action be discontinued, the Intervener would first have to obtain recognition of the German insolvency proceedings before he is able to commence fresh proceedings on the Defendant's behalf. Thereafter, the Intervener would have to issue and serve a

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fresh writ out of jurisdiction on the Plaintiff, a German entity, in order to pursue his claim for wrongful arrest. The affidavits and Notes of Evidence which he has to rely on would then have to be tendered afresh. In essence, the proceedings would be reset. While the Intervener may be compensated with costs, the Court of Appeal observed in *Rohde & Liesenfeld Pte Ltd v Jorg Geselle and others* [1998] 3 SLR(R) 335 at [14] that "costs are not be (*sic*) the only consideration. Any award of costs does not truly compensate for the *loss of time and effort* directed towards fighting the proceedings" [emphasis added].

31 Such loss of time and effort must also be viewed in the light of the Defendant's insolvency,[15] as the additional costs and delays which flow from the discontinuance of the Action would ultimately be suffered by the Defendant's innocent creditors.

32 Considered alongside the uncertainty of the test to be applied when mounting a claim for damages for wrongful arrest outside of *in rem* proceedings (see [22]–[26] above), it is unlikely that costs would be able to adequately compensate the Intervener for the time and effort that he would expend in re-commencing an action for the wrongful arrest claim. Accordingly, I disallow the discontinuance of the Action.

Withdrawal of the claim

33 Nonetheless, there is force in the argument that a plaintiff should not be compelled to "litigate against his will" so long as injustice is not caused to the defendant: *Covell Matthews* at 879. In this regard, I note that O 21 r 2(1) of the ROC permits a plaintiff to "discontinue the action, or *withdraw any particular*

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15 Gittermann para 1.

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claim" [emphasis added] without the leave of the court, and that such right to discontinue or withdraw is subject to the inherent powers of the court to prevent injustice and an abuse of process (see [8] above).

34 Accordingly, while I disallow a discontinuance of the Action to prevent injustice to the Intervener, I think that it is only fair that the Plaintiff be allowed to withdraw its claim for the Outstanding sum against the Defendant if it so wishes. However, if it does so, the Plaintiff is prohibited from commencing a fresh action for the same claim. This will allow the Plaintiff to discontinue its aspect of the Action, while allowing the Intervener to avoid the uncertainty and loss of advantages that he would suffer were the Action to be discontinued entirely. In my view, this strikes a proper balance between the parties' respective positions, and ensures that injustice is prevented.

35 I find support for the propriety of such an order in the case of *Setiadi Hendrawan v OCBC Securities Pte Ltd and others* [2001] 3 SLR(R) 296 ("*Setiadi*"). There, the plaintiff applied for leave to discontinue its action against OCBC Securities, the first defendant in the case. The judge denied the application to discontinue, and instead struck out the plaintiff's claim against OCBC Securities, while also precluding the plaintiff from commencing a fresh action against OCBC Securities: see *Setiadi* at [40]–[43]. This demonstrates that the court may allow the discontinuance of part of the action (*eg,* withdrawal of the claim) in lieu of discontinuing the action as a whole.

Conclusion

36 In conclusion, I find that the present case is an appropriate case which necessitates the court exercising its inherent powers to set aside the NOD, with the result that the Action persists. Atop the setting aside of the NOD, I make the following orders:

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(a) the Plaintiff is at liberty to withdraw its claim in the Action, and, if the Plaintiff decides to do so, I further order that the Plaintiff is not to institute a fresh action with respect to the same claim; and

(b) regardless of whether the Plaintiff withdraws its claim, the Intervener is at liberty to claim and apply for such relief and/or remedy as may be necessary, including but not limited to a claim for damages for wrongful arrest within the Action.

37 For completeness, I must stress that while much was made about the merits of the Intervener's claim for wrongful arrest, such submissions were irrelevant in the proceedings before me, which relate solely to whether there was an abuse of process or injustice caused to the Intervener by the Plaintiff's NOD. Also, as I have already set aside the NOD to prevent injustice to the Intervener, I make no findings as to whether the Plaintiff's filing and service of the NOD amounted to an abuse of process, which is the alternate ground which would necessitate the exercise of the court's inherent powers.

38 Finally, while the Plaintiff strongly urged the court to consider the case of *Newland Enterprise Pte Ltd v "Santa Arona" (Owners of)* [1988] 2 MLJ 246 ("*Newland*"), I found the case to be of little assistance. In *Newland*, the defendants did not dispute the fact that the plaintiffs had discontinued the action without leave by serving its NOD. Instead, the dispute involved the effectiveness of orders that had been made after the action had been discontinued. In that regard, the court held that "even after discontinuance by the plaintiff, the court can make such further order as may be requisite for giving effect to rights acquired by the defendant in the course of proceedings": *Newland* at 9. The other issue related to whether the defendants' solicitors had authority to defend the action. Plainly, the matter of whether it was appropriate

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to set aside the NOD was not raised, and the relevance of the case to the present action is therefore unclear.

39 I will now hear parties on the question of costs.

Vincent Hoong
Judicial Commissioner

Yap Ming Kwang Kelly and Keng Xin Wee, Shereen (Oon & Bazul LLP) for the plaintiff;
Yap Yin Soon and Dorcas Seah (Allen & Gledhill LLP) for the defendant and intervener.

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