OpenNet Pte Ltd *v* Info-Communications Development Authority of Singapore [2013] SGCA 24

Case Number	: Civil Appeal No 81 of 2012/Q (Summons No 3702 of 2012/Y)
Decision Date	: 14 March 2013
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Tan Chee Meng SC, Melvin Lum, Lionel Leo, Daniel Chan, Tricia How (WongPartnership) for the Appellant; Cavinder Bull SC, Chia Voon Jiet, Lin Shumin (Drew & Napier) for the respondent.
Parties	: OpenNet Pte Ltd — Info-Communications Development Authority of Singapore

Civil Procedure – Leave to Appeal

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2012] 4 SLR 1076.]

14 March 2013

Chao Hick Tin JA (delivering the grounds of decision of the court):

1 This was an application by the Info-Communications Development Authority of Singapore, the respondent (the "Respondent") in Civil Appeal No 81 of 2012/Q, to strike out the notice of appeal filed by the appellant ("the Appellant"), OpenNet Pte Ltd, on the ground that the Appellant had not obtained leave to appeal to the Court of Appeal, pursuant to s 34(2)(d), read with the Fifth Schedule, of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the SCJA"). At the conclusion of the hearing we ruled that the Appellant did not require leave of court to file the appeal and accordingly dismissed the application to strike out the notice of appeal. We now give our reasons.

The Background

2 The Appellant is a joint venture company incorporated in Singapore. The Respondent is a statutory board established pursuant to the Info-Communications Development Authority of Singapore Act (Cap 137A, 2000 Rev Ed).

3 By way of Originating Summons No 1099 of 2011/V, the Appellant filed an application under O 53 of the Rules of Court (Cap 322, Rev Ed 2006) ("ROC") for leave from the High Court to commence judicial review of a decision made by the Respondent that both a business trust by the name of NetLink Trust and its trustee-manager CityNet Infrastructure Management Pte Ltd had fulfilled the requirements set out in a deed of undertaking furnished by Singapore Telecommunications Limited to the Respondent.

4 The Appellant's application for leave to commence judicial review was heard on 17 January 2012, 21 February 2012, 2 March 2012 and 19 April 2012. On 7 June 2012, the Appellant's leave application was dismissed. On 6 July 2012, the Appellant filed a notice of appeal against the High Court's refusal to grant leave to commence judicial review.

5 On 23 July 2012, the Respondent filed the present application for an order that the Appellant's notice of appeal be struck out on the ground that the Appellant had not obtained leave to appeal as

required under s 34(2)(d), read with the Fifth Schedule, of the SCJA.

Issue

6 The sole issue which we had to decide was whether the Appellant was required to apply for leave to appeal from the High Court in order to file the notice of appeal against the Judge's refusal to grant leave to commence judicial review.

The legislative framework

7 Before examining the arguments made by the parties, it may be helpful to lay out the legislative framework for appeals on civil matters. As held by this court in *Blenwel Agencies Pte Ltd v Tan Lee King* [2008] 2 SLR(R) 529 ("*Blenwel*"), "[t]he Court of Appeal is a creature of statute and, hence, is only seised of the jurisdiction that has been conferred upon it by the relevant provisions in the legislation creating it". Therefore, as a starting point, we refer to s 29A of the SCJA, which provides that the Court of Appeal has jurisdiction over appeals from "any judgment or order of the High Court in any civil cause or matter", subject to the provisions of the SCJA or "any other written law regulating the terms and conditions upon which such appeals may be brought":

> **Jurisdiction of Court of Appeal**
>
> **29A.**—(1) The civil jurisdiction of the Court of Appeal shall consist of appeals from any judgment or order of the High Court in any civil cause or matter whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to the provisions of this Act or any other written law regulating the terms and conditions upon which such appeals may be brought. ...

8 Section 34(1) of the SCJA sets out the matters which are non-appealable, while s 34(2) sets out the matters which are appealable only with leave:

> **Matters that are non-appealable or appealable only with leave**
>
> **34.**—(1) No appeal shall be brought to the Court of Appeal in any of the following cases:
>
> (a) where a Judge makes an order specified in the Fourth Schedule, except in such circumstances as may be specified in that Schedule;
>
> (b) [Deleted by Act 30/2010 wef 01/01/2011]
>
> (c) [Deleted by Act 30/2010 wef 01/01/2011]
>
> (d) where the judgment or order is made by consent of the parties; or
>
> (e) where, by any written law for the time being in force, the judgment or order of the High Court is expressly declared to be final.
>
> (2) Except with the leave of a Judge, no appeal shall be brought to the Court of Appeal in any of the following cases:
>
> (a) where the amount in dispute, or the value of the subject-matter, at the hearing before the High Court (excluding interest and costs) does not exceed $250,000 or such other amount as may be specified by an order made under subsection (3);

(b) where the only issue in the appeal relates to costs or fees for hearing dates;

(c) where a Judge in chambers makes a decision in a summary way on an interpleader summons where the facts are not in dispute;

(*d*) *where a Judge makes an order specified in the Fifth Schedule, except in such circumstances as may be specified in that Schedule; or*

(e) where the High Court makes an order in the exercise of its appellate jurisdiction with respect to any proceedings under the Adoption of Children Act (Cap. 4) or under Part VII, VIII or IX of the Women's Charter (Cap. 353).

[emphasis added]

9 In addition to listing the matters that are only appealable to the Court of Appeal with leave, s 34(2)(d) of the SCJA further refers to the Fifth Schedule of the SCJA, which lists the orders made by a Judge that are only appealable to the Court of Appeal with leave of a Judge:

ORDERS MADE BY JUDGE THAT ARE APPEALABLE ONLY WITH LEAVE

Except with the leave of a Judge, no appeal shall be brought to the Court of Appeal in any of the following cases:

(*a*) where a Judge makes an order refusing leave to amend a pleading, except if —

(i) the application for such leave is made after the expiry of any relevant period of limitation current at the date of issue of the writ of summons; and

(ii) the amendment is an amendment to correct the name of a party or to alter the capacity in which a party sues, or the effect of the amendment will be to add or substitute a new cause of action;

(*b*) where a Judge makes an order giving security for costs;

(*c*) where a Judge makes an order giving or refusing discovery or inspection of documents;

(*d*) where a Judge makes an order refusing a stay of proceedings;

(*e*) *where a Judge makes an order at the hearing of any interlocutory application other than an application for any of the following matters:*

(i) for summary judgment;

(ii) to set aside a default judgment;

(iii) to strike out an action or a matter commenced by a writ of summons or by any other originating process, a pleading or a part of a pleading;

(iv) to dismiss an action or a matter commenced by a writ of summons or by any other originating process;

(v) for further and better particulars;

(vi) for leave to amend a pleading;

(vii) for security for costs;

(viii) for discovery or inspection of documents;

(ix) for interrogatories to be varied or withdrawn, or for leave to serve interrogatories;

(x) for a stay of proceedings.

[emphasis added]

Our Analysis

10 The Respondent made three arguments as to why the Appellant was required to apply for leave to appeal from the High Court in order to file an appeal against the Judge's refusal to grant leave to commence judicial review. We shall examine each of these three arguments, starting with the second argument. We shall also examine one of the Appellant's arguments.

The Respondent's second argument

11 The Respondent's second argument was that leave to appeal was required because the Appellant's application for leave to commence judicial review was an "interlocutory application" within the meaning of paragraph (e) of the Fifth Schedule of the SCJA. Paragraph (e) of the Fifth Schedule of the SCJA is a catch-all provision which prescribes a blanket requirement of leave to appeal against orders made in all "interlocutory application[s]" which are not specifically exempted from the requirement for leave. The Respondent argued that the Appellant's application for leave to commence judicial review was an "interlocutory application" because, being an application for leave, it was simply a preliminary step to the substantive application for judicial review. Moreover, an application for leave to commence judicial review is "interlocutory" because the application must be made by an *ex parte* originating summons, *ie*, where a respondent may not even be heard on the application.

12 Furthermore, the Respondent argued that the Appellant itself had proceeded on the basis that its application for leave to commence judicial review was an interlocutory proceeding because all of its affidavits in support of the application for leave stated that they contained statements of information or belief. Order 41 r 5 of the ROC provides that "[a]n affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof". Therefore, the Appellant's reliance on hearsay evidence is consistent with the Respondent's contention that the Appellant's application was an "interlocutory application".

Our decision

13 We could not accept the Respondent's second argument for these reasons. First, even if the Appellant had thought that the application for leave to commence judicial review was an interlocutory proceeding, and hence its affidavits contain hearsay evidence permitted under O 41 r 5, such a belief or understanding on the part of the Appellant carries little weight and can hardly be determinative. If the Appellant's understanding was wrong, it remained wrong. It cannot be thereby rendered right. There is no question of estoppel arising. We accept that the Appellant's subjective belief as to whether "interlocutory application" in paragraph (e) of the Fifth Schedule of the SCJA includes an application for leave to commence judicial review is only germane in so far as it is a view which this court should consider in ascertaining the correct meaning of the expression "interlocutory application"

in the context of the SCJA.

14 Second, the Respondent's contention that an application for leave to commence judicial review is "interlocutory" because the application is simply a preliminary step to the substantive application for judicial review, and must be made by *ex parte* originating summons, does not really assist the Respondent. The expression "interlocutory application" is not defined in the SCJA. According to Jowitt's Dictionary of English Law, "[a] proceeding or application is interlocutory when it is peripheral to the main hearing determining the outcome of the case, whether before or after judgment" (see *Jowitt's Dictionary of English law* (Daniel Greenberg gen ed) (Sweet & Maxwell, 2010) at p 1215). Another dictionary defines "interlocutory applications" to mean "in the meantime; is a request made to the court, or to a Judge for its interference in a matter arising in the progress of a cause or proceeding" (Anandan Krishnan, *Words, Phrases & Maxims Legally & Judicially Defined* (LexisNexis, 2008) at para I0990). These definitions do not resolve the issue. On these definitions, it is doubtful if the plain and ordinary meaning of "interlocutory application" could encompass a pre-action application such as the present application for leave to commence judicial review, where there is no "main hearing determining the outcome of the case" to begin with. More importantly, a purposive reading of the SCJA as elaborated below reveals that "interlocutory application" in the context of paragraph (e) of the Fifth Schedule of the SCJA does not include an application under O 53 r 1 for leave to commence judicial review. For the purpose of the discussion below, we shall use the general expression of "interlocutory application" to mean any application that is made before the substantive trial.

15 Third, this court should give the expression "interlocutory application" in paragraph (e) of the Fifth Schedule of the SCJA an interpretation that would promote the purpose underlying the SCJA. Section 9A(1) of the Interpretation Act (Cap 1, 2002 Rev Ed) provides that:

> In the interpretation of a provision of a written law, an interpretation that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to an interpretation that would not promote that purpose or object.

16 According to s 9A(2) (read with s 9A(3)(c)) of the Interpretation Act, consideration may be given to a piece of material which is "capable of assisting in the ascertainment of the meaning of the provision", including "the speech made in Parliament by a Minister on the occasion of the moving by that Minister of a motion that the Bill containing the provision be read a second time in Parliament". At the Second Reading of the Supreme Court of Judicature (Amendment) Bill 2010 (*Singapore Parliamentary Debates, Official Report* (18 October 2010) vol 87 cols 1367–1395), which eventually brought into being s 34(2)(d) and the Fifth Schedule of the SCJA through the enactment of the Supreme Court of Judicature (Amendment) Act (No 30 of 2010) ("Act 30 of 2010"), the Senior Minister of State for Law, Associate Professor Ho Peng Kee ("the Minister"), stated:

> The streamlining of appeals to the Court of Appeal arising from interlocutory applications is found in clause 9 of the Bill. Between the time when a party files a *civil case* in court and when the case is heard, lawyers may file what are known as "*interlocutory applications"* in court. *These applications deal with procedural matters that prepare the case for the hearing;* for example, requesting the court to order the other party to furnish information or documents that are relevant to the hearing.
>
> [emphasis added]

17 This part of the Minister's statement underscored the fact that normally, "interlocutory

applications" relate to procedural matters with the view to preparing the case for trial. However, it does not follow that an "interlocutory application" in the context of the SCJA will always be for that purpose, *viz*, preparing the case for trial. This is because an application for summary judgment, or for the striking out of an action, is no less an "interlocutory application", as can be seen from paragraph (e) of the Fifth Schedule, even though such applications do not "prepare the case for the hearing". Later in the same speech, the Minister further explained thus:

> Clause 9 therefore amends section 34 to streamline and restrict appeals to the Court of Appeal on interlocutory matters. *Interlocutory applications will now be categorised based on their importance to the substantive outcome of the case.* With this calibrated approach, some interlocutory orders will not be allowed to go to the Court of Appeal, whilst others can only go to the Court of Appeal with the permission of the High Court. The decision of the High Court whether to grant permission is final. *The right to appeal all the way to the Court of Appeal will, however, remain for interlocutory applications that could affect the final outcome of the case.* The types of orders in the three categories are set out in the Fourth and Fifth Schedules to the Bill.
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> ...
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> Now, as Ms Lim herself points out, there are certain interlocutory applications which may potentially affect the substantive outcome of the trial. But this is precisely why the present amendments categorise interlocutory applications into three groups which are carefully differentiated based on their importance to the substantive outcome of the case. Those that are non-appealable and they are really based on the existing section 34 – slightly expanded but still there is a precedent for that – and *those which will be appealable as of right and, like I said, these are the interlocutory applications that will substantially affect the outcome of the case. So that remains, appeals to the Court of Appeal from the High Court as a matter of right*, and the middle category, which is the norm, is appealable to the Court of Appeal, but with the leave of the High Court. I think we have to see this matrix in context and we are dealing with interlocutory applications which usually do not involve novel points of law or important points of law.
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> Let me illustrate with an example, in the case where a party applies to strike out his opponent's claim and fails. If he is dissatisfied with the Registrar's decision, he can appeal to High Court Judge who hears the application afresh as if it came before him for the first time. So, a lot of pain is taken by the High Court Judge to hear this appeal as though it was de novo, or hearing for the first time. But if the High Court Judge refuses to strike out the claim, this decision will no longer be appealable as of right to the Court of Appeal. This is because the effect of such a decision is that the claim will proceed to trial as it ordinarily would. The substantive rights of the parties are not affected because the case will go on to trial. On the other hand, *if the judge agrees to strike out the claim, then the applicant can file a further appeal to the Court of Appeal as of right. This is because the decision means that the case can no longer proceed to trial and it would clearly put an end to the party's substantive rights.*
>
> ...
>
> Now, it should be pointed out that the default position is that all interlocutory applications are appealable to the Court of Appeal with leave. It is those interlocutory applications which clearly do not affect the conduct of the trial that have been placed in the no-right-to-appeal category which is contained in the Fourth Schedule.
>
> [emphasis added]

18 The rationale behind the calibrated approach mentioned by the Minister is really to ensure that in general, a decision of a High Court judge in an interlocutory application is not unnecessarily taken all the way to the Court of Appeal, leading to a waste of judicial time. In short, the purpose underlying the SCJA regarding the right to appeal is that an appeal to the Court of Appeal will generally be as of right for orders made at interlocutory applications which have the effect of finally disposing of the substantive rights of the parties; while an appeal to the Court of Appeal will ordinarily be denied for orders made at interlocutory applications which do not finally dispose of the substantive rights of the parties, and which are deemed to involve established principles of law. The middle category which consists of orders made at interlocutory applications which lie in the middle of these two extreme situations may be appealed to the Court of Appeal only with leave of court. (see Teo Guan Siew, "Recent Amendments to the Supreme Court of Judicature Act and the Subordinate Courts Act", Singapore Law Gazette (January 2011)) at 16-21).

19 This scheme of things is clearly reflected in the SCJA. One example is seen in the case of an application for summary judgment. Paragraph (e) of the Fifth Schedule of the SCJA is a catch-all provision imposing a blanket requirement for leave to appeal to the Court of Appeal for any "interlocutory application", and paragraph (e)(i) specifically lists an order made at the hearing of an application for summary judgment to be exempted from this blanket requirement for leave. Where an application for summary judgment is refused and leave to defend the proceedings has been given, s 34(1)(a) and paragraphs (a) and (b) of the Fourth Schedule of the SCJA provide that no appeal to the Court of Appeal shall be allowed. The net result of these provisions is that where summary judgment has been ordered, which has the effect of finally disposing the substantive rights of the parties, leave to appeal to the Court of Appeal is not required. On the other hand, where leave to defend is granted in an application for summary judgment, and as such the order does not finally dispose of the substantive rights of the parties, no appeal may be made against that order. The effect of such an order is that the rights of neither party are affected as the matter will just go for trial, where both parties will have ample opportunity to canvas their respective positions. No appeal is allowed because it would serve no useful purpose in prolonging such interim litigation.

20 Another example would be an application to amend a pleading. Paragraph (g) of the Fourth Schedule provides that no appeal shall be brought to the Court of Appeal where a Judge makes an order giving leave to amend a pleading in general, since the order does not finally dispose of the substantive rights of the parties. On the other hand, where a Judge makes an order refusing leave to amend a pleading, the consequence of that order would be that material facts and causes of action or defences that are sought to be raised would not be adjudicated upon, and this *may* have serious consequences on the substantive rights of the party which sought to make that amendment. Because of that, paragraph (a) of the Fifth Schedule only allows an appeal against such refusal to the Court of Appeal provided that leave of court is obtained.

21 As the Minister explained, the amendments brought about by Act 30 of 2010 introduced a new category-approach regime based on the type of interlocutory application and the eventual order made thereon. The question as to which of the three categories an order made in an interlocutory application would fall within is critical. As for the present application which the Appellant had initiated by way of an originating summons ("OS"), the very relief sought in the OS was to obtain leave to commence proceedings for judicial review. This was all that was sought in the OS, which had been refused. In refusing leave to commence judicial review, the substantive issue in the OS had been decided upon by the Judge. There was nothing more to proceed on. The substantive rights of the parties had come to an absolute end unless there could be an appeal. Therefore, the application made by the Appellant in the OS did not come within the meaning of "interlocutory application" under paragraph (e) of the Fifth Schedule of the SCJA. As the Minister had explained in Parliament, the Fourth and Fifth Schedules of SCJA were concerned with interlocutory applications. Accordingly, no

leave of court was needed by the Appellant in order to file an appeal against the decision of the Judge in refusing to grant leave to enable the Appellant to commence judicial review.

The Respondent's first argument

22 The Respondent's first argument was that leave to appeal was required pursuant to O 53 r 8 of the ROC ("O 53 r 8") which reads as follows:

> **Appeal to Court of Appeal (O. 53, r. 8)**
>
> An appeal shall lie from an order made by a Judge in Chambers under this Order as it does in the case of an interlocutory order.

23 According to the Respondent, O 53 r 8 requires that an appeal against a Judge's order in an application for leave to commence judicial review has to be made in the same manner as an appeal against an interlocutory order of a Judge made in other proceedings. The manner in which an appeal against an interlocutory order is to be made is specified by s 34(2)(d), read with paragraph (e) of the Fifth Schedule, of the SCJA, which provide a blanket requirement of leave for all "order[s] at the hearing of any interlocutory application" which are not specifically exempted from the requirement for leave. Therefore, the Appellant here was required to apply for leave from the High Court to appeal against the Judge's refusal to grant leave to commence judicial review.

24 Furthermore, the Respondent argued that if "interlocutory application" under paragraph (e) of the Fifth Schedule of the SCJA does not include an application for leave to commence judicial review by way of an OS, O 53 r 8 would be rendered nugatory and otiose. The fact that O 53 r 8 was retained and renumbered after the amendments to s 34 of the SCJA were enacted shows that the requirement for leave to appeal was applicable to the orders made under O 53. If this were not the case, there would have been no reason to retain O 53 r 8.

Our decision

25 We will begin our analysis by first comparing the present O 53 r 8, which came into being in 2002, with its predecessor provision, *ie*, the previous O 53 r 7 of the Rules of Court (Cap 322, R 5, 1997 Rev Ed) ("the previous O 53 r 7"). The previous O 53 r 7 provided that if leave to commence judicial review had been refused by the High Court Judge, the dissatisfied applicant could make a second application for leave to the Court of Appeal, instead of filing an appeal against the refusal of the judge:

> **Appeal to Court of Appeal (O. 53, r. 7)**
>
> 7. Where leave to apply for an order of mandamus, prohibition or certiorari has been refused by a Judge, an application for such leave may be made to the Court of Appeal under Order 57, Rule 16.

26 Before the present O 53 r 8 was introduced in 2002, the then s 34(1)(c) of the SCJA provided that no appeal shall be brought to the Court of Appeal "where a Judge makes an interlocutory order in chambers unless the Judge has certified, on application within 7 days after the making of the order by any party for further argument in court, that he requires no further argument". The effect of the previous O 53 r 7, read with the then s 34(1)(c) of the SCJA, was that a party who was dissatisfied with the judge's refusal to grant leave to commence judicial review did not have to fulfil the requirement under the then s 34(1)(c) by writing in to the judge to request for further arguments so

as to be able to appeal against that order. Instead, the dissatisfied applicant could make a second application for leave to the Court of Appeal, without filing an appeal against the judge's refusal to grant leave to commence judicial review.

27 The previous O 53 r 7 was amended in 2002 to what we see is now O53 r 8. How was O 53 r 8 (which was numbered as O 53 r 7 in 2002) to be read with the then s 34(1)(c)? It seems clear to us that it meant that the recourse available to a dissatisfied party in an application for leave to commence judicial review was that of an appeal to the Court of Appeal, and the dissatisfied applicant could no longer make a second application to the Court of Appeal for leave to commence judicial review. Further, by providing that the appeal shall be made as in the case of an "interlocutory order", the effect of O 35 r 8 was that the requirement for further arguments in the then s 34(1)(c) of the SCJA applied. In other words, the dissatisfied party must first, within seven days, write to the judge to hear further arguments; and only if the judge should refuse to hear further arguments that he could appeal to the Court of Appeal. If the judge should agree to hear further arguments, and if on such further hearing he should decide to stick by his earlier decision, the dissatisfied applicant would be entitled to appeal as of right to the Court of Appeal.

28 Now, the amendment to the SCJA in 2011 (brought about by Act 30 of 2010) has repealed s 34(1)(c). It is pertinent to note that during the second reading of the Bill which led to the enactment of Act 30 of 2010, the Minister stated that the requirement for further arguments in the then s 34(1)(c) of the SCJA was merely a "technical requirement" which was removed:

> Next, clause 7 adds a new section 28(B) to make changes to an aspect of the litigation process commonly referred to by lawyers as "Further Arguments". Currently, a litigant must first apply to the High Court to make "Further Arguments" before he can file an appeal to the Court of Appeal. Failure to do so within the stipulated time frame could prevent the litigant from subsequently filing an appeal to the Court of Appeal. This amendment removes this technical requirement by making the need to file such "Further Arguments" voluntary.

29 With the repeal of the then s 34(1)(c) in the light of the above statement of the Minister, the question which now arises for consideration is how should O 53 r 8 be construed? As explained earlier at [27], the reference to "interlocutory order" in O 53 r 8 was to link it with the then s 34(1)(c) of the SCJA so that the dissatisfied party in an application for leave to commence judicial review must first, within seven days, write to the judge to hear further arguments before an appeal may be filed. Now that s 34(1)(c) has been repealed, there is no longer a reference to an "interlocutory order" in the SCJA. Therefore, it seems that the reference to "interlocutory order" in O 53 r 8 is no longer meaningful, but a relic of the past. Perhaps the Rules Committee may wish to have another look at O 53 r 8 to see how it could be better synchronised with the scheme under the present s 34, and Fourth and Fifth Schedules of SCJA. If we bear in mind the rationale for the three category appeal approach, then for the reasons which we have alluded to earlier at [18] to [21], the Appellant here should be entitled to lodge an appeal as of right. The refusal by the Judge to grant leave to the Appellant to commence judicial review had brought the proceedings to an abrupt and absolute end. A historical informed view of O 53 r 8, including the reference to "interlocutory order" therein, does not undermine the strong parliamentary intention that an appeal to the Court of Appeal will remain as of right for orders made at interlocutory applications which will finally dispose of the substantive rights of the parties.

The Respondent's third argument

30 The Respondent's third argument is that there are compelling reasons why leave is required in order to appeal against a refusal by a judge to grant leave to commence judicial review. An

application for leave to commence judicial review is refused because the applicant has failed to pass the low threshold of showing an "arguable or prima facie case of reasonable suspicion", or that there are serious flaws with the application. If the applicant could not even satisfy such a low threshold, then such an application should not be allowed to invoke the Court of Appeal's jurisdiction as of right. Otherwise, that would defeat the key purpose of the application for leave to commence judicial review, which is to prevent a wasteful use of judicial time.

Our decision

31 While we see the drift of this argument, the fact remains that the decision of the Judge to refuse leave would bring to an end the Appellant's attempt to challenge the decision of the Respondent. Unless it is shown that the right of a party to appeal against a decision of the High Court is statutorily curtailed, that party would be entitled to appeal to the Court of Appeal.

32 As we have stated at [21] above, the Appellant's application for leave to commence judicial review under O 53 is not an "interlocutory application" under paragraph (e) of the Fifth Schedule of the SCJA, and the Appellant did not have to seek leave to appeal from the High Court Judge before appealing to the Court of Appeal. The policy reason cited by the Respondent is only relevant in so far as it could assist in arriving at a purposive interpretation of the relevant provisions. In view of the clear purpose underlying the relevant provisions in the SCJA, this policy reason advanced by the respondent carries little weight.

Analysis of the Appellant's argument

33 There remains just one of the Appellant's arguments which we would like to touch on briefly, even though it would not affect the decision which we had made in this case. The argument is that no leave of court is required to appeal against the Judge's order refusing leave to commence judicial proceedings because the order in question falls within the exception in paragraph (e)(iv) of the Fifth Schedule of the SCJA. According to the Appellant, paragraph (e)(iv) stipulates that leave is not required where the order made was to dismiss an action or a matter commenced by writ of summons or by any other originating process.

34 Paragraph e)(iv) of the Fifth Schedule of the SCJA provides as follows:

> Except with the leave of a Judge, no appeal shall be brought to the Court of Appeal in any of the following cases:
>
> (e) where a Judge makes an order at the hearing of any interlocutory application other than an application for any of the following matters:
>
> (iv) to dismiss an action or a matter commenced by a writ of summons or by any other originating process;

35 On the face of it, we can see the sense of the argument here – that since the Judge dismissed the appellant's application for leave to commence judicial review, and the application for leave to commence judicial review was initiated by an originating summons, the present case should fall within the exception in paragraph (e)(iv), and no leave of court is required.

36 However, we agree with the Respondent's contention that this argument is flawed. Paragraph (e)(iv) only applies where a judge makes an order pursuant to an *application to dismiss an action or a matter* commenced by writ of summons or by any other originating process. There are two essential

prerequisites. First, there must be an application by the opposing party. Second, that application must be to ask the court to dismiss the action or matter claimed in the writ of summons or any other originating process. The present case satisfied none of these two prerequisites. Accordingly, we could not accept the argument that paragraph (e)(iv) applied here.

Conclusion

37 For the above reasons, we dismissed Summons No 3702 of 2012/Y, and ordered that costs be in the appeal.