IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 83

Suit No 860 of 2013
HC/Summons No 974 of 2017

Between

Aries Telecoms (M) Berhad
(formerly known as V Telecoms Berhad)

… *Plaintiff*

And

ViewQwest Pte Ltd

… *Defendant*

And

Fiberail Sdn Bhd

… *Third Party*

GROUNDS OF DECISION

[Civil Procedure] — [Appeals] — [Leave]

Aries Telecoms (M) Bhd
v
ViewQwest Pte Ltd (Fiberail Sdn Bhd, third party)

[2017] SGHC 83

High Court — Suit No 860 of 2013 (HC/Summons No 974 of 2017)
Woo Bih Li J
17 March 2017

12 April 2017

Woo Bih Li J:

Introduction

1 Summons No 974 of 2017 ("Summons 974") was an application by the plaintiff, Aries Telecoms (M) Berhad ("Aries") for a declaration that no leave to appeal to the Court of Appeal was required in respect of an order I made on 7 February 2017 ("the 7 February 2017 Order"). Alternatively, if leave to appeal was required, the application also asked for an extension of time to file the (same) application for such leave and an order that such leave be granted. After hearing submissions, I declared that no leave was required. I also said that if I were wrong on this issue, I would have granted the alternative prayers sought.

2 The application raised interesting and important issues. I set out below the background facts and the reasons for my decision.

Background facts

3 The main action was a claim by Aries against the defendant ViewQwest Pte Ltd ("ViewQwest") for conversion arising from ViewQwest's refusal to return certain information technology equipment to Aries after a letter of demand was sent by Aries to ViewQwest. The equipment was eventually returned before the trial of the action without prejudice to the parties' rights.

4 After the trial was part heard over some days, ViewQwest eventually consented on 11 October 2016 to an interlocutory judgment to be granted against it with damages to be assessed. Accordingly, I granted interlocutory judgment in favour of Aries against ViewQwest that same day. I also indicated that it might be appropriate for an application to be made for a preliminary point to be decided as to the nature of the relief which the Plaintiff was entitled to.

5 Eventually Aries filed Summons No 5786 of 2016 ("Summons 5786") for the determination of a preliminary issue pursuant to O 14 r 12 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"). The preliminary point was whether Aries was entitled to (a) an account of profits made by ViewQwest arising from the conversion of the equipment or (b) an order that ViewQwest disgorge such profits to Aries.

6 Summons 5786 was heard by me on 12 January 2017 and 7 February 2017. In the course of arguments, Aries also sought to claim, as an alternative, punitive, exemplary or aggravated damages. The hearing continued on the basis that I was to rule also on those damages. On 7 February 2017, I decided

that Aries was not entitled to claim an account of profits from ViewQwest nor an order for ViewQwest to disgorge its profits from the use of the equipment. I also decided that Aries was not entitled to punitive, exemplary or aggravated damages. I have referred to this as the 7 February 2017 Order. My decision meant that Aries was entitled only to ordinary damages. I then gave directions for the assessment of such damages including the filing of pleadings and affidavits of evidence-in-chief.

7 However, on 23 February 2017, Aries filed a notice of appeal to the Court of Appeal against the 7 February 2017 Order.

8 ViewQwest then took the position that Aries required leave to appeal whereas Aries took the opposite position. Eventually Aries filed Summons 974 for the court to determine whether Aries' intended appeal required the leave of the court and, if so, whether such leave would be granted. As mentioned above, Aries was successful in that application.

Reasons of the court

9 As stated at [11] of *Dorsey James Michael v World Sports Group Pte Ltd* [2013] 3 SLR 354 ("*Dorsey*"), any judgment or order of the High Court is ordinarily appealable as of right. However, this is subject to any contrary law.

10 Section 34(1)(*a*) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") provides that no appeal shall be brought to the Court of Appeal, "where a Judge makes an order specified in the Fourth Schedule, except in such circumstances as may be specified in that Schedule". It was not

disputed that the 7 February 2017 Order was not one of the orders specified in the Fourth Schedule.

11 So, the next question was whether s 34(2)(*d*) of the SCJA applied. That section states:

> 34.—(2) Except with the leave of the High Court or the Court of Appeal, no appeal shall be brought to the Court of Appeal in any of the following cases:
>
> …
>
> (*d*) where a Judge makes an order specified in the Fifth Schedule, except in such circumstances as may be specified in that Schedule.

12 The relevant paragraph in the Fifth Schedule was para (*e*). I set out below the Fifth Schedule and para (*e*):

> FIFTH SCHEDULE
>
> ORDERS MADE BY JUDGE
> THAT ARE APPEALABLE ONLY WITH LEAVE
>
> Except with the leave of the High Court or the Court of Appeal, 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:
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> (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.

13 Summons 5786 was not one of the applications listed under para (*e*) of the Fifth Schedule. The key question was whether the 7 February 2017 Order came within the meaning of "an order at the hearing of an interlocutory application" as stipulated in para (*e*) itself. If it did, then leave to appeal was required. Conversely, if it did not, then no leave to appeal was required.

What constitutes "an order at the hearing of an interlocutory application"

14 In *Dorsey*, the question was whether an order granting leave to serve pre-action interrogatories was a final or interlocutory order. That involved a consideration of para (*i*) of the Fourth Schedule to the SCJA. Nevertheless, *Dorsey* also considered para (*e*) of the Fifth Schedule and explained three features of an application made under O 14 r 12 of the ROC at [80]. These features are elaborated later at [41].

15 The Court of Appeal concluded at [85] that the reference to "order" in para (*e*) of the Fifth Schedule means an interlocutory order. In other words, if an order were a final order, then it would not come within para (*e*) and an appeal to the Court of Appeal was available as of right.

16 The question then was what constitutes a final order. In *Bozson v Altrincham Urban District Council* [1903] 1 KB 547 ("*Bozson*"), Lord Alverstone CJ famously said (at 548):

> Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then … it ought to be treated as a final order; but if it does not, it is then … an interlocutory order.

17 This has been referred to and applied in many local cases as the "order" test or "*Bozson*" test. It is different from the "application" test enunciated in *Salaman v Warner* [1891] 1 QB 734 at 736.

18 The "order" test or "*Bozson*" test was cited with approval by the Court of Appeal in *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR(R) 525 ("*Wellmix*"). Before I continue, I should mention that in *Downeredi Works Pte Ltd v Holcim (Singapore) Pte Ltd* [2009] 1 SLR(R) 1070, I considered *Wellmix* to be binding on me as it is a decision of the Court of Appeal (at [14]). However, in the light of Summons 974, I had the opportunity to reflect on *Wellmix* again with the benefit of subsequent cases.

The decision in Wellmix

19 In *Wellmix*, the defendant had failed to comply with an order made by an assistant registrar in time. He was late by one day. Under that order, a judgment would be entered against him if he failed to comply with the order by the specified deadline in the order. Consequently, pursuant to that order, the plaintiff entered an interlocutory judgment against the defendant with damages to be assessed. The defendant's application to set aside the default judgment was unsuccessful. On appeal to a judge, he was also unsuccessful. The decision of the judge was given on 15 July 2005 ("the 15 July 2005 Order"). He then wrote to request further arguments before the judge. The judge acceded to the request. After hearing further arguments, the judge set aside the default judgment unconditionally and ordered the action to be

restored for trial. This was on 23 September 2005 ("the 23 September 2005 Order"). The plaintiff then filed a notice of appeal to the Court of Appeal against the 23 September 2005 Order.

20 The defendant then applied to strike out the notice of appeal on the ground that under s 34(1)(*a*) of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) ("1999 SCJA"), the 23 September 2005 Order was not appealable. Section 34 of the 1999 SCJA was the predecessor to s 34 of the SCJA and the terms are different.

21 One of the questions raised by the appeal in *Wellmix*, and which is pertinent for present purposes, was whether the 15 July 2005 Order was an interlocutory or a final order. If it were a final order, the plaintiff argued that the judge would have been precluded from hearing further arguments because by the time the request for further arguments was made on 22 July 2005, the 15 July 2005 Order had been perfected. If it were an interlocutory order, the defendant had seven days to request further arguments under s 34(1)(*c*) of the 1999 SCJA.

22 The Court of Appeal referred to Lord Alverstone CJ's statement and said (at [14]) that "the word 'dispose' must mean making a determination on the substantive rights and, as a matter of common sense, the court can only make a determination on the substantive rights after hearing the parties on the merits."

23 However, Lord Alverstone CJ did not say that "dispose" must be a determination on the substantive rights after hearing the parties on the merits of the case. The word "dispose" is neutral. A case may be disposed of either

on the merits or without a decision on the merits, *ie*, by default, for example, for want of prosecution or for failure to comply with a procedural rule or an order of court. It may also be disposed of after a hearing on the merits when the parties are before the court or when, say, the defendant has decided not to participate further in the action.

24 If an action were struck out for want of prosecution or for failure to comply with a procedural rule or an order of court, would that not be a disposal of the action as well? It seemed to me that the action would be at an end whatever the reason might be for causing it to come to an end. Furthermore, the plaintiff would be precluded from commencing another action on the same cause of action and facts. His recourse would be to set aside the order which dismissed the action. Likewise, if a default judgment were granted, would that not also be a disposal of the action as well even though there was no determination on the merits? The defendant would not be able to resist the enforcement of the judgment until he sets it aside.

25 If there may be a disposal of the action without a determination on the merits, then an interlocutory default judgment, whether on the merits or not, would, in principle, be a final order.

26 *Wellmix* also recognised at [15] that if an interlocutory judgment on the merits were not considered a final order, there would be problems arising from a split hearing. It considered the example of an interlocutory judgment obtained after a hearing in chambers on the merits. It then went on to say that there was much force in the argument that a determination as to liability did not finally or fully dispose of the rights of the parties where damages are still to be assessed. That would only be a partial determination of the rights. The

determination of liability was not an end in itself. Damages were what the plaintiff was seeking. On such a view, an interlocutory judgment (obtained in chambers) with damages to be assessed would not be a final order as it did not finally dispose of the rights of the parties. It was this paragraph of *Wellmix* that invited further consideration.

27 At [16], *Wellmix* noted that an order granted in one proceeding may be interlocutory and yet the same nature of order granted in another proceeding may well be final. It drew a distinction between an application for discovery made in the course of an action and a pre-action application for discovery. In the latter situation an order for pre-action discovery would be a final order because it would dispose of everything in the pre-action application/action.

28 I noted that Lord Alverstone CJ did not say that an order must dispose of the *entire* cause of action in order to constitute a final order. True, he did refer to the "rights" of parties in the plural but, in my view, he did not mean by that to exclude a decision on a singular right.

29 It seemed to me that it is one thing to say that an order which disposes of the entire action is a final order. However, it does not necessarily follow that an order must dispose of the entire action to be considered a final order.

30 Although *Wellmix* said that the determination of liability is not an end in itself, that is precisely the purpose of an interlocutory judgment. It does dispose of the question of liability, once and for all, between the parties. The fact that the plaintiff is seeking damages does not negate the above point. A decision may dispose of the substantive rights of the parties on one issue in the

main action without determining all the claims or all the heads of damages claimed in the action.

31 Indeed, in *Lim Chi Szu Margaret v Risis Pte Ltd* [2006] 1 SLR(R) 300, Andrew Phang JC (as he then was) appeared to prefer the view that an interlocutory judgment with damages to be assessed is a final order (at [15]). He noted that the appeals in question concerned the issue of liability alone (at [16]). I add that that is the very nature of every appeal against an interlocutory judgment. It would necessarily be on liability alone. Nevertheless, *Wellmix* considered the view of Phang JC to be *obiter* and was not persuaded by such a view (at [26]).

32 In *Wellmix*, the view that an interlocutory judgment is not a final order was confined to a case where an interlocutory judgment was obtained *in chambers* even after an argument on the merits. *Wellmix* recognised at [15] that there was a statutory exception from the scope of s 34(1)(*c*) of the 1999 SCJA for an interlocutory judgment obtained *in open court*.

33 However, as a matter of principle, one would be hard pressed to justify why there should be a difference between the two. Why should an interlocutory judgment obtained in chambers after an argument on the merits be an interlocutory order but one obtained in open court after similar arguments be a final order?

34 Such a dichotomy would mean that instead of seeking such a judgment in chambers, a plaintiff should not make such an application and instead wait to go to open court and obtain the "same" judgment. Such a resulting situation is not logical. The same point was made by the Privy Council in the New

Zealand case of *Strathmore Group Ltd v A M Fraser* [1997] 2 AC 172 ("*Strathmore*") at [178].

35 *Wellmix* at [21] did consider *Strathmore* and its endorsement of Sir John Donaldson MR's reasoning in *White v Brunton* [1984] QB 570. However, *Wellmix* considered that *White v Brunton* had been distinguished in *Aberdeen Asset Management Asia Ltd v Fraser & Neave Ltd* [2001] 3 SLR(R) 355 at [23] ("*Aberdeen*") in the context of Singapore. The point of difference noted in *Aberdeen* was that in Singapore, the right of appeal against an interlocutory order made by a judge in chambers was only *qualified* by the requirement to apply for further arguments within seven days after the making of the order and if the judge issued a certificate that he required no further argument. However, in *White v Brunton*, the relevant English statute provided that there was *no* right of appeal against such an order except with leave. *Aberdeen* was of the view that there was nothing unjust about requiring an intended appellant to request further arguments before filing a notice of appeal (at [23]). It further observed that making such a request could hardly be considered to be an onerous burden (at [24]).

36 On the other hand, one may wonder why that should be a valid reason to make the distinction in the case of split hearings. The point is not so much whether it would be unjust or difficult to require a request for further arguments to be made first but whether there is a logical reason to draw such a distinction in the first place. Furthermore, after amendments made to the SCJA by way of the Supreme Court of Judicature (Amendment) Act 2010 (Act 30 of 2010) (effective on 1 January 2011), the current situation in Singapore is more like the one in *White v Brunton* than *Aberdeen*. In the case of an interlocutory

order, it is no longer a question of requiring a request to be made first for further arguments but one of requiring leave to appeal.

37 I observed that *Wellmix* also distinguished *White v Brunton* because the latter adopted the "application" test instead of the "order" test which applies in Singapore (at [23]). I was of the view that notwithstanding this distinction, the observation of Sir John Donaldson MR in *White v Brunton* (as cited at [21] of *Wellmix*) is still persuasive in Singapore in the context of split hearings.

Decisions subsequent to Wellmix

38 In *The* "*Xin Chang Shu*" [2016] 3 SLR 1195, Steven Chong J considered whether *Wellmix* remains good law after the aforementioned amendments to the SCJA. He said (at [27(b)]) that *Wellmix* had been cited with approval in numerous Court of Appeal decisions handed down *after* such amendments including *Dorsey*, *The* "*Nasco Gem"* [2014] 2 SLR 63 and *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] SLR 797 ("*Citiwall v Mansource*").

39 Relying on *Wellmix*, Chong J decided that a wrongful arrest order was an interlocutory one for the purpose of the same para (*e*) of the Fifth Schedule SCJA before this court (at [31]). It was not necessary for this court to conclude whether Chong J's decision was correct on the facts in the case before him. However, I will elaborate on *Dorsey*, *The* "*Nasco Gem*" and *Citiwall v Mansource*.

40 I noted that in *Dorsey*, *Wellmix* was cited with approval in the context of the adoption of the *Bozson* test (at [29]). In so far as *Dorsey* referred to [16]

of *Wellmix*, *Dorsey* noted that that was *dicta* (at [63]). In any event, [16] of *Wellmix* states that an order for pre-action discovery is a final order because it disposes of everything in the pre-action application. That was not the controversy before me. *Dorsey* did not cite [15] of *Wellmix* which, I suggest, is also *dicta*. Chong J in *The "Xin Chang Shu"* at [25]–[26] similarly considered [15] of *Wellmix* to be *dicta*. It is that paragraph which suggests that an interlocutory judgment with damages to be assessed is not a final order. However, the second feature of an O 14 r 12 application, as explained in *Dorsey* and elaborated below by this court, suggests that [15] of *Wellmix* need not be followed.

41 As alluded to above, *Dorsey* explained three features of an application made under O 14 r 12 of the ROC at [80] as follows:

> Three features of an application made under O 14 r 12 of the Rules of Court are pertinent. First, such an application, being made in the course of proceedings, would be an interlocutory application for the purposes of para (*e*) of the Fifth Schedule to the SCJA. Second, the application could result in the making of a final order, in that in so far as the court may dismiss the action or cause judgment to be entered, such an order would be one that finally disposes of the substantive rights of the parties. Third, applications under O 14 r 12 of the Rules of Court are not expressly excepted from the requirement of leave under para (*e*) of the Fifth Schedule to the SCJA.

42 The second feature mentioned in *Dorsey* was that such an application could result in the making of a final order in that the court may cause judgment to be entered. Such an order would be one that finally disposes of the substantive rights of the parties. I add that this would be in respect of the liability issue. There was no suggestion that the "judgment" mentioned in the second feature could not include an interlocutory judgment. Indeed, where damages have to be assessed in any event, the purpose of an O 14 r 12

application may well be to obtain an interlocutory judgment. To that extent, it seemed to me that *Dorsey* appeared to have implicitly departed from part of the decision in *Wellmix* so that an interlocutory judgment on the merits obtained in chambers would be a final order for the purpose of s 34(2)(*d*) SCJA.

43 I was mindful that in the case before me, I had already granted interlocutory judgment to Aries on 11 October 2016 (see [4] above). For the purpose of Summons 5786, I had effectively dismissed certain heads of damages claimed by Aries under the 7 February 2017 Order. Nevertheless, I was of the view that the second feature in *Dorsey* still applied in principle to the 7 February 2017 Order.

44 It also seemed to me that the second feature discussed in *Dorsey* about the dismissal of an action or a judgment being entered was mentioned in the context of an action with a single cause of action and a single relief claimed. That was an illustration only. In the context of multiple causes of action, the causes of action may actually be based on different facts, although the background facts may be the same. Hence, a plaintiff may claim various breaches of the same contract and the breaches may be quite different in nature. A plaintiff could also claim various heads of damages arising from the same breach.

45 For such cases, I was of the view that a decision which affects the substantive rights of the parties on an issue in the action is still a final order even if it does not dismiss the entire action or cause judgment to be entered. For example, if the court were to rule under O 14 r 12 that a cause of action was time-barred, that would be a final order in respect of that cause of action

even though the rest of the causes of action might proceed to trial. The substantive rights of the parties would have been finally disposed of as regards that substantive issue.

46 Indeed, the words of O 14 r 12 are not confined to a situation where the determination of a question of law or construction of any document will fully determine the entire action. Order 14 r 12 states:

> 12.—(1) The Court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause or matter where it appears to the Court that —
>
> (*a*) such question is suitable for determination without a full trial of the action; and
>
> (*b*) such determination will fully determine (subject only to any possible appeal) the entire cause or matter *or any claim or issue therein*.
>
> (2) Upon such determination, the Court may dismiss the cause or matter or make such order or judgment as it thinks just.
>
> [emphasis added]

As can be seen, O 14 r 12(1)(*b*) refers to a situation where such determination will fully determine the entire cause or matter *or any claim or issue therein*. Accordingly, not every order made on an O 14 r 12 application will fully determine the entire cause or matter. It may well determine only a single substantive issue in the action.

47 The question then is whether a distinction is to be drawn between an order made under O 14 r 12 which determines the entire action and one which determines a substantive issue in the action. In my view, both constitute final

orders. A decision that finally disposes of the substantive rights of the parties on an issue in the action need not be one that affects the entire action.

48 This analysis may be supported by an earlier decision of the Court of Appeal in *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] 2 SLR 880 ("*OpenNet*"). As noted in *Dorsey* at [90], the court in *OpenNet* had decided that an order was final in the sense that it effectively disposed of a party's substantive claim to relief (see *OpenNet* at [18]). It was not suggested there that the decision must also dispose of the entire action.

49 As a matter of principle, there seems to be no difference between an order which dismisses an entire action and one which dismisses a particular claim but not the entire action for the purpose of determining whether an order is a final order. Each is a final order because it finally disposes of a substantive issue in the action between the parties.

50 It also bears mention that the legislative purpose underlying s 34(2)(*d*) and the Fifth Schedule to the SCJA was to restrict the proliferation of appeals to the Court of Appeal only where no substantive right was in issue. Accordingly, an automatic right of appeal where a substantive right is disposed of is consistent with that purpose.

51 The legislative scheme under s 34, read with the Fourth and Fifth Schedules to the SCJA, was explained by the-then Senior Minister of State for Law, Associate Professor Ho Peng Kee ("the Minister") in the Second Reading of the Supreme Court of Judicature (Amendment) Bill (see *Singapore*

Parliamentary Debates, Official Report (18 October 2010) vol 87 at col 1368). The Minister said:

> Given that interlocutory applications involve procedural points that do not *usually affect the substantive rights of the parties* and are not likely to involve novel points of law, it is an unproductive use of resources for all such applications to go up to the Court of Appeal, especially when the High Court already serves as one level against the Registrar who first hears the application.
>
> 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 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.
>
> [emphasis added]

52 The first paragraph of the above passages mentioned the substantive rights of the parties.

53 While the second paragraph referred to "their importance to the substantive outcome of the case" and "the final outcome of the case", it seemed to me that these phrases did not necessarily mean that an order must dispose of the entire cause of action before it can be a final order. An order deciding a substantive issue in the action will also be of "importance to the substantive outcome of the case" and "could affect the final outcome of the case". Furthermore, it is unclear whether the Minister had in mind cases with multiple causes of action and multiple heads of damages. In my view, Parliament intended to preserve the right of appeal whenever the substantive

right of a party is disposed of and the view that an order dismissing a claim for one head of damage is a final order does not contravene the purpose of the legislative scheme.

54 On the contrary, if such an order were to be considered to be an interlocutory order, then inconsistency, injustice and wastage of time and costs may well result, as explained in *Strathmore* and cited in *Wellmix* at [18].

55 A recent local case is perhaps an even better illustration in the context of the facts before this court. I refer to *ACB v Thomson Medical Pte Ltd and others* in Suit 467 of 2012. There, the plaintiff, ACB had undergone an In-Vitro Fertilisation procedure to achieve a successful pregnancy. Unfortunately her egg was mistakenly fertilised with the sperm of a male person other than the sperm of her husband. The mistake was discovered after the birth of her child. ACB sued the defendants for negligence (and the third defendant for breach of contract as well). The plaintiff claimed general damages to be assessed and special damages.

56 On 14 August 2014, ACB obtained interlocutory judgment against all four defendants with damages to be assessed.

57 On 28 August 2014, ACB filed Summons 4264 of 2014 which was an application under O 33 r 2 of the ROC for a preliminary issue to be tried, namely, whether ACB was entitled in law to claim various heads of damages which were collectively referred to as "the Upkeep Claim". This item was part of other damages claimed by her.

58 The application was heard in chambers. After hearing arguments, Choo Han Teck J decided that ACB was not entitled in law to make the Upkeep Claim.

59 ACB then appealed to the Court of Appeal which recently released its judgment (see *ACB v Thomson Medical Pte Ltd and three ors* [2017] SGCA 20). The Court of Appeal decided that ACB was not entitled to make the Upkeep Claim but could claim for loss of "genetic affinity" (at [135]).

60 For present purposes, the point is that ACB filed her appeal to the Court of Appeal without applying for leave to do so. Apparently, there was no suggestion that leave was required.

61 Although there are differences between an application made under O 14 r 12 and one made under O 33 r 2, the differences are not material for present purposes. Indeed I suggest that Aries could have made its application under O 33 r 2 and likewise ACB could have made her application under O 14 r 12.

62 If the decision of Choo J were not appealable as of right, ACB would have been deterred from making the application. She would then have spent time and costs to prove the expenses at the hearing of the assessment of damages only to find that such a claim is not maintainable at law. The fact that she may still be required to prove such expenses as part of a claim for loss of "genetic affinity" is a separate point. The point is that she was not required to adduce evidence to prove a claim which may not be maintainable in law until the question of law was determined.

63 Thus, if there had been no application under O 14 r 12, ViewQwest would have had to give evidence of the profits it made pursuant to Aries' claim but all that evidence and cross-examination thereon would have come to naught if the court were to dismiss Aries' claim for an account of profits or disgorgement of profits. Furthermore, ViewQwest would already have revealed the profits it made, which is sensitive information, only to find that it need not have done so.

64 In addition, if Aries were required to obtain leave to appeal against the 7 February 2017 Order and such leave were denied, it would then be in a quandary. It would be too late for Aries to wait till the subsequent assessment of damages to be concluded to appeal against the 7 February 2017 Order as that order would have circumscribed the perimeters of the assessment hearing. Under that order, ViewQwest would not have to adduce evidence about its profits at the assessment hearing since this court had determined that Aries was not entitled to the reliefs in question. Furthermore, if Aries were to wait till after the conclusion of the assessment hearing to appeal, Aries would also have been met by the argument that the issue was *res judicata*.

65 While it is unlikely that leave to appeal would have been refused, if leave were required, that is not the point. Aries should not be required to obtain leave in the first place. Furthermore, if Aries were required to apply to obtain leave, it would have exceeded the time to do so. Again, the point is not whether an application for an extension of time was likely to be granted. Aries should not have to face the prospect that it might not be granted.

66 After *Dorsey*, the Court of Appeal again considered the question of what constitutes a final order in *The* "*Nasco Gem*". There, an application to set

aside a warrant of arrest was dismissed. A question arose whether that dismissal order was an interlocutory one or a final one. Unsurprisingly, the Court of Appeal decided that it was an interlocutory order.

67 *The* "*Nasco Gem*" considered the tests enunciated in *OpenNet* and in *Dorsey*. At [9], *The* "*Nasco Gem*" summarised the reasons in *OpenNet* in various sub-paragraphs. At sub-paragraph (c), it referred to [15] and [18] of *OpenNet* to the effect that an appeal would generally be as of right if the order made at an interlocutory application had the effect of finally disposing of the substantive rights of the parties. Again, the focus was on the substantive rights of the parties and not putting an end to the entire action.

68 At [11], *The* "*Nasco Gem*" also cited with apparent approval, [90] of *Dorsey* which in turn referred to [18] of *OpenNet.* I have already mentioned this above at [48]. At [13], it noted that *Dorsey* had referred to *Wellmix*, which in turn cited Lord Alverstone CJ's statement with approval. However, in the subsequent portion of [13], *The "Nasco Gem"* also noted that [16] of *Wellmix*, as cited in *Dorsey* at [63], was in fact *dicta*. This I have mentioned above at [40].

69 I turn now to consider *Citiwall v Mansource*. An adjudication determination ("the AD") was issued in favour of Citiwall Safety Glass Pte Ltd ("Citiwall") which then filed an originating summons seeking leave to enforce the AD. It obtained the leave ("the Leave Order") and went on to enter judgment requiring Mansource Interior Pte Ltd ("Mansource") to make payment ("the Judgment"). Mansource then applied to the High Court to set aside the AD, the Leave Order and the Judgment. It failed at first instance before an assistant registrar but was successful in its appeal to a judicial

commissioner ("the Judge"). Citiwall then filed a notice of appeal to the Court of Appeal and filed its solicitors' certificate that it had furnished an undertaking to hold $15,000 as security for Mansource's costs of that appeal.

70 One of the issues was whether Citiwall's appeal should be struck out because it furnished $15,000, instead of $20,000, as security for Mansource's costs of the appeal. Under certain practice directions, $15,000 was required as security for appeals against interlocutory orders and $20,000 was required as security for all other appeals.

71 The question then was whether the decision of the Judge was an interlocutory order or a final one. The Court of Appeal decided that once the Judge had set aside the AD, the Leave Order and the Judgment, his order was a final order because there was nothing further for the court to deal with. Therefore, Citiwall should have provided $20,000 as security for Mansource's costs of the appeal. However, as this was an irregularity, Citiwall was given seven days to furnish the additional $5,000 as security (at [96]–[97]).

72 In discussing the meaning of a final order, the Court of Appeal cited [15], [16] and [20] of *Wellmix* with apparent approval (at [92]–[94]). However, it did not discuss the views expressed in *Dorsey* on an application made under O 14 r 12.

73 It seemed to me that the facts in *Wellmix* and in the abovementioned cases decided by the Court of Appeal were different from those before me. None of them involved a case where an order was in fact made on an application under O 14 r 12. The facts in *Dorsey* were also different although the Court of Appeal there went further to set out guidelines using the example

of an application made under O 14 r 12. As elaborated above at [42]–[45], its guidelines appear to favour the view that an order made under O 14 r 12 is final if it effectively disposes of a party's substantive claim in the main action, *ie*, it does not have to dispose of the entire action.

74 For the reasons I have mentioned, that was also the conclusion I reached.

Whether an extension in time to file an application for leave to appeal ought to be granted

75 However, if I were wrong and leave to appeal was required, I informed parties that I would have granted Aries the alternative prayers of Summons 974, *ie*, an extension of time to file that application and leave to Aries to appeal to the Court of Appeal.

76 An extension of time was necessary since the application for leave to appeal would have had to be filed within seven days from the 7 February 2017 Order (see O 56 r 3(1) of the ROC). Summons 974 was only filed on 2 March 2017. This was because Aries' solicitors had thought that there was no need to seek leave to appeal until ViewQwest's solicitors objected to the filing of the notice of appeal.

77 The four factors to be considered for an extension of time to appeal are:

(a) the length of the delay;

(b) the reason for the delay;

(c) the chances of the intended appellant's appeal succeeding on the merits, if extension of time were granted; and

(d) the degree of prejudice to the intended respondent, if extension of time were granted.

These factors can be found, for example, in the Court of Appeal decision of *Sun Jin Engineering Pte Ltd v Hwang Jae Woo* [2011] 2 SLR 196 at [29]. However, in applying the four factors mentioned above, the overall question is where the justice of the case lies.

78 It is not necessary for me to address each of the above factors one at a time. Suffice it for me to say that it was clear to this court that the justice of the case lay in granting an extension of time. It was quite understandable why Aries' solicitors were of the view that no leave to appeal was required and they acted reasonably promptly after the dispute arose by writing in for a clarification first and then filing Summons 974 pursuant to the court's direction to do so. The question whether they should have filed an application immediately instead of writing to the Registrar first to seek a clarification from the court is not material in the present circumstances and I will not say any more about it.

79 Even though I could not say that there was a high chance of success in Aries' appeal, it was also not obviously unmeritorious. At the end of the day, Aries should not be denied a chance to appeal when its substantive right had been disposed of against it.

Whether leave to appeal should be granted

80 As regards the question whether leave to appeal should be granted, it was not disputed that generally speaking, leave to appeal will be granted in one of three situations (see *Lee Kuan Yew v Tang Liang Hong* [1997] 2 SLR(R) 862 ("*LKY v Tang*") at [16]):

(a) a *prima facie* case of error;

(b) a question of general principle decided for the first time; or

(c) a question of importance upon which further argument and a decision of a higher tribunal would be to the public advantage.

81 I agreed with ViewQwest that Aries did not show any *prima facie* case of error. Neither did it establish either the second or third situation. The 7 February 2017 Order was given after applying legal principles to the facts. Nevertheless, as the 7 February 2017 Order did affect the substantive rights of the parties (unlike the facts in *LKY v Tang* which concerned the question of costs), I was of the view that leave to appeal should be granted to Aries, if leave was required.

82 I will deliver separate grounds of decision on the merits of Aries' claim for the reliefs in question.

Woo Bih Li
Judge

Troy Yeo (Chye Legal Practice) for the applicant/plaintiff;
John Sze and Nicola Loh (Joseph Tan Jude Benny LLP) for the respondent/defendant.
