The "Nasco Gem"
[2014] SGCA 1

Case Number : Originating Summons No 617 of 2013

Decision Date : 07 January 2014

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Andrew Phang Boon Leong JA

Counsel Name(s) : Toh Kian Sing SC, Nathanael Lin and Justin Gan (Rajah & Tann LLP) for the applicant; Prem Gurbani and Tan Hui Tsing (Gurbani & Co) for the respondent.

Parties : The "Nasco Gem"

Civil Procedure – appeals – leave

7 January 2014 Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

1 This is an application for extension of time to file a notice of appeal against the order made by the High Court judge ("the Judge") in Summons No 3640 of 2012 ("SUM 3640/2012") dismissing the applicant's application to, *inter alia*, set aside the warrant of arrest and service of the admiralty writ in Admiralty in Rem No 249 of 2012 ("ADM 249/2012"). The anterior, albeit crucial, question for determination is whether leave to appeal is required in respect of the Judge's order in the light of s 34(2)(*d*) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the SCJA") read with para (*e*) of the Fifth Schedule to the SCJA.

Background facts

2 The material facts may be summarised as follows. The applicant ("the Applicant") is the owner of the ship the "Nasco Gem" ("the Vessel") and the defendant in ADM 249/2012. The respondent ("the Respondent") is the plaintiff in ADM 249/2012. On 10 July 2012, the Respondent arrested the Vessel pursuant to an order obtained in ADM 249/2012. The substantive claim of the Respondent in ADM 249/2012 was as the holder of bills of lading dated 26 May 2012 ("the B/Ls") and for the alleged misdelivery of the goods under the B/Ls. Subsequently, the Applicant applied *vide* SUM 3640/2012 dated 20 July 2012 ("the Setting Aside Application") to, *inter alia*, set aside the warrant of arrest and service of the admiralty writ on the grounds that there was non-disclosure of material facts and that the arrest was an abuse of process, and also seeking damages for wrongful arrest. In particular, the Applicant alleged that the warrant of arrest was obtained based on two critical representations made to the Assistant Registrar (in an *ex parte* application) which the Applicant claimed were erroneous, *viz*, that (a) the Respondent was the holder of the B/Ls and therefore had *locus standi* to sue on them; and (b) the cargo had been misdelivered to a third party buyer by the Applicant without the presentation of the B/Ls and had thereafter been moved out of the port vicinity. On 17 August 2012, the Judge dismissed the Setting Aside Application.

3 On 29 August 2012, the Applicant applied in Summons No 4424 of 2012 ("the Leave Application") for leave to appeal to the Court of Appeal against the decision of the Judge dismissing the Setting Aside Application. The Leave Application was initially scheduled to be heard on 5 October 2012. However, due to repeated vacations of the hearing dates, the Leave Application was eventually fixed to be heard on 25 June 2013.

4 The Applicant asserts that on or around 20 June 2013, its solicitors started preparations for the hearing of the Leave Application and, in the process, they came across the recent decisions of this court in *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] 2 SLR 880 ("*OpenNet*") and *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 ("*Dorsey*"). The Applicant claims that by virtue of these two decisions, an appeal to the Court of Appeal lay as of right against the Judge's decision dismissing the Setting Aside Application and that, contrary to its previous understanding, leave to appeal was not required. As a result, on 25 June 2013, the Applicant withdrew the Leave Application. Because by then it was out of time for the Applicant to file any notice of appeal, it, on 30 June 2013, filed the present application for an extension of time to file a notice of appeal ("the Extension of Time Application") (*ie*, on the premise that it has the right to appeal but was only out of time).

The parties' arguments

5 The Applicant submits that, in light of the elucidation of this court in *OpenNet* and *Dorsey*, the order handed down by the Judge in the Setting Aside Application is not "an order at the hearing of any interlocutory application" requiring leave to appeal under s 34(2)(*d*) of the SCJA, but is appealable as of right under s 29A of the SCJA. The Applicant further submits that leave should be granted to it to file a notice of appeal out of time. In particular, the Applicant argues that the delay in bringing the Extension of Time Application should be seen in light of the various extenuating and exceptional circumstances. The Applicant explains that without any clear authority at the time as to the proper interpretation of s 34(2)(*d*) and para (*e*) of the Fifth Schedule to the SCJA (brought about by the 2010 statutory amendments to the SCJA), it had taken a legitimate and considered decision in August 2012 to apply for leave to appeal against the dismissal of the Setting Aside Application as opposed to simply filing a notice of appeal to the Court of Appeal.

6 Conversely, the Respondent takes the view that the Judge's order dismissing the Setting Aside Application is an interlocutory order falling within para (*e*) of the Fifth Schedule to the SCJA. Therefore, leave of a High Court judge is required before an appeal can be brought against the order. Moreover, even if the Judge's order was a final order and an appeal lies as a matter of right to the Court of Appeal, the Respondent submits that the Extension of Time Application should still not be granted as the application is grossly out of time.

Our Analysis

The law

7 On 15 November 2010, amendments were made to the SCJA *vide* the Supreme Court of Judicature (Amendment) Act 2010 (No 30 of 2010). The amendments material to this application took the form of a re-worded s 34, as well as the insertion of the Fourth and Fifth Schedules to the SCJA which set out the matters that are non-appealable to the Court of Appeal and the matters which are appealable only with leave of a High Court judge (collectively, "the 2010 Amendments"). Where a matter does not fall specifically within these two schedules, an appeal to the Court of Appeal as of right remains available. The 2010 Amendments sought to streamline and restrict the right of appeal to the Court of Appeal against orders made at "interlocutory applications". For this purpose, s 34(2) of, and the Fourth and Fifth Schedules to, the SCJA grouped "interlocutory applications" into three distinct categories:

(a) a first closed list from which an appeal lies as of right;

(b) a second closed list of non-appealable orders made in interlocutory applications; and

(c) a residual, blanket list in which an appeal lies only with leave of the High Court.

8 The material parts of s 34(2) and the Fifth Schedule are reproduced below:

Matters that are non-appealable or appealable only with leave

34.— …

(2) Except with the leave of a Judge, 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; …

…

FIFTH SCHEDULE

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:

…

(*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 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.

9 *OpenNet* was the first opportunity which this court had to examine the scope and application of the 2010 Amendments. In that case, the question arose in the context of an appeal against the High Court's refusal to grant leave to commence judicial review, where the application for leave was made by way of an originating summons. There, the respondent's primary argument in its attempt to strike out the notice of appeal filed by the appellant was essentially that para (*e*) of the Fifth Schedule was a "catch-all provision" requiring leave to appeal in relation to orders made in all "interlocutory applications" unless specifically exempted, and that the application for leave to commence judicial review was "interlocutory" because it was only "a preliminary step to the substantive application for judicial review": *OpenNet* at [11]. This court disagreed with the respondent and declined to strike out the notice of appeal. In a nutshell, the court held that the very relief sought by the originating summons was only to obtain leave to commence proceedings for judicial review. In other words, the substantive issue in the originating process had been absolutely determined by the judge at first instance when he refused leave and there was "nothing more to proceed on". For that reason, the application for leave to commence judicial review could not be an "interlocutory application for the purposes of the SCJA". The detailed reasoning of the court is as follows:

(a) Section 29A of the SCJA provided that the Court of Appeal had 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". Unless it was shown that the right of a party to appeal against a decision of the High Court was statutorily curtailed, that party would be entitled to appeal to the Court of Appeal: at [17] and [31].

(b) The plain and ordinary meaning of "interlocutory application" meant an application which related to a matter which arose in the course of the proceedings and which did not concern the eventual outcome of those proceedings. However, it did not follow that an "interlocutory application" in the context of the SCJA would always be for that purpose. That is because an application for summary judgment, or for the striking out of an action, is no less an "interlocutory application" even though the outcome of the application could bring the proceedings to an end: at [14] and [17].

(c) Taking a purposive interpretation in accordance with s 9A(1) of the Interpretation Act (Cap 1, 2002 Rev Ed) ("the Interpretation Act"), an interpretation that would promote the purpose underlying the SCJA was to be preferred. The broad scheme of things envisaged under the SCJA was that an appeal to the Court of 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; while an appeal to the Court of Appeal would ordinarily be denied for orders made at interlocutory applications which do not really affect the substantive rights of the parties in the main action, and which are deemed to involve established principles of law. The middle category, which consists also of orders made at interlocutory applications but which lie in the middle of these two extreme situations, may be appealed to the Court of Appeal only with leave of court: at [15] and [18].

(d) In refusing leave to commence judicial review, the substantive issue in the originating summons had been decided upon and the proceedings had come to an absolute end unless there could be an appeal. Therefore, the application made in the originating summons was not an "interlocutory application" under para (*e*) of the Fifth Schedule. Accordingly, para (*e*) of the Fifth Schedule was not applicable and no leave of court was needed to file an appeal against the

decision of the High Court in refusing to grant leave to commence judicial review: at [21].

10 The provisions were examined again in *Dorsey*, in the context of an appeal against an order of the High Court giving leave to serve pre-action interrogatories. The respondent in that case argued that para (*i*) of the Fourth Schedule, which lists the order made by a judge that are non-appealable, should be given its plain and ordinary meaning and should be construed to include pre-action interrogatories applied for by way of an originating summons. Again, this court disagreed, holding that the relevant statutory provisions must be interpreted in accordance with the purpose or object underlying the statute, *viz*, to streamline appeals to the Court of Appeal arising from interlocutory applications. In dismissing the respondent's application to strike out the notice of appeal, this court laid down the following propositions:

(a) Ordinarily, any judgment or order of the High Court was appealable to the Court of Appeal as of right, unless that right was specifically curtailed by law: at [11].

(b) Section 9A(1) of the Interpretation Act mandated that a purposive approach be taken in statutory interpretation. The purposive approach was paramount and took precedence over any other common law principle of interpretation including the plain meaning rule. Moreover, under the purposive approach, reference could be made to extrinsic material such as parliamentary debates even if, on a plain reading, the words of the statutory provision are unambiguous or do not produce unreasonable or absurd results: at [18] and [19].

(c) The question before the court was whether para (*i*) of the Fourth Schedule, when read harmoniously with the statutory context, included an order of a judge giving or refusing pre-action interrogatories. This question turned on the anterior question of whether an application for leave to serve pre-action interrogatories was an "interlocutory" application for the purposes of the SCJA: at [50].

(d) It was clear that the legislative scheme introduced by the 2010 Amendments was only intended to apply to orders made in relation to interlocutory applications. Paragraph (*i*) of the Fourth Schedule should also be read contextually, in light of para (*e*) of the Fifth Schedule which established the default requirement that leave of the High Court be obtained before an appeal could be brought to the Court of Appeal from orders made at the hearing of interlocutory applications. Accordingly, para (*i*) of the Fourth Schedule should be construed to refer to an order giving or refusing interrogatories made at the hearing of an interlocutory application for interrogatories: at [51] to [54].

(e) Counsel for the respondent properly conceded that an application for leave to serve pre-action interrogatories commenced by way of an originating summons was not an interlocutory application. Such an application was not an application made in a pending action between the time when the action was filed in court and when the action was finally disposed of. The sole object of the originating summons was to obtain discovery of information through the administration of interrogatories. Once the application was determined, the entire subject matter of that originating summons was spent and there was nothing further for the court to deal with: at [57], [60] and [64].

(f) Therefore, an application for leave to serve pre-action interrogatories did not fall within the meaning of "interlocutory application" under the SCJA. It followed that the reference to "interrogatories" in para (*i*) of the Fourth Schedule did not include pre-action interrogatories: at [74].

11 In *Dorsey*, this court also considered the interpretation of para (*e*) of the Fifth Schedule to the SCJA, in particular, whether the default requirement of leave under para (*e*) of the Fifth Schedule applied regardless of the nature of the order made. The court observed that in passing the 2010 Amendments, Parliament had intended that an appeal to the Court of Appeal should remain as of right in respect of an order made in an interlocutory application that could affect the final outcome of the action. In the circumstances, the reference to "order" in para (*e*) of the Fifth Schedule should be construed to mean an "interlocutory order": at [79], [81] and [91]. The court attempted to explain the decision in *OpenNet* in light of its preceding analysis, in the following terms (at [90]):

> In *OpenNet* … this court was taking precisely the same approach as we have articulated here. Put simply, *OpenNet* held in effect that the ***2010 amendments did not apply to an*** **order** ***that was final in the sense that it effectively disposed of a party's substantive claim to relief, even if that order was made in the course of an application that might have been interlocutory in nature*** **.** [emphasis added in bold italics]

12 The court in *Dorsey* also referred to its earlier decision of *Maldives Airport Co Ltd and another v GMR Malé International Airport Pte Ltd* [2013] 2 SLR 449 ("*Maldives*") as being directly on point. There, the respondent had applied by way of originating summons for an interim injunction under s 12 of the International Arbitration Act (Cap 143A, 2002 Rev Ed). The judge had granted the injunction and the appellant appealed to the Court of Appeal. Before the Court of Appeal, the respondent raised the preliminary objection that the decision of the judge to grant the injunction was an order made at the hearing of an interlocutory application, such that leave to appeal was required pursuant to s 34(2)(*d*) of the SCJA, read with para (*e*) of the Fifth Schedule. In rejecting the respondent's challenge, the court in *Maldives* held (at [15]) that:

> … [I]t is incorrect to characterise the Judge's decision as one made on an interlocutory application. The application for the Injunction was made by OS 1128; the sole purpose of OS 1128 was to seek the Injunction. It would be odd if OS 1128 were characterised as an interlocutory application when there was nothing further for the court to deal with once the Injunction had either been either granted or refused. This was not a case where an interlocutory injunction was sought pending the resolution of a substantive dispute before the court. The sole and entire purpose of the originating process in this case was to obtain the Injunction. ***Once that application had been determined, the entire subject matter of that proceeding would have been spent.*** [emphasis added in bold italics]

13 *Dorsey* also referred to *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR(R) 525 ("*Wellmix Organics*"), an authority of this court on the legislative scheme prior to the 2010 Amendments. There, this court approved the following test as laid down by Lord Alverstone CJ in *Bozson v Altrincham Urban District Council* [1903] 1 KB 547 at 548–549 ("the *Bozson* test") in determining whether an order made was of an interlocutory or final nature:

> 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.

The following *dicta* in *Wellmix Organics* (at [16]) (in discussing the meaning of "interlocutory order" under s 34(1)(*c*) of the old SCJA) was also cited in *Dorsey* (at [63]):

> We recognise that on [the *Bozson* test], it is possible that an order granted in one proceeding may be interlocutory and yet the same nature of order granted in another proceeding may be final. The point may again best be illustrated by an example. Taking the case of an action for breach of contract, where an application is made for discovery of documents, the order for

discovery will be an interlocutory order. But it does not follow that every discovery order will necessarily be an interlocutory order. It will depend on the nature of the originating process and the relief(s) prayed for. A proceeding may be instituted purely to obtain pre-action discovery. In that situation, upon the granting of the order prayed for, that order will be a final order ***because it disposes of everything in the proceeding*** . [emphasis added in bold italics]

14 In the light of the preceding authorities, the following propositions may be made as regards the question whether an order made by a High Court judge is appealable as of right, non-appealable or appealable only with leave of court:

(a) There shall be no right of appeal in respect of an order made by a High Court judge which falls within the Fourth Schedule, s 34(1)(*d*) or s 34(1)(*e*).

(b) Where an application would in the normal sense be regarded as "interlocutory" (that is, where the application is peripheral to the main hearing determining the outcome of the case, or occurs during the course of proceedings between the initiation of the action and the final determination), one will have to apply the tests in *OpenNet* and *Dorsey* (informed by the object and purpose of the 2010 amendments) to determine if the order made in that application is "interlocutory" in nature within the meaning of the SCJA.

(c) If so, then pursuant to ss 34(1)(*a*) and 34(2)(*d*) of the SCJA, read with the Fourth and Fifth Schedules to the SCJA respectively, such orders are either appealable only with leave of court or are non-appealable.

(i) The orders that are non-appealable are stated in the Fourth Schedule to the SCJA.

(ii) The orders that are appealable only with leave of court are stated in the Fifth Schedule to the SCJA.

(iii) Where no explicit reference is made to the order in question in the Fourth and Fifth Schedules to the SCJA, then the catch-all provision in para (*e*) of the Fifth Schedule to the SCJA applies such that leave to appeal is required.

(d) If not, then the order made by the High Court in that application is appealable as of right pursuant to s 29A(1) of the SCJA.

Admittedly, in practice, the difficulties lie in ascertaining whether orders made at the hearing of particular applications are "interlocutory" in nature. The approach in *Dorsey* (effectively endorsing and applying the test in *Bozson* and *Wellmix Organics*) provides a workable test.

Application of the law to the facts

15 At the outset, we highlight the fact that the decisions in *Dorsey* and *OpenNet* involved a very different situation from that which we are confronted with in this application. In contrast to the present case, *Dorsey* and *OpenNet* involved pre-action proceedings being taken out by the applicant solely in order to obtain specific reliefs – reliefs which would assist the applicant in *Dorsey* to decide whether he should commence the main action or which would grant the applicant in *OpenNet* leave to commence an action for judicial review. The applications made in *OpenNet* and *Dorsey* were not interlocutory applications, for the reasons alluded to at [9] and [10] above, and were thus not caught by para (*e*) of the Fifth Schedule to the SCJA. In contrast, in the present matter, the order in question relates to a warrant of arrest of a vessel obtained by the Respondent *after* the issuance of

an originating process, namely ADM 249/2012: see O 70, r 4(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed).

16 In our judgment, an application for a warrant of arrest, whether allowed or denied, does not determine the substantive rights of the parties or the relief claimed in the originating process. The outcome of the application for a warrant of arrest merely determines whether the arresting party will be entitled to arrest the ship and obtain security for its claim. It is clearly an interlocutory application in the admiralty suit. Thus an order made on that application *prima facie* falls within the scope of para (*e*) of the Fifth Schedule as an "order at the hearing of any interlocutory application". Accordingly, leave is required to appeal against the Judge's order in the present proceedings refusing to set aside the warrant of arrest made in ADM 249/2012. At this juncture, we think it necessary to refer to the following written submissions of the Applicant which, in our view, are erroneous: [note: 1]

> In determining whether an application is "interlocutory", emphasis is placed on the relief that is sought; if the sole purpose of the application is the relief sought, then once the application is determined, the entire matter ends there i.e. the subject-matter of the application is spent, then the application is not interlocutory. …

With respect, what is wrong with the approach advanced in the Applicant's submissions is that it focuses on the application instead of the cause in the pending action. The result of the above argument will be that every order made by the court on an application made in a pending action would have to be regarded as final, even in respect of (for example) an order refusing further and better particulars. To determine whether an order made at an interlocutory application is final, the matter must be viewed in the context of the cause in the pending action. To reiterate, it is the cause of the pending *proceedings* in which the application is being brought which is significant, not the specific purpose of the *application*.

17 The Applicant also runs various arguments relating to the specific nature of the application in question. We shall deal with these arguments in turn. First, the Applicant submits that the legislative intent of the 2010 Amendments does not contemplate setting aside orders made in admiralty actions specifically. Given that the *Report of the Law Reform Committee to Review and Update the Supreme Court of Judicature Act and the Subordinate Courts Act* (31 July 2009) ("the Report") and the Singapore Parliamentary Debates on the proposed amendments ("the Parliamentary Debates") do not mention admiralty matters generally, the Applicant submits that this is clearly not an area which the 2010 Amendments are targeted at. In our view, this argument does not really assist the Applicant. The mere fact that admiralty actions are not specifically referred to in the amended legislation or the Report or the Parliamentary Debates does not mean that they do not come within the scope of the legislative intent of the 2010 Amendments. This simply means that the court must carry out the usual exercise of statutory interpretation and decide the question on the basis of first principles. With regard to this argument, we would point out one significant fact, which is that where Parliament had intended to exclude specific proceedings from the scheme of things under s 34, it had expressly done so: see s 34(2)(*e*) and s 34(2A) of the SCJA.

18 Secondly, the Applicant submits that the Setting Aside Application had the practical effect of determining the substantive rights of the parties so that leave to appeal against the Judge's decision is not required. The Applicant's arguments run along three broad strands, which we shall consider in turn:

> (a) that the Judge's decision is in effect an endorsement that the admiralty jurisdiction of the court has been correctly invoked against the Vessel;

(b) that the Judge's decision has determined the Respondent's substantive right to pre-judgment security to the claim (and the Applicant's corresponding liability to furnish such security); and

(c) that the Judge's decision amounted to a final determination of the Applicant's prayer for damages for wrongful arrest.

Invocation of the admiralty jurisdiction of the court

19 The arrest of a vessel or service of a writ on a vessel are alternative means of invoking the court's admiralty jurisdiction against the vessel: *The "Fierbinti"* [1994] 3 SLR(R) 574 at [39]. The Applicant submits that were the warrant of arrest and service of the writ set aside, the admiralty jurisdiction of the court would not have been invoked against the Vessel. Conversely, in refusing to set aside the warrant of arrest and service of the admiralty writ, the Judge in effect agreed that the admiralty jurisdiction of the court has been correctly invoked against the Vessel. The Applicant argues that once the Setting Aside Application was determined by the Judge, the matter ended there unless there is a right of appeal. The Applicant further points out that in refusing to set aside the warrant of arrest and the service of the admiralty writ, the court was not preparing ADM 249/2012 for a substantive hearing on its merits. To that extent, the Applicant argues that the Setting Aside Application is not an interlocutory application and an appeal against an order made on such an application is not an appeal which the 2010 Amendments were intended to streamline and curtail.

20 In the present case, the writ of summons was served at the same time as the affixing of the warrant of arrest. In the result, the Respondent argues that there is no doubt that the admiralty jurisdiction of the court has been invoked. The Respondent points out that in prayer 3 of SUM 3640/2012, *ie*, the Setting Aside Application, which was dismissed by the Judge was a prayer that "[t]he writ as well as this action be struck out on the grounds that the arrest of the vessel, "NASCO GEM", is vexatious, oppressive or otherwise an abuse of process". Pursuant to para (*e*) of the Fourth Schedule to the SCJA, the part of the order which relates to the refusal to strike out the writ of summons and action in ADM 249/2012 is not appealable. The Respondent argues that by the Judge's refusal to strike out the writ of summons and action in ADM 249/2012, the court's admiralty jurisdiction in the action is no longer open to challenge. Moreover, by filing a memorandum of appearance in the action in ADM 249/2012 and by taking part in the continuation of the proceedings in ADM 249/2012, the Applicant has accepted the jurisdiction of the High Court.

21 In our judgment, we do not think the Applicant is correct to contend that just because the Judge refused to strike out the writ of summons and the action in ADM 249/2012, the Applicant is thereafter precluded from raising the point again. It is trite law that the court does not strike out an action except in clear and obvious cases: see *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1998] 3 SLR(R) 649 at [18]. The rationale for this is that a plaintiff should not be denied his day in court unless the cause of action is certain to fail. In the circumstances, the fact that the Applicant did not succeed in having ADM 249/2012 struck out is neither here nor there and the position of the Applicant is not thereby pre-judged. The point may still be canvassed. In this regard, we note that the Applicant had also in the Setting Aside Application prayed for *service* of the admiralty writ to be set aside. However, as noted by the Respondent's counsel in oral arguments, the Applicant has not stated any procedural grounds on which service of the writ should be set aside. Moreover, the issue of the Respondent's *locus standi* to sue on the B/Ls is an issue that will be canvassed in the trial itself. As we see it, the Applicant's real concern relates to the Respondent's right to pre-judgment security (see below at [22]–[25]).

Substantive right to pre-judgment security

22 The second strand of argument raised by the Applicant is that an admiralty action *in rem* is "characterised" by the claimant's right (unique to admiralty actions *in rem*) to obtain pre-judgment security by arresting the vessel. Upon such pre-judgment security having been obtained by the arrest of the vessel or other forms of security being furnished for release of the vessel, the issue of arrest no longer features in the substantive determination of the claim or the process leading up to that. The Setting Aside Application therefore determined the Respondent's substantive right to pre-judgment security (amounting to US$4.6m) obtained by arresting the Vessel. If the Setting Aside Application had been successful, the Vessel would have been released or any substituted security that had been furnished would have been returned; conversely, with its dismissal, the security has been retained. Either way, the Applicant submits that that marks the end of the inquiry as to whether the admiralty claim would be secured or not. Moreover, it meant that the admiralty jurisdiction of the court has been validly invoked against the Vessel with the result that had security not been furnished, the Vessel stood liable to be sold by the court in a judicial sale. It also meant that the judgment of the court can be enforced against the Vessel or the proceeds of a judicial sale.

23 On the other hand, the Respondent argues that an application for a warrant of arrest is nothing more than a device through which a legitimate maritime claimant who has invoked the admiralty jurisdiction of the court can obtain security for his claim, whether pre-judgment or post-judgment. The order that is made on an application for a warrant of arrest is not a final order and does not dispose of the parties' rights or the action from which an entitlement to arrest arises. The Respondent's counsel also submitted in oral arguments before us that there is no difference in principle between the right to arrest a ship to provide the claimant with pre-judgment security and the right of a claimant to any other type of security, *eg*, security for costs. An application for security for costs is clearly interlocutory in nature; an order giving security for costs is only appealable with leave by virtue of para (*b*) of the Fifth Schedule to the SCJA and an order refusing security for costs is clearly non-appealable (see para (*h*) of the Fourth Schedule to the SCJA).

24 It is clear that the divergence between the parties' positions ultimately boils down to a matter of characterisation. The Applicant asserts that the issue of the Respondent's entitlement to pre-judgment security is a standalone or (for the lack of a better word) "carve-out" issue to be determined in the proceedings. For this reason, the Applicant argues that the Judge's order upholding the Respondent's right to pre-judgment security (by way of refusing to set aside the warrant of arrest) was a final as opposed to interlocutory order. The Respondent on the other hand argues that the warrant for arrest is in fact parasitic and conditional on the main action. The warrant for arrest is not an end in itself and does not entitle the Respondent to anything *per se*. Instead, it merely ensures that should the Respondent succeed in the main action, it has security for what it is awarded.

25 Of course, we recognise that in reality the admiralty *in rem* jurisdiction is an extremely powerful and far-reaching one with the potential to give rise to serious consequences affecting the property rights of the ship-owner who will as a result be obliged to furnish substantial security in order to secure the release of his vessel. However, there is simply no basis to conclude that the Judge's order was a final as opposed to interlocutory order. To begin with, the Applicant has not provided any good reason why the validity of the warrant of arrest entitling the Respondent to pre-judgment security should be treated as a separate or "carve-out" issue in the proceedings. On the contrary, the Setting Aside Application was an application made during the course of proceedings between the initiation of the action and the final determination. Moreover, the order made during the hearing of the Setting Aside Application could not be said to have the effect of finally disposing of the substantive rights of the parties in the admiralty action or to have the potential to affect the final outcome of the proceedings. In light of the blanket rule specified in para (*e*) of the Fifth Schedule concerning orders made in interlocutory applications, leave to appeal against the Judge's order refusing the Setting

Aside Application must be obtained.

Claim for damages in wrongful arrest

26 The final strand of argument canvassed by the Applicant is that the dismissal of its application in SUM 3640/2012, *ie*, the Setting Aside Application, had determined its substantive right to claim for damages for wrongful arrest, the latter being an ancillary prayer in the application. While the Applicant acknowledged that to succeed in this claim for damages it must show that there had been actual malice or gross negligence amounting to malice on the part of the Respondent, it argues that serious material non-disclosure may lead to such a claim being allowed. The Applicant highlighted that the pursuit of the claim for damages for wrongful arrest would not be a matter that will feature again in the substantive determination of the action in ADM 249/2012, and that the Applicant would not be able to resurrect its claim for wrongful damages even if it were to successfully resist the Respondent's claim in ADM 249/2012 for misdelivery under the B/Ls. For this additional reason, the Applicant submits that the Judge's order was not in the nature of an interlocutory order made in an interlocutory application within the scope of para (*e*) of the Fifth Schedule.

27 This argument is a non-starter. As noted by the Respondent, a claim for damages for wrongful arrest only arises as a consequence of an order setting aside the warrant of arrest. A claim for damages for wrongful arrest is not an application that could have stood by itself. It is therefore not a "substantive right" of the Applicant that has been determined in the proceedings, but merely a possible consequence of wrongful arrest.

Conclusion

28 For the above reasons, the order made by the Judge dismissing the Setting Aside Application is an interlocutory order requiring leave to appeal to the Court of Appeal. In these premises, the second issue, *viz*, whether extension of time to file a notice of appeal should be granted, would not arise. We therefore dismiss the application with costs.

29 As a post-script we would only add this. It will be seen from [3] above that the Applicant did initially apply for leave to appeal against the Judge's dismissal of the Setting Aside Application. While we appreciate that the question of whether this is a case where there is an automatic right of appeal is not one that can be said to be abundantly clear, we would have thought that it might be more prudent to let the Leave Application remain. The Leave Application could also have been amended to include an alternative prayer for an extension of time (or a fresh summons could have been filed for that purpose). Let the court make the decision.

[note: 1] Applicant's Submissions dated 12 September 2013 at para 57(f).