IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 66

Civil Appeal No 22 of 2022

Between

Owner of the vessel JEIL CRYSTAL (IMO No. 9193587)

… *Appellant*

And

Owners of cargo lately laden onboard JEIL CRYSTAL (IMO No. 9193587)

… *Respondent*

In the matter of Admiralty in Rem No 256 of 2020 (Summons Nos 586 and 599 of 2021)

Between

Owners of cargo lately laden onboard JEIL CRYSTAL (IMO No. 9193587)

… *Plaintiff*

And

Owner of the vessel JEIL CRYSTAL (IMO No. 9193587)

… *Defendant*

GROUNDS OF DECISION

[Admiralty and Shipping — Admiralty jurisdiction and arrest]
[Admiralty and Shipping — Practice and procedure of action *in rem*]
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Judith Prakash JCA, Tay Yong Kwang JCA and Steven Chong JCA
8 August 2022

17 October 2022

Steven Chong JCA (delivering the grounds of decision of the court):

Introduction

1 This appeal, which arose from an application to set aside a warrant of arrest in an action *in rem*, has raised an issue which hitherto has not squarely come before the Singapore court for determination. When the setting-aside application was heard before a judge in the General Division of the High Court ("the Judge"), it was clear that the original claim stated in the warrant of arrest never existed. Indeed, prior to the filing of the setting-aside application, the plaintiff had applied to amend the statement of claim, abandoning the original claim altogether and substituting it with a totally different claim. In short, it was not seriously disputed that the arrest of the vessel had been premised on a patently wrong claim.

2 Nonetheless, the Judge did not set aside the warrant of arrest because, in his view, given that he had allowed the amendment to the statement of claim, and since that amendment related back to the date of the *in rem* writ, the original

claim stated in the warrant of arrest was deemed to have likewise been amended. The Judge held that, since the facts in relation to the amended claim had existed at the time of the arrest and were also within the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed) ("the HCAJA"), the warrant of arrest should not be set aside, notwithstanding the defect in the original claim.

3 The appellant, Jeil International Co Ltd ("JIL"), the owner of *The Jeil Crystal* ("the Vessel"), sought leave to appeal against the Judge's refusal to set aside the warrant of arrest. The appellant was granted leave to appeal by the Appellate Division of the High Court but only in respect of the following limited issue ("the Question"):

> In an application to set aside a warrant of arrest of a ship, can the warrant of arrest be upheld on the basis of an amended claim and/or cause of action which was not originally pleaded by the arresting party at the time of the application for and the issue of the warrant of arrest?

4 JIL's appeal, which had been filed with the Appellate Division, was later transferred to the Court of Appeal on the court's own motion under s 29D(3) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the SCJA") on the ground that it was "more appropriate" for the Court of Appeal to hear the appeal as it raised a point of law of public importance, and also because of the complexity and novelty of the issues raised in the appeal (see O 56A r 12(2)(*b*) and O 56A r 12(3)(*b*) and r 12(3)(*c*) of the Rules of Court (2014 Rev Ed) ("the Rules")).

5 We heard and allowed the appeal on 8 August 2022, answering the Question in the negative. In our view, the answer to the Question, and the resolution of the dispute arising from the unique circumstances of the arrest, turned on a proper understanding of the nature of a warrant of arrest and whether it was capable of amendment in the first place. These are our detailed grounds.

Background facts

6 The respondent, Banque Cantonale de Geneve ("BCG"), is a Swiss bank in the business, *inter alia*, of trade financing. In May 2020, by way of a letter of credit, BCG financed a transaction for the purchase of 2,000 metric tons of Lube Base Oil 150BS ("the Cargo") by its customer, one GP Global APAC Pte Ltd ("GP Global"). GP Global in turn chartered the Vessel from JIL to carry the Cargo.

7 A set of original bills of lading was issued in respect of the Cargo ("the Original BL"). The Original BL named BCG as the consignee, and it was provided by GP Global to BCG under the terms of the letter of credit. However, it was undisputed that, sometime in late-June 2020, BCG had released and endorsed the Original BL to GP Global pursuant to the latter's request. According to BCG, GP Global had requested for the return of the Original BL, in order to procure the delivery of the Cargo to its buyer, one Prime Oil Trading Pte Ltd ("Prime Oil")

8 Between July and August 2020, BCG became concerned that several shipments involving GP Global (including the Cargo) for which it had provided financing appeared questionable. BCG also learnt sometime in July 2020 that the Cargo had been discharged without production of the Original BL, a fact which it apparently verified following further investigations. On 10 October 2020, BCG commenced HC/ADM 256/2020 ("ADM 256"). The writ in ADM 256 ("the Writ") contained the following endorsement of claim:

> [BCG], as the owner or other person interested in the cargo lately laden on board the Vessel 'JEIL CRYSTAL' under Bill of Lading No. EX384/2020 dated 13.6.2020 [the Original BL], claims damages against [JIL] for conversion of the said cargo, and/or breaches of contract and/or duty and/or negligence, in or about the carriage and/or care and/or custody of the said

> cargo, in particular, discharging and/or releasing the said cargo without the production of the original Bill of Lading.

9 On 10 October 2020, BCG obtained a warrant of arrest for the Vessel ("WA 39"). WA 39 contained an endorsement of claim that was identical to the one in the Writ. At the hearing of the application for WA 39, BCG claimed to be the "holder" of the Original BL. Quite clearly, that was incorrect because BCG had by then already released and endorsed the Original BL to GP Global (see [7] above).

10 On 11 October 2020, WA 39 was executed, and the Vessel was arrested. At that time, however, JIL was already in possession of the Original BL. This was because, by 29 June 2020, the Original BL had been surrendered by GP Global to JIL, and a set of switched bills of lading ("the Switched BL") was issued in place of the Original BL, pursuant to GP Global's request. According to JIL, GP Global had made this request sometime on or around 16 June 2020, and the Original BL that was surrendered to it contained a stamped and signed endorsement by BCG on its reverse side, with the words "[d]eliver to the order of GP Global APAC Pte Ltd". Thus, by the time the Writ was issued, JIL and *not* BCG was in possession of the Original BL.

11 Immediately after the arrest of the Vessel, JIL instructed their solicitors to seek BCG's confirmation that it (BCG) was still in possession of the Original BL. On 13 October 2020, BCG's solicitors replied, stating that they were "instructed to inform … that [BCG] holds the original 3/3 Bills of Lading". In the event, on 19 October 2020, JIL furnished security by way of payment into court in the sum of S$2.1m ("the Security") to secure the release of the Vessel, and the Vessel was eventually released on 21 October 2020.

12 On 4 November 2020, BCG filed its statement of claim in ADM 256 ("the SOC"). Then, on 10 November 2020, JIL instructed its solicitors to file a Notice to Produce, requesting to inspect, amongst other things, the Original BL that BCG claimed was still in its custody. On 16 November 2020, BCG's solicitors filed a Notice of Inspection wherein they stated that they did not have the Original BL in their possession and hence it was not available for inspection. The Notice further added that the solicitors had requested BCG to send the Original BL to them and, once received, they would notify JIL's solicitors to arrange for the inspection to take place. It is not disputed that BCG's solicitors did not follow up with JIL's solicitors as regards the inspection of the Original BL.

13 On 30 November 2020, JIL filed its defence & counterclaim in ADM 256 ("the D&CC"). JIL averred in the D&CC the abovementioned facts relating to the switching and the cancellation of the Original BL (see [10] above). JIL further averred that the Cargo had been properly discharged into the possession of one Standard Asiatic Oil Company Ltd, which was the consignee of the Switched BL and thus entitled to take delivery of the Cargo. BCG claimed that it was only upon reviewing the D&CC that it came to its attention that the Original BL had been switched and that it no longer had possession of the Original BL. BCG claimed that it was also only through subsequent internal investigations that it learned that the Original BL had been delivered to GP Global in late-June 2020 pursuant to the latter's request to facilitate the delivery of the Cargo to Prime Oil (see [7] above).

14 On 15 January 2021, BCG filed its reply and defence to counterclaim ("the Reply"). In the Reply, BCG acknowledged that it had, in late-June 2020, voluntarily released the Original BL to GP Global pursuant to the latter's request, but averred that it was unaware that GP Global had requested the

Original BL for the purpose of switching the Original BL. It added that if it had known that GP Global had intended to switch the Original BL, it would have denied GP Global's request.

15 On 4 February 2021, BCG filed HC/SUM 586/2021 to amend the SOC. The amendment abandoned BCG's original claim for misdelivery of the Cargo. The amended claim was instead based on an alleged wrongful switch of the Original BL without BCG's knowledge or consent. BCG pleaded that the wrongful switch was, amongst other matters, a breach of the contract of carriage as evidenced by the Original BL, a breach of JIL's duty to BCG to take reasonable care of the Cargo which resulted in loss and damage to BCG, as well as a breach of JIL's duty as bailee of the Cargo for reward. A day later, on 5 February 2021, JIL filed HC/SUM 599/2021 ("SUM 599") to set aside WA 39, and also to strike out the Writ and ADM 256 pursuant to O 18 r 19 of the Rules. SUM 599 also sought the return of the Security, and an order for BCG to pay damages for wrongful arrest. It should be noted that, in addition, JIL has pursued a counterclaim for wrongful arrest against BCG.

The Judge's decision

16 The Judge dismissed JIL's application to set aside WA 39 and to strike out the Writ and ADM 256, but he allowed BCG's application to amend the SOC. The Judge found that BCG's failure to disclose the fact that it did not have custody and possession of the Original BL at the time when ADM 256 was commenced, constituted material non-disclosure. However, he found it appropriate to exercise his discretion not to set aside WA 39 because he was satisfied that BCG's non-disclosure was not deliberate and was instead the result of negligence (see *The Jeil Crystal* [2021] SGHC 292 ("the GD") at [24]–[26]).

17 The Judge concluded that, as he had allowed BCG's application to amend the SOC, WA 39 could be maintained on the basis of the amended claim. The Judge's reasoning was that, provided that the court's admiralty jurisdiction had been validly invoked at the outset on the basis of the original claim, and the amended claim also fell within the court's admiralty jurisdiction, then any amendment to the statement of claim would result in *both* the *in rem* writ and the warrant of arrest being "consequentially amended" (see the GD at [56] and [59]). Such "consequential amendment", according to the Judge, could take place by either one of the following means: (a) first, pursuant to the court's powers to rectify irregularities under O 2 r 1 of the Rules, so that the amendments to the SOC would have a curative effect on the *in rem* writ which in turn would result in the consequential amendment of the warrant of arrest; (b) second, pursuant to the court exercising its powers under O 20 r 8 of the Rules to amend the writ and warrant of arrest (the part of the *in rem* writ and the warrant of arrest setting out the original claim being the "defect or error" for the purposes of O 20 r 8) (see the GD at [49]–[50], [57]–[59] and [60]–[62]).

18 Specifically, in connection with the facts of ADM 256, the Judge considered that the following factors supported his decision to uphold WA 39 on the basis of the amended claim: (a) the facts pleaded by BCG which constituted the amended claim were already in existence when ADM 256 was commenced and when WA 39 was applied for (see the GD at [66]); and (b) the court would have allowed a warrant of arrest to be issued if the true facts and the amended claim had been presented to the court at the time when BCG applied for WA 39 (see the GD at [53]). Thus, all the requirements for the valid invocation of the court's admiralty jurisdiction would have been met if BCG had applied for WA 39 on the basis of the amended claim (see the GD at [53]).

19 JIL applied for leave to appeal against the Judge's refusal to set aside WA 39. As mentioned earlier, the Appellate Division granted JIL leave to appeal but only in respect of the Question.

The appeal

20 We now turn to the parties' arguments in the appeal. For ease of reference, we reproduce the Question:

> In an application to set aside a warrant of arrest of a ship, can the warrant of arrest be upheld on the basis of an amended claim and/or cause of action which was not originally pleaded by the arresting party at the time of the application for and the issue of the warrant of arrest?

21 The overarching theme of JIL's written arguments was that WA 39 was "wrongly issued" because BCG did not have possession or custody of the Original BL at the time when WA 39 was obtained. Therefore, the original claim in ADM 256 was in fact "not available" to BCG, and consequentially WA 39 "should not have been issued in the first place". With that as its starting point, JIL went on to argue that the Judge was wrong in holding that WA 39 was capable of amendment, and being correspondingly amended by virtue of the amendment to the SOC.

22 At the hearing, we pointed out to both counsel that, the foundational issue imbedded in the Question was whether an amendment to the statement of claim could have a corresponding effect on a warrant of arrest that was issued prior to the amendment. We pointed out that this was the threshold issue before us, and that a determination of this issue would essentially dispose of this appeal.

23 On that footing, JIL argued that a warrant of arrest could only be issued for the claim as set out in the supporting affidavit. Where an amendment has been allowed to the statement of claim and/or the endorsement of claim in the *in rem* writ, there would be no question of upholding the warrant of arrest on the basis of the amended claim, and the warrant of arrest must accordingly be set aside. Therefore, the Question must be answered in the negative. It followed that the Judge's decision to uphold WA 39 on the basis of BCG's amended claim was wrong, and WA 39 must be set aside.

24 On the other hand, BCG argued that nothing in the Rules, nor anything in the case law, suggested that the court could not uphold a warrant of arrest on the basis of an amended claim. The Judge was therefore correct in holding that he had the requisite jurisdiction to uphold WA 39 on the basis of BCG's amended claim, which was implicit in the Judge's view that WA 39 could be consequentially amended by virtue of the amendment to the SOC. Given that the Judge had the requisite jurisdiction, his decision to uphold WA 39 on the basis of BCG's amended claim was an exercise of his discretion, with which this court should not interfere. Finally, BCG also argued that it had released and endorsed the Original BL pursuant to GP Global's misrepresentation. It also maintained that it had "honestly and in good faith" believed that it was in possession of the Original BL when questioned by JIL, and that its erroneous confirmation was the result of an "innocent lapse".

The issues

25 In our view, the Judge's decision *assumed* that an amendment to the statement of claim would have a corresponding effect on *both* the *in rem* writ and the warrant of arrest. While the former is correct (see [32]–[37] below), the latter is not necessarily so. First, the warrant of arrest and the *in rem* writ are

quite distinct in nature. The *in rem* writ provides the foundation for the entire action while the warrant of arrest serves the limited purpose of obtaining pre-judgment security for the claim set out in the warrant of arrest. The applicable provisions in the Rules for writs and warrants of arrest are also different (see O 6 and O 70 r 4 of the Rules). Thus, it did not follow simply because the writ was capable of being correspondingly amended, that the same conclusion must be drawn in respect of a warrant of arrest. Second, while there are express provisions in the Rules for the amendment of writs (see O 20 rr 1 and 5 of the Rules), there is no equivalent whatsoever for amendments of warrants of arrest. In our view, this showed that the drafters of the Rules did not contemplate warrants of arrests in admiralty proceedings as coming within the class of documents that were capable of amendment in the course of the proceedings. Thus, as we pointed out to both counsel at the hearing, the determination of the Question turns on whether an amendment to the statement of claim could have a corresponding effect on the warrant of arrest. This, in our view, entailed an examination of the following issues:

(a) What is the true nature of a warrant of arrest?

(b) Whether an amendment to a statement of claim can have a corresponding effect on a warrant of arrest?

(c) If not, what then is the status of a warrant of arrest following an amendment to the statement of claim?

26 We set out our views on each of these issues before we explain how we applied those principles to the facts of this appeal.

What is the true nature of a warrant of arrest

27 At the outset, we should state that this specific issue was not raised by the parties in the court below. Accordingly, the Judge did not directly address this issue.

28 A warrant of arrest for maritime property is a unique creature of the *in rem* procedure. The determination of the true nature of a warrant of arrest would require an examination of the purpose of a warrant of arrest and the process by which it is obtained.

29 First, the applicant for a warrant of arrest is effectively seeking *relief* from the court, albeit in the nature of interlocutory relief while proceedings between the parties remain pending. This is because the arrest remedy is essentially to obtain *pre-judgment* security. In applying for a warrant of arrest, the *in rem* plaintiff is seeking the remedy of the arrest procedure under O 70 r 4 of the Rules in order to obtain security for its claim by arresting the *res* that is the subject of the *in rem* action. As the instrument which entitles the plaintiff to *relief* – namely, the remedy of the arrest procedure – pursuant to the court's sanction, a warrant of arrest is undoubtedly an order of court.

30 Second, the procedure by which a warrant of arrest is obtained also reinforces our view that it is an order of court. The arrest procedure obliges the applicant to place the requisite information before the court so as to put the court in a position to determine if its discretionary powers of arrest should be exercised, and if the warrant as sought should be issued (see *The Eagle Prestige* [2010] 3 SLR 294 at [74]). Under O 70 r 4 of the Rules, an *in rem* plaintiff who seeks a warrant of arrest must: (a) file a warrant of arrest in Form 160 of Appendix A to the Rules; (b) procure a search in the record of caveats to

ascertain whether there is a caveat against arrest in force with respect to the property to be arrested; and (c) file an affidavit containing the particulars required under O 70 rr 4(6) and (7) of the Rules, which include, amongst other things, the nature of the claim in respect of which the warrant is required and the nature of the property to be arrested. The applicant is also under a duty to make full and frank disclosure of material facts, just as in any other *ex parte* application (see *The Vasiliy Golovnin* [2008] 4 SLR(R) 994 at [84]–[85]). This procedure is therefore essentially one in which the plaintiff seeks to persuade the court that it is entitled to the *in rem* remedy of arrest. Where the plaintiff has satisfied the court that it is indeed an appropriate case for the court's powers of arrest to be exercised, a warrant of arrest would then be issued. The issuance of a warrant of arrest at the conclusion of that procedure represents a determination by the court that the plaintiff is properly entitled to the relief sought. In these circumstances, there can be no doubt that a warrant of arrest is indeed an order of court.

31 For this reason, any removal of or interference with arrested property, with the knowledge that an arrest warrant has been issued, would constitute a contempt of court and be punishable by committal (see generally, *The Petrel* (1836) 3 Hagg 299; Toh Kian Sing SC, *Admiralty Jurisdiction and Practice* (LexisNexis, 3rd Ed, 2017) at p 204; Nigel Meeson QC and John Kimbell QC, *Admiralty Jurisdiction and Practice* (Informa, 5th Ed, 2018) at para 4.64). It was therefore understandable that counsel for BCG, Mr Liew Teck Huat ("Mr Liew"), candidly acknowledged at the hearing that a warrant of arrest is an order of court.

Whether an amendment to a statement of claim can have a corresponding effect on a warrant of arrest

An amendment to a statement of claim will generally have a corresponding effect on the endorsement in the writ

32 Before turning to examine this issue, we should first state that we agreed with the Judge that an amendment to a statement of claim would result in a "consequential amendment" to the *in rem* writ (see [17] above).

33 A statement of claim, although in the nature of a pleading and separate from the endorsement of claim in the writ (see *Veale v Automatic Boiler Feeder Co Ltd* (1887) 18 QBD 631 at 634), is a particularisation of the claim as set out in the endorsement. The relationship between the two was considered by Barwick CJ and McTiernan J in *Renowden v McMullin and another* (1970) 123 CLR 584 (at 595):

> The indorsement on the writ not being a statement of claim is not in the nature of a pleading. In our opinion, it should not be construed as such but read for what it is, namely, *a notice of the nature of the plaintiff's claim*, of the cause thereof, and of the relief sought in the action. It suffices if it conveys that information generally and without particularity save where and to the extent to which particularity is indispensable to notify the required elements of the indorsement … *the indorsement marks out the perimeter or range of the area within which the plaintiff may express his claim in his statement of claim*, whether as originally filed or as sought to be amended. … The statement of claim is *the specific way of stating the claim* he has endorsed on the writ …
>
> [emphasis added]

34 Two consequences flow from this relationship between the statement of claim and the endorsement in the writ. First, it means that where a statement of claim has been delivered, it supersedes the endorsement in the writ. That is why any defect in the endorsement of claim can be cured by the delivery of a proper statement of claim (see *Pan-United Shipyard Pte Ltd v The Chase Manhattan*

Bank (National Association) [1999] 1 SLR(R) 703 at [27]). Therefore, it is also generally accepted that, if the plaintiff in his statement of claim omits mention of any cause of action or any relief claimed in the endorsement, he will be deemed to have elected to abandon it (see *Singapore Civil Procedure 2021 vol 1* (Cavinder Bull gen ed) (Sweet & Maxwell, 2021) ("*Singapore Civil Procedure*") at para 18/15/3).

35 Second, since the statement of claim represents a particularisation of the endorsement in the writ, it does not have a life of its own. As such, a statement of claim still falls to be construed with reference to the endorsement in the writ for the purposes of determining the cause of action or relief which the plaintiff is entitled to pursue in the proceedings. For example, in *Moulin Global Eyecare Holdings Ltd v Olivia Lee Sin Mei* (2014) 17 HKCFAR 466 (at [28]–[31]), the Hong Kong Court of Final Appeal held that whether a claim introduced by way of an amendment to a statement of claim constituted a "new claim" for the purposes of the Limitation Ordinance (Cap 347) (HK) (and hence was statute-barred) was to be ascertained with reference to the endorsement in the writ, and not to what had been pleaded originally in the statement of claim. Thus, if the claim introduced by the amendment came within the scope of claims identified and constituted in the endorsement, it would not constitute a "new claim". Another instance illustrating this position is the general rule that, while a plaintiff is permitted to alter, modify or extend the original endorsed claim in his statement of claim and to claim further or other relief, he can only do so without amending the writ if he does not completely change the cause of action endorsed on the writ (see *Singapore Civil Procedure* at para 18/15/13, citing *Johnson v Palmer* (1879) 4 CPD 258). Order 18 r 15(2) of the Rules of Court states to similar effect that:

> A statement of claim must not contain any allegation or claim in respect of a cause of action *unless that cause of action is mentioned in the writ or arises from the facts which are the same as, or include or form part of, facts giving rise to a cause of action so mentioned*; but, subject to that, a plaintiff may in his statement of claim alter, modify or extend *any claim made by him in the endorsement of the writ* without amending the endorsement.
>
> [emphasis added]

36 Given the relationship between the statement of claim and the endorsement in the writ, the causes of action identified in the statement of claim (and in any amended version of the same) should be aligned with those identified in the endorsement in the writ. Where only the statement of claim but not the endorsement in the writ is amended, the inconsistency between them would constitute a "defect or error" in the proceedings coming within O 20 r 8 of the Rules. The court may therefore, "at any stage of the proceedings" and "of its own motion", order the writ to be amended pursuant to O 20 r 8, so as to bring the endorsement in line with the amended statement of claim. We agreed with the Judge that, if an amendment to the statement of claim has no corresponding effect on the endorsement in the writ, that would make no logical sense because it would render nugatory the court's order in granting leave to amend the statement of claim. Any other view would mean that the writ might be invalid or defective because leave to amend the endorsement in the writ had not been separately sought by the plaintiff (see the GD at [57]).

37 We also agreed with the Judge that any consequential amendment to the endorsement in the writ by virtue of an amendment to the statement of claim would relate back to the date when the writ was filed, so long as the cause of action and the underlying facts pleaded in the amended statement of claim were in existence at the time the writ was originally filed (see the GD at [57]). This

follows from what is generally known as the "Relation Back Rule" as explained in *Singapore Civil Procedure* (at para 20/8/3):

> [a]n amendment duly made … takes effect, not from the date when the amendment is made, but from the date of the original document which it amends; and this rule applies to every successive amendment of whatever nature and at whatever stage the amendment is made.

There is no basis on which an amendment to a statement of claim can have a corresponding effect on a warrant of arrest

38 Given our view that a warrant of arrest is an order of court (see [27]–[31] above), the starting point of our analysis of this issue is O 20 r 11 of the Rules, which stipulates:

> **Amendment of judgment and orders (O. 20 r. 11)**
>
> **11.** Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court by summons without an appeal.

39 Although O 20 r 8 of the Rules provides generally for the amendment of "any document in the proceedings", that rule is only applicable where there are no specific rules governing the amendment in question (see *Singapore Civil Procedure* ([34] above) at para 20/8/2). It therefore does not apply to a judgment or order of court, the amendment of which is governed by O 20 r 11. Order 20 r 8(2) makes this explicit by stating that O 20 r 8 "shall not have effect in relation to a judgment or an order". Put simply, O 20 r 11 is the exclusive provision within the Rules dealing with amendments of an order of court. Therefore, whether an amendment to a statement of claim has a corresponding effect on a warrant of arrest must be examined with reference to O 20 r 11.

40 An order of court can only be amended pursuant to O 20 r 11 in limited circumstances, namely, (a) where there are clerical mistakes or (b) where there

are errors arising from *accidental* slip or omission, *in the court's judgment or order* (see *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR(R) 907 at [93]). An example is where the quantum of the judgment sum was misstated due to an inadvertent typographical error (see *Philip Securities (Pte) v Yong Tet Miaw* [1988] 1 SLR(R) 566 at [8]–[10]). Another example is where there has been an error in the words used to express the court's manifest intention in a court order, so that the court's intention was not accurately captured in the wording of that order (see *AAY and others v AAZ* [2011] 2 SLR 528 at [19]–[20]).

41 In issuing a warrant of arrest, the court's manifest intention is to grant the plaintiff the arrest remedy for the purposes of the claim that has been verified in the supporting affidavit. This is because a warrant of arrest is issued by the court entirely on the basis of the claim as verified in the supporting affidavit filed by the *in rem* plaintiff in the arrest application. Where an amendment has been allowed to the statement of claim and the underlying *in rem* writ, that would constitute a change in the claim which the plaintiff is seeking to pursue in the *in rem* action. However, it goes without saying that any such amendment to the statement of claim and the *in rem* writ can have no effect whatsoever on the averments in the supporting affidavit. The court's manifest intention, in issuing the warrant of arrest and allowing the plaintiff to arrest the vessel identified therein, remained premised on the *original* claim as verified in the supporting affidavit. Thus, notwithstanding an amendment to the statement of claim, in the absence of any clerical mistake or accidental error, there would be no basis to invoke O 20 r 11 of the Rules to amend the warrant of arrest.

42 For the above reasons, there was simply no legal basis for the amendment to the SOC to have had a corresponding effect on WA 39. In our respectful view, the Judge erred in holding that the amendment to the SOC had

a consequential effect on WA 39 (see the GD at [59]). This ground alone was sufficient for this court to set aside WA 39. Consequently, we answered the Question in the negative.

The reasons relied on by the Judge in arriving at his conclusion

43 For completeness, we also examined the reasons which persuaded the Judge to find that an amendment to the statement of claim had a corresponding effect on the warrant of arrest. In our view, the Judge's reasons could not overcome the insurmountable hurdle that a warrant of arrest is incapable of amendment save in cases of clerical mistake or accidental error.

44 The Judge considered that, where the statement of claim had been amended (and the *in rem* writ consequentially amended), the original claim described in the warrant of arrest would constitute a "defect or error" in the proceedings for the purposes of O 20 r 8 of the Rules. That being the case, the court could exercise its powers under that rule to amend the warrant of arrest so that it described the amended claim instead of the original claim (see the GD at [60]–[62]). Given our conclusion above (at [31]) that a warrant of arrest is an order of court, it plainly followed that the Judge's reasoning could not stand. After all, O 20 r 8(2) expressly states that O 20 r 8 does not apply to a "judgment or order", which includes a warrant of arrest.

45 The Judge also considered that, where the statement of claim had been amended (and the *in rem* writ consequentially amended), the description of the original claim instead of the amended claim in the warrant of arrest would qualify as "defects or irregularities" which may be cured by the court under O 2 r 1 of the Rules (see the GD at [59]). The Judge therefore held that, following the amendment to the statement of claim, the warrant of arrest could

be treated as having been consequentially amended with the amended claim. In our view, this was incorrect as a matter of principle, and we say so for two principal reasons.

46 First, for the court's powers under O 2 r 1 to be engaged, there must, in the first place, be an "irregularity", which is some form of non-compliance with the requirements in the Rules (see, for example, *Kuah Kok Kim v Chong Lee Leong Seng Co (Pte) Ltd* [1991] 1 SLR(R) 795 at [21]). In the situation contemplated in the Question – that is, where an amendment is made to the statement of claim *after* a warrant of arrest has been issued on the basis of the original claim – there was no such non-compliance in the warrant of arrest. It is true, as the Judge noted, that Form 160 in Appendix A of the Rules requires the plaintiff to set out *a* description of the claim, which the plaintiff is instructed to "copy from the writ" (see the GD at [58]). That requirement was, however, strictly complied with in this case by BCG since *a* claim corresponding to that set out in the endorsement in the Writ was in fact stated in WA 39. The mere fact that the original claim was fatally defective was a separate matter altogether.

47 The significance of the requirement for a description of the claim in Form 160 must be appreciated in the context of the procedure for the application for a warrant of arrest (see also [30] above). An applicant for a warrant of arrest must file a warrant in Form 160 and accompany his application with a supporting affidavit verifying the claim that is described in the warrant sought. It is on the foundation of the information provided in the supporting affidavit, and not Form 160, that the court determines if its discretionary powers of arrest should be exercised. A warrant of arrest, if it is to be issued, is issued on the strength of the claim as verified in the supporting affidavit and the details contained therein. Seen in this light, the description of the claim in Form 160 is

no more than a formal requirement that a warrant of arrest mirror the particulars of the claim contained in the supporting affidavit, which in turn would necessarily mirror that set out in the endorsement in the *in rem* writ at the time the affidavit was filed, and upon which a warrant of arrest is sought.

48 Second, if the specific nature of the non-compliance is governed by other provisions of the Rules, then any such "irregularity" would have to be examined under that provision and not under O 2 r 1. Therefore, in *Bernstein and another v Jackson and others* [1982] 1 WLR 1082, the English Court of Appeal held that a failure to renew a writ was not an irregularity coming within O 2 r 1 since O 6 r 8 of the UK Rules of Supreme Court had already provided for a "compendious code" for the extension and renewal of writs. Thus, even if it were accepted for the sake of argument that, following the amendment to the statement of claim (and the consequential amendment to the *in rem* writ), the description of the original claim in the warrant of arrest constitutes an instance of non-compliance with the Rules (which is not: see [46]–[47] above), that is not an "irregularity" that can be rectified under O 2 r 1, because amendments to orders of court are expressly governed by O 20 r 11. To permit rectification of any such 'non-compliance' under O 2 r 1 would circumvent the effect of O 20 r 11 which is designed to restrict the circumstances under which judgments or orders of court may be amended.

JIL's reliance on The Amigo

49 JIL relied on *The Amigo* [1991] 2 HKC 491, a decision of the Hong Kong Court of First Instance in aid of its argument that WA 39 should be set aside. In that case, the plaintiff agreed to sell the vessel *The Amigo* to the defendant. The plaintiff duly performed its obligations under the agreement which included, amongst others, executing a Bill of Sale transferring 100% of

the shares in the vessel to the defendant and notifying the authorities of the transfer of the vessel's ownership to the defendant. However, the cheque provided by the defendant for the balance purchase price was dishonoured. The plaintiff thereafter first commenced an action against the defendant to recover the balance purchase price. It then separately commenced an *in rem* action against the defendant. The statement of claim endorsed to the *in rem* writ pleaded that "the plaintiff [had] transferred 100% of the shares in the ship in favour of the [defendant]" and that it had registered the vessel in the ownership of the defendant. Relying on the *in rem* pleading, the plaintiff claimed possession of the ship and judgment for the balance purchase price. The plaintiff subsequently obtained a warrant of arrest on the basis of that claim. Later, the plaintiff sought to amend the statement of claim to reformulate its claim, while the defendant sought to strike out the amendment and to set aside the warrant of arrest.

50 Barnett J set aside the warrant of arrest and dismissed the plaintiff's application to amend the statement of claim. For present purposes, what is material is Barnett J's decision in setting aside the warrant. The claim that the plaintiff purported to advance in the *in rem* action fell within the court's admiralty jurisdiction, as it was a "claim to the possession or ownership of a ship or to the ownership of any share therein": see s 3(1)(*a*) of the HCAJA and s 12A(2)(*a*) of the Hong Kong High Court Ordinance (Cap 4) (HK). However, since the plaintiff's statement of claim stated that it had, at the time of the issuance of the *in rem* writ, divested itself of ownership and possession of the vessel, no claim falling within the court's admiralty jurisdiction was disclosed by the plaintiff's pleadings. Effectively, the plaintiff's claim was one for the balance purchase price, and the warrant of arrest was issued to obtain security for that *in personam* claim. In these circumstances, the court ought not to have

issued the warrant of arrest in the first place because a claim for the balance purchase price did not fall within the court's admiralty jurisdiction. As Barnett J explained (at 496):

> … on the material available to the Registrar when the application for the warrant [of arrest] was made the plaintiff had apparently divested itself of ownership and possession [of the vessel], so that there could be no question of a claim giving rise to an action *in rem*. … The warrant clearly was wrongly issued.

51 JIL argued that *The Amigo* stood for the general proposition that a subsequent amendment of the pleadings could not justify the issuance of a warrant of arrest that was wrongly issued in the first place. It argued that, like the warrant of arrest in *The Amigo*, WA 39 was wrongly issued on the basis of a non-existent or fatally defective claim. This was because at the time when BCG commenced ADM 256 and applied for WA 39, BCG was no longer in possession of the Original BL, and thus could not be a person with an interest in goods carried on a ship relating to that bill of lading under s 3(1)(*g*) of the HCAJA. The original claim was therefore "not available" to BCG at the time when WA 39 was obtained. The subsequent amendment to the SOC could not have cured the inherent defect in WA 39.

52 Since BCG's original claim was as such fatally defective and/or non-existent, there was necessarily no factual or legal basis to support the arrest of the Vessel pursuant to WA 39 (see *The Xin Chang Shu* [2016] 1 SLR 1096 at [23]), and so WA 39, which was incorrectly upheld by the Judge on the basis of the amended claim (see [42] above), must necessarily be set aside. Therefore, in so far as *The Amigo* stands for the proposition that a warrant of arrest obtained on the basis of a non-existent or fatally defective claim must be set aside, we agree. It is however not clear to us if *The Amigo* necessarily stands for the proposition that a subsequent amendment to pleadings cannot justify the

issuance of a warrant of arrest that was wrongly issued in the first place. In *The Amigo*, the application to amend the statement of claim was not allowed and so there was no amendment to speak of to begin with. That being the case, we do not think that *The Amigo* addressed the key issue in this appeal, which is whether an amendment to a statement of claim can have a corresponding effect on a warrant of arrest that was issued prior to the amendment.

53 In any event, the Judge distinguished *The Amigo* on the basis that the warrant of arrest in that case was wrongly issued from the outset and the statement of claim did not disclose any cause of action giving rise to an *in rem* action (see the GD at [40]–[49]). He observed that unlike *The Amigo*, in the present case, the amendment was based on facts which existed at the time when the *in rem* writ was issued and more significantly, the amended claim fell within the court's admiralty jurisdiction (see the GD at [49]).

54 Given the views that we have expressed in answering the Question, the decision in *The Amigo* strictly has no bearing on the Question. That having been said, we do not think that *The Amigo* should be as narrowly construed as was done by the Judge. A warrant of arrest can be set aside so long as the court is satisfied that there is no legal and/or factual basis to support the arrest of the vessel (see *The Xin Chang Shu* at [23]). It does not follow that a warrant of arrest can only be set aside when the claim stated therein is not within the court's admiralty jurisdiction. Put simply, the invalid invocation of the court's admiralty jurisdiction at the time when the warrant of arrest was obtained is not the *only* ground on which a warrant of arrest can be set aside.

55 Here, it is beyond dispute that BCG did not have any cause of action as stated in WA 39 and in the Writ at the time of their issuance. There was clearly no factual basis to support the arrest of the Vessel on the basis of the original

claim even if that claim, being a claim arising out of or in relation to a contract of carriage, fell within the court's admiralty jurisdiction at the time when BCG applied for WA 39. WA 39 therefore must be set aside.

What then is the status of a warrant of arrest following an amendment to the statement of claim

56 As we have stated earlier, for a warrant of arrest to stand, there must be some legal and/or factual basis to support the arrest of the vessel at the time of its issuance (see *The Xin Chang Shu* ([52] above) at [23]). The arrest procedure is intended to allow a plaintiff to obtain security for the claim that he seeks to pursue in the *in rem* action. Following an amendment to the statement of claim (and the consequential amendment to the *in rem* writ), the *in rem* plaintiff is effectively seeking to pursue a different claim in the *in rem* action, namely, the amended claim. In the event where the original claim, on which the warrant of arrest is issued is abandoned altogether, there would no longer be any basis for the plaintiff to arrest the vessel to obtain security on the strength of the original claim. In such a situation, the court *must* set aside the warrant of arrest and order the return of the security furnished (if any) or order the release of the vessel, as the case may be. Contrary to Mr Liew's submission, this would be a matter of jurisdiction and not discretion.

57 Finally, we observe that JIL, in the court below as well as before this court, mounted an argument that there was material non-disclosure in that BCG failed to disclose the fact that it was no longer in possession of the Original BL when WA 39 was obtained. In our view, this was not strictly a case of non-disclosure of material facts. The fact that BCG was not in possession of the Original BL meant that it did not have any reasonable cause of action and its original claim was clearly frivolous and vexatious and thus open to summary

dismissal. This was a material fact that went towards BCG's entitlement to the remedy of arrest, rather than the court's exercise of discretion, and BCG's failure to disclose this fact could not be characterised as "material non-disclosure". Indeed, it would be wholly odd to describe BCG's failure or omission as non-disclosure because that would be tantamount to saying that BCG ought to have disclosed the fact that it did not have the pleaded cause of action in the first place. Such an argument is better situated as a ground to show that such a plaintiff does not have any reasonable cause of action or that its claim is otherwise frivolous and vexatious.

58 In any case, we have some difficulty in accepting that BCG's mistake in claiming to be the holder of the Original BL when ADM 256 was commenced as an "innocent lapse" (see [24] above). BCG's status in relation to the Original BL was fundamental to the original claim and went to the root of the cause of action pursued in ADM 256. We were also not persuaded that BCG could have "honestly and in good faith" believed that it had possession of the Original BL since JIL's solicitors had sought confirmation from BCG immediately after the arrest on 11 October 2020 whether it was in possession of the Original BL which query BCG curiously answered in the affirmative (see [11] above). Furthermore, on 10 November 2020, JIL filed a Notice to Produce to inspect the Original BL and yet BCG maintained that it remained in possession of the Original BL until the Reply was filed on 15 January 2021 (see [14] above). We however express no conclusive view on this point given the limited terms on which leave to appeal had been granted and JIL's pending counterclaim against BCG for damages for wrongful arrest in ADM 256.

59 The upshot of our decision is not that a plaintiff can never pursue an arrest of a vessel on the basis of an amended claim. In a situation where the amendment to the statement of claim is made *before* the issuance of a warrant

of arrest, there would be no legal impediment in ensuring that the claim in the warrant of arrest reflects the amended claim. In a situation where the amendment is made *after* the issuance of a warrant of arrest and where the warrant of arrest has yet to be executed, it is open to the plaintiff to file fresh court papers including a new affidavit verifying the amended claim together with an explanation on the circumstances which led to the amendment in order to obtain a fresh warrant of arrest. It is then for the court hearing the fresh arrest application to determine whether a fresh warrant of arrest should be issued. Issues such as any intervening time bar and the nature of the amendment would be relevant. Here, we are concerned with a situation of an amendment which completely substituted the original claim with an amended claim after the *execution* of the warrant of arrest. As we have explained above, in such a situation, the warrant of arrest simply could not stand on the basis of the original claim and must therefore be set aside.

Conclusion

60 Given our decision that the Question had to be answered in the negative (see [42] above), the Judge's decision to uphold WA 39 was incorrect. We therefore allowed the appeal and ordered WA 39 to be set aside, and for the Security to be returned to JIL. We also ordered BCG to pay JIL costs of $35,000 (all-in) with the usual consequential orders.

61 Finally, we also note that BCG's amended claim in ADM 256 has raised interesting questions as to whether a *former holder* of a bill of lading like BCG, who has released and endorsed the bill of lading to the shipper, could nevertheless maintain a claim against the carrier in relation to the cargo shipped under that bill of lading and whether a carrier (contractually or in its capacity as a bailee of those goods) has an obligation, before effecting a switch of those

bills, to obtain consent to the switch from a *former* holder of the bill of lading, where the former holder had *consented* to the release and endorsement of the bill of lading which facilitated the switching of the bills of lading in the first place. These are some of the interesting legal questions that BCG would have to address at the trial of the substantive action.

Judith Prakash
Justice of the Court of Appeal

Tay Yong Kwang
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

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