

Case Comment

**THE WARRANT OF ARREST AND THE IMPORTANCE
OF GETTING IT RIGHT THE FIRST TIME ROUND**

The Jeil Crystal [2022] 2 SLR 1385

[2023] SAL Prac 6

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? This question was squarely dealt with by the Court of Appeal in *The Jeil Crystal* [2022] 2 SLR 1385 for the first time. This article explores the implications of and key takeaways from the Court of Appeal's decision.

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I. Introduction

1 Given the international element present in many maritime claims, a key consideration for maritime claimants is the enforceability of their judgments in the event their claims are successful. In this regard, a warrant of arrest for maritime property is a powerful tool, as it allows a maritime claimant to obtain pre-judgment security. However, given the serious consequence of the warrant of arrest being set aside, a maritime

claimant should be careful to frame its claim correctly at first instance.

2 The recent Court of Appeal decision of *The Jeil Crystal*¹ advances certain exciting and novel developments in the area of ship arrest. Specifically, the Court of Appeal examined the issue: 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? (the “Question”).

3 This Question was answered in the affirmative by the General Division of the High Court in *The Jeil Crystal*.² However, the High Court’s decision not to set aside a warrant of arrest premised on an amended cause of action was reversed on appeal, and the Court of Appeal answered the Question in the negative.

4 It is now clear that for a warrant of arrest to stand, there had to be some legal and/or factual basis to support the arrest of the vessel *at the time of the issuance of the warrant of arrest*. If a claimant subsequently amends its statement of claim to the extent that the original claim on which the warrant of arrest was issued was abandoned altogether, there would no longer be any basis for the claimant to arrest the vessel to obtain security on the strength of the original claim. In such a situation, the court had to set aside the warrant of arrest, and either order the release of the vessel or order the return of the security furnished for the release of the vessel (if any), as the case may be.

5 In answering the Question, the Court of Appeal delivered a comprehensive judgment that examined three issues:

- (a) What is the true nature of a warrant of arrest?
- (b) Can an amendment to a statement of claim have a corresponding effect on a warrant of arrest?

1 [2022] 2 SLR 1385.

2 [2021] SGHC 292.

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

II. *The Jeil Crystal*

A. *The facts*

6 The appellant, Jeil International Co Ltd (“JIL”), is the owner of The “Jeil Crystal” (the “Vessel”). The respondent, Banque Cantonale de Geneve (“BCG”), is a Swiss bank in the business of, *inter alia*, 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 one of its customers, 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:³

[BCG], as the owner or other person interested in the cargo lately laden on board the Vessel ‘JEIL CRYSTAL’ under Bill of Lading

3 *The Jeil Crystal* [2022] 2 SLR 1385 at [8].

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. That was incorrect because BCG had by then already released and endorsed the Original BL to GP Global.

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”.⁴ 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 its solicitors to seek BCG’s confirmation that it (BCG) was still in possession of the Original BL. On 1 October 2020, BCG’s solicitors replied, stating that they were “instructed to inform ... that [BCG] holds the original 3/3 Bills of Lading”.⁵ In any event, on 19 October 2020, JIL furnished security by way of payment into court in the sum of S\$2.1 million (the “Security”) to secure the release of the Vessel, and the Vessel was eventually released on 21 October 2020.

4 *The Jeil Crystal* [2022] 2 SLR 1385 at [10].

5 *The Jeil Crystal* [2022] 2 SLR 1385 at [11].

12 On 4 November 2020, BCG filed its statement of claim in ADM 256. Subsequently, 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 and counterclaim in ADM 256. JIL pleaded in the defence and counterclaim the abovementioned facts relating to the switching and the cancellation of the Original BL. 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.

14 BCG claimed that it was only upon reviewing the defence and counterclaim 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.

15 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.

16 On 4 February 2021, BCG filed HC/SUM 586/2021 (“SUM 586”) to amend its statement of claim. 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.

17 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 of Court 2014⁶ (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.

B. *The decision before the High Court*

18 The High Court 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 statement of claim. 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.

19 The judge concluded that, as he had allowed BCG’s application to amend the statement of claim, 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

6 Cap 322, R 5, 2014 Rev Ed.

the court's admiralty jurisdiction, then any amendment to the statement of claim would result in both the *in rem* Writ and WA 39 being "consequentially amended".

20 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 statement of claim would have a curative effect on the *in rem* Writ which in turn would result in the consequential amendment of WA 39; (b) second, pursuant to the court exercising its powers under O 20 r 8 of the Rules to correct the "defect or error" in respect of the Writ and WA 39.

21 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; 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. 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.

22 JIL applied for leave to appeal against the judge's refusal to set aside WA 39 and the Appellate Division granted JIL leave to appeal but only in respect of the Question. 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 1969,⁷ 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.

7 Cap 322, 2007 Rev Ed.

C. The Court of Appeal's decision

23 The Court of Appeal started off with an analysis of the true nature of a warrant of arrest and held that a warrant of arrest is essentially an order of court. It gave two reasons for this:

(a) 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.

(b) Second, the arrest procedure obliges the plaintiff 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. Under O 70 r 4 of the Rules, an *in rem* plaintiff who seeks a warrant of arrest must:

(i) file a warrant of arrest in Form 160 of Appendix A to the Rules;

(ii) 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

(iii) file an affidavit containing the particulars required under O 70 rr 4(6) and 4(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. 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.

24 Next, the court examined whether an amendment to a statement of claim can have a corresponding effect on a warrant of arrest. Whilst it agreed with the judge that an amendment to a statement of claim would result in a “consequential amendment” to the *in rem* writ, it disagreed that an amendment to a statement of claim would have a corresponding effect on a warrant of arrest.

25 Given the court's view that a warrant of arrest is an order of court, the starting point of the 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.

26 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. 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 1.

27 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. An example is where the quantum of the judgment sum was misstated due to an inadvertent typographical error. Another example is where there has been an error in the words used to express the court's manifest intention in a court order, such that the court's intention was not accurately captured in the wording of that order.

28 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.

29 For the above reasons, the Court of Appeal held that there was simply no legal basis for the amendment to the statement of claim to have had a corresponding effect on WA 39.

30 Following from the above, the Court of Appeal held⁸ that 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.

31 That said, the Court of Appeal did not go so far as to hold that all subsequent amendments to a claim would render a warrant of arrest null and nugatory. The Court of Appeal observed that where the amendment to the statement of claim had been 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 reflected the amended claim. Where the amendment had been made *after* the issuance of a warrant of arrest and where the warrant of arrest had yet to be executed, it was 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 for a fresh warrant to be obtained. It was for the court hearing the fresh arrest application to determine whether a new warrant of arrest should be issued.

III. Commentary

32 The Court of Appeal's decision has clarified that the warrant of arrest is an order of court, and that the basis for the court to exercise its discretion to issue a warrant of arrest is to be properly set out in the supporting affidavit for the arrest application.

8 *The Jeil Crystal* [2022] 2 SLR 1385 at [56].

33 In practice, it may sometimes be difficult to fully canvass the various issues in dispute and gather all available information and documents at the time the arrest application is filed. This is because applicants for a warrant of arrest often have little time to prepare for an arrest application as the voyages chartered and/or to be undertaken by a vessel may not be publicly available information. A vessel may only call at a port for a short period of time before sailing off, and therefore, time is usually of the essence.

34 However, given the draconian consequences to a shipowner that flow from the arrest of its vessel, the Court of Appeal's decision is generally welcomed as it discourages maritime claimants from taking out frivolous and vexatious arrest applications and subsequently attempting to cure any defects in their claims by amending their claims when more information comes to light.

35 This decision balances the scales between a shipowner and a maritime claimant as it provides some form of safeguard to prevent wrongful arrests which can not only be costly, but also may have negative commercial and reputational consequences on the shipowner.

36 Maritime claimants should appreciate that a shipowner who has had his vessel arrested once is likely to take active steps to avoid arrest in the same jurisdiction. Accordingly, maritime claimants who intend to take out an application for a warrant of arrest should treat this decision as a cautionary tale, as they will seldom get a second bite of the cherry to re-arrest the vessel in the same jurisdiction. In such circumstances, the maritime claimant may potentially end up with an unsecured judgment even if it ultimately succeeds in obtaining a judgment on its amended case. It is therefore pertinent that all information and documents relevant to the arrest be prepared and reviewed carefully.

37 The Court of Appeal also observed⁹ that the fact that BCG was not in possession of the Original BL meant that it did

9 *The Jeil Crystal* [2022] 2 SLR 1385 at [57].

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. It goes without saying that one of the potential consequences of arresting a vessel without a reasonable cause of action is that it also exposes the maritime claimant to a potential claim for wrongful arrest. Indeed, the judgment noted that there is a pending counterclaim by JIL for wrongful arrest.¹⁰

38 Following from this decision, maritime claimants should ensure that they get their cause of action right the first time round in the supporting affidavit, as well as the writ, when applying for a warrant of arrest.

¹⁰ *The Jeil Crystal* [2022] 2 SLR 1385 at [58].