Wellmix Organics (International) Pte Ltd v Lau Yu Man
[2006] SGCA 11

Case Number : CA 111/2005, NM 122/2005

Decision Date : 21 March 2006

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Lai Siu Chiu J; Yong Pung How CJ

Counsel Name(s) : Michael Por and Krishnasamy Siva Sambo (Tan Lee & Partners) for the appellant; Irving Choh and Melvin Lum (Rajah & Tann) for the respondent

Parties : Wellmix Organics (International) Pte Ltd — Lau Yu Man

Civil Procedure – Judgments and orders – Interlocutory judgment entered following non-compliance with order to serve affidavit by deadline – Application to set aside default judgment successful after judge denying application hearing further arguments – Whether initial order by judge denying application to set aside default judgment final order – Whether judge making initial order precluded from hearing further arguments – Whether order setting aside default judgment unconditionally – Whether appeal against such order precluded by s 34(1)(a) Supreme Court of Judicature Act – Section 34(1)(a) Supreme Court of Judicature Act (Cap 332, 1999 Rev Ed)

21 March 2006 *Judgment reserved.*

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

1 This is an application by the respondent in Civil Appeal No 111 of 2005, ("the appeal") by way of motion, to strike out the notice of appeal filed by the appellant on the ground that under s 34(1)(*a*) of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) ("the SCJA") the decision of the judge is non-appealable.

The background

2 We shall first set out briefly the facts which led to the filing of the present motion. By way of Suit No 642 of 2001, the appellant claimed against the respondent, who, at all material times, was a director of the appellant, for breach of his duties as a director of the appellant, namely, to act diligently and *bona fide* in the interest of the appellant.

3 Matters came to a head in the action when the respondent failed to file the necessary affidavits of evidence-in-chief ("AEICs") by 10 June 2005 as ordered by the senior assistant registrar. As a result, on 13 June 2005, the appellant applied by way of summons in chambers, Summons in Chambers No 2391 of 2005 ("SIC 2391/2005"), requiring the respondent to file its AEICs by a specified date, failing which the amended defence filed by the respondent in the action would be struck out "without further attendance or order". On the day on which the parties were to attend before the assistant registrar in relation to SIC 2391/2005, counsel for the parties had a private discussion before appearing before the assistant registrar where they agreed to set the deadline of 21 June 2005 for the filing of AEICs. The orders which the assistant registrar made were, *inter alia*, as follows:

> 3. the [respondent] file and serve [its] Affidavits of Evidence-in-Chief by Tuesday, 21 June 2005, failing which Judgment will be entered in the matter for the [appellant].
>
> 4. the [appellant] file and serve [its] fourth Affidavit of Evidence-in-Chief by Tuesday, 21 June 2005.

4 While the respondent filed its two affidavits in question within time on 21 June 2005, it only served them on the appellant the next day. As a result, interlocutory judgment was entered in favour of the appellant, with damages to be assessed. Upon the respondent's application to have the interlocutory judgment entered set aside, Assistant Registrar Yeong Zee Kin ("AR Yeong") refused it on 29 June 2005. Upon the respondent's appeal against AR Yeong's decision, Andrew Phang Boon Leong JC (as he then was) ("the judge"), on 15 July 2005, dismissed the appeal. On 22 July 2005, the respondent wrote in to the judge to request for further arguments. The judge acceded to the request. On 23 September 2005, after hearing further arguments, the judge ordered that the interlocutory judgment be set aside unconditionally and that the action be restored for trial. Being dissatisfied with this decision of the judge, the appellant filed the present appeal on 21 October 2005, having complied with s 34(1)(*c*) of the SCJA by requesting for further arguments.

5 We ought to add that even before the appellant filed the notice of appeal, the respondent had notified the former that the former was precluded from appealing further in view of s 34(1)(*a*) of the SCJA which provides that no appeal may be brought to the Court of Appeal where a judge makes an order setting aside unconditionally a default judgment.

Issues raised by the motion

6 To resist the motion to strike out the notice of appeal, the appellant raises two main grounds for the consideration of this court. The first is whether the order made by the judge on 15 July 2005 was in the nature of an interlocutory or a final order. The effect of this argument is that if the order is in truth a final order, it follows that the judge would be precluded from hearing further arguments because by the time further arguments were requested on 22 July 2005, the order had been perfected. This would further mean that the order of 15 July 2005 would stand. The second issue is whether the order made on 23 September 2005 was an order setting aside unconditionally a default judgment. Either of these grounds will defeat the motion.

Final or interlocutory

7 We will examine the two issues in turn. The answer to the question as to whether an order is interlocutory or final is significant because it has implications as regards the nature of the rights of the parties to appeal further to the Court of Appeal. Section 34(1)(*c*) of the SCJA provides:

> No appeal shall be brought to the Court of Appeal in any of the following cases:
>
> > (c) subject to any other provision in this section, where a Judge makes an interlocutory order in chambers unless the Judge has certified, on application within 7 days after the making of the order by any party for further argument in court, that he requires no further argument;

8 This provision in its present form, was introduced by an amendment Act in 1993. However, this is not to say that its contents were entirely new. Its equivalent previously was s 34(2) of the 1970 Rev Ed, and it read:

> No appeal shall lie from an interlocutory order made by a Judge in chambers unless the Judge has certified, after application, within four days after the making of such order by any party for further argument in Court, that he requires no further argument, or unless leave is obtained from the Court of Appeal or from the Judge who heard the application.

9 It would be noted that there are significant differences between the two versions. Without

going into a minute analysis of the two, what can be said broadly is that under the present s 34(1)(*c*), the possibility of a party appealing to the Court of Appeal against an interlocutory order is narrower. While under the previous provision, even though the party did not ask for further arguments within four days, he could still apply for leave to appeal to either the Judge or the Court of Appeal. Under the present provision this option is no longer available. Of course, under the present provision, the party has a longer period of time to request for further arguments, *ie*, seven days instead of four days.

10 The question of whether an order is truly interlocutory or final has troubled the courts here, as well as in England, for a long time. However, in England, they have resolved the problem by adopting a listing approach. What kind of applications or orders are to be treated as interlocutory are distinctly listed out. Singapore has not yet adopted that approach and still has to grapple with the problem from time to time.

11 Traditionally, two tests were propounded to determine the issue. The first is known as the "application" test, enunciated in *Salaman v Warner* [1891] 1 QB 734, where Fry LJ stated (at 736):

> [A]n order is final only where it is made upon an application or other proceeding which must, whether such application or proceeding fail or succeed, determine the action. Conversely … an order is "interlocutory" where it cannot be affirmed that in either event the action will be determined.

12 The second is called the "order" test or "*Bozson*" test and was stated by Lord Alverstone CJ in *Bozson v Altrincham Urban District Council* [1903] 1 KB 547 ("*Bozson*") to be this (at 548):

> Does the judgment or order, as made, finally disposes 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.

13 In *Ratnam v Cumarasamy* [1962] MLJ 330, the Court of Appeal of the Federation of Malaya held that the *Bozson* test was the proper test to be applied to determine whether an order was to be held interlocutory or final. A later case where the Federal Court in Singapore adopted the same approach was *Tee Than Song Construction Co Ltd v Kwong Kum Sun Glass Merchant* [1965–1968] SLR 230.

14 Since then, the Bozson test was applied in many subsequent cases in Singapore, such as, *Rank Xerox (Singapore) Pte Ltd v Ultra Marketing Pte Ltd* [1992] 1 SLR 73 ("*Rank Xerox*"); *Ling Kee Ling v Leow Leng Siong* [1996] 2 SLR 438 and *Aberdeen Asset Management Asia Ltd v Fraser & Neave Ltd* [2001] 4 SLR 441 ("*Aberdeen Asset*"). This court recognised in *Aberdeen Asset* that whichever test was adopted would have its problems but as stated in that case, the *Bozson* test seems more logical. We do not see any compelling reason to depart from the approach. Obviously, the key words in the *Bozson* test are "finally", "disposes" and "rights". The word "rights" has been construed in *Rank Xerox* (at 76) to mean the substantive "rights" in the action or proceeding. A little more problematic are the other two words. The word "dispose" has a spectrum of meanings ranging from "to throw away", "to make final arrangement", "to deal" to "to determine the outcome". It seems to us that in the context of the *Bozson* test, the word "dispose" must mean making a determination on the substantive rights and, as a matter of common sense, the court can only make a determination on the substantive rights after hearing the parties on the merits. Indeed, in *Bozson*, that was what happened – the first instance judge there had decided on the questions of liability and breach of contract. It was agreed that the rest of the case was to go before the official referee. Where an interlocutory judgment is entered into by default through failure to comply with either the Rules of Court (Cap 322, R 5, 2004 Rev Ed) ("the ROC") or an order of court, there has been no determination

on the merits.

15 As regards the word "finally", its ordinary meaning is clear. It means either "the last" or "completely". But in the context of the *Bozson* test, there could be some problems because of split hearing. Where, in an action, interlocutory judgment is entered against the defendant after hearing in chambers on the merits, does that order finally dispose the rights of the parties? I should add that an interlocutory judgment obtained *after hearing in open court* is expressly excluded from the scope of s 34(1)(*c*). There is much force in the argument that a determination as to liability does not finally or fully dispose of the rights of the parties where damages are also claimed in the action. That will only be a partial determination of the rights. The determination of liability is not an end in itself. Such a determination is not the only thing that the plaintiff is asking for. Damages are really what the plaintiff is seeking, and determining liability is a necessary step towards deciding whether damages or compensation are payable, and if so, what is the appropriate amount. On this view, an interlocutory judgment with damages to be assessed will not be an order which finally disposes of the rights of the parties in that action.

16 We recognise that on this approach, 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 well 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 the discovery of documents, the order on 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 that disposes of everything in the proceeding.

17 We note that in *Singapore Press Holdings Ltd v Brown Noel Trading Pte Ltd* [1994] 3 SLR 151 at 166, [40], and *Aberdeen Asset* ([14] *supra*) at [23], this court had observed that the object of s 34(1)(*c*) was to give the judge, who may not have had adequate time to consider the interlocutory matter when it first came before him in chambers, a second opportunity to look at the matter again before an appeal was taken to this court. Viewed in this light, an interlocutory judgment obtained after full arguments in chambers on the merits should not be treated as interlocutory. That may well be the implicit rationale for s 34(1)(*c*). But there is nothing in s 34(1)(*c*) which says that that is a criteria for determining whether the judge should be given a second chance to look at his decision again. Take again the case of an application for discovery. Full arguments might well have been made. However, that does not mean that the unsuccessful party can just appeal without asking for further arguments. The judge must decide whether he has heard enough. Ultimately, we are still thrown back to the *Bozson* test to determine if the order in question is interlocutory or final.

18 At this juncture we would refer to the judgment of the Privy Council in the New Zealand case of *Strathmore Group Ltd v A M Fraser* [1992] 2 AC 172 ("*Strathmore Group v Fraser*"). There, the petitioner sued its former directors, for, *inter alia*, breach of fiduciary duty. In defence, the respondents contended that there had been a compromise between them to the effect that the petitioner would not pursue the claims. This assertion was challenged by the petitioner. The petitioner also averred that if there was a compromise agreement, it had been cancelled. The question of the compromise was tried as a preliminary issue, with the calling of witnesses. The New Zealand Court of Appeal ("NZCA") reversed the first instance judge and found that there was such a compromise and duly dismissed the petitioner's action. The NZCA also refused the petitioner's application for leave to appeal to the Privy Council on the ground that the judgment was interlocutory and the petitioner was not entitled as of right to appeal to the Privy Council. Upon the petitioner's application for special leave from the Privy Council, the latter held that the decision of the NZCA was a final judgment on

which the petitioner was entitled to appeal. The Privy Council set out its reasons as follows (at 178):

> If no preliminary issue had been ordered, the trial judge would have tried the whole action and decided the compromise issue, the cancellation issue and the misconduct issue. If the judge awarded damages to the petitioner on the grounds that there was no compromise or that the compromise had been cancelled and on the grounds that the respondents had been guilty of misconduct in the Clearwater transaction, then the respondents could have appealed to the Court of Appeal and either party, losing before the Court of Appeal, could have appealed to the Privy Council as of right and on that appeal all three issues, the compromise issue, the cancellation issue and the misconduct issue could have been argued. If the trial judge dismissed the petitioner's action either on the compromise issue or on the misconduct issue, then the petitioner could have appealed to the Court of Appeal and either party, losing before the Court of Appeal, could have appealed to the Privy Council as of right and on that appeal all three issues, the compromise issue, the cancellation issue and the misconduct issue could have been argued. The judgment of the Court of Appeal would have been final if the action by the petitioner were dismissed and final if the petitioner were awarded damages. All three issues, the compromise issue, the cancellation issue and the misconduct issue would be in play on the hearing of any appeal to the Privy Council.
>
> If the judgment of the Court of Appeal on 4 October 1991, finally deciding the compromise issue and the cancellation issue, was not a final judgment for the purposes of rule 2 of the Order of 1910, then the petitioner has been deprived of an appeal to the Privy Council as of right, an unintended consequence of the decision of Wylie J. that, in the interest of justice and for the possible saving of time and expense, the compromise issue should be tried as a preliminary issue. …
>
> It seems to their Lordships that the petitioner cannot be deprived of a right of appeal solely because the trial was divided into two parts, the first part dealing with the compromise issue and the cancellation issue and the second part, so far as necessary, dealing with the misconduct issue.

19 On the above analysis, one would have to hold that an interlocutory judgment, with damages to be assessed, is a final judgment. However, as we see it, *Strathmore Group v Fraser* indeed was a final judgment because the NZCA, having found that there was a compromise, went on to dismiss the action. The petitioner's action, to all intents and purposes, had come to an absolute end. For argument's sake, let us suppose for a moment that the NZCA had not reversed the first instance judge's finding and had instead affirmed the lower court finding that there was no compromise, the case would have gone back to the first instance court for hearing to determine whether there was any breach of fiduciary duty. Such an order, which determined that there was no compromise, could surely not be construed, as far as the action was concerned, to be a final judgment. However, we recognise that the order could be viewed to be final in a narrower sense, namely, that as far as the issue of compromise was concerned, it would be final unless leave to appeal was granted.

20 The Privy Council in *Strathmore Group v Fraser* did not refer to *Bozson*. In fact, the circumstances in *Bozson* were similar to those in *Strathmore Group v Fraser. Bozson* was an action to recover damages for breach of contract. By an order it was ruled that the questions of liability and breach of contract only were to be tried and that the rest of the case, if any, was to go to an official referee. At the end of the trial, the judge held that there was no binding contract between the parties and dismissed the action. The plaintiff appealed against the decision of the trial judge. The defendant took the point that as the order was an interlocutory order, applying the application test propounded in *Salaman v Warner* ([11] *supra*), the appeal was out of time. The Court of Appeal held

that it was a final order. We do not disagree with that. The order in *Bozson* was a final order because the action was dismissed. There was nothing more to the action.

21 The Privy Council in *Strathmore Group v Fraser* did refer to *White v Brunton* [1984] QB 570, a case where the court held that a decision on a preliminary issue of documentary construction was a final order. This was how Sir John Donaldson MR explained the position (at 573):

> It is plainly in the interests of the more efficient administration of justice that there should be split trials in appropriate cases, as even where the decision on the first part of a split trial is such that there will have to be a second part, it may be desirable that the decision shall be appealed before incurring the possibly unnecessary expense of the second part. If we were to hold that the division of a final hearing into parts deprived the parties of an unfettered right of appeal, we should be placing an indirect fetter upon the ability of the court to order split trials. I would therefore hold that where there is a split trial or more accurately, in relation to a non-jury case, a split hearing, any party may appeal without leave against an order made at the end of one part if he could have appealed against such an order without leave if both parts had been heard together and the order had been made at the end of the complete hearing.

22 However, in *Aberdeen Asset*, this court, having taken note of what was decided in *White v Brunton*, explained a significant difference between the position in *White v Brunton* and that in Singapore, as follows (at [23]):

> Admittedly, the reasoning in *White v Brunton* seems quite persuasive. One could almost say that it should also apply to a case like the present because what had occurred here is also a split trial. But there is one very significant difference. In *White v Brunton* (like that in *Strathmore Group v Fraser*), there was no right of appeal except with leave. However, in a case where s 34(1)(*c*) applies, the parties' right of appeal is not taken away. All that the statutory provision superimposes is that the party intending to appeal should first write to the judge requesting for further arguments. The process is basically to give the judge another opportunity to review his decision and once the judge decides to affirm his decision, the requesting party would have his undoubted right to appeal. Viewed in this light, the reasoning expressed in *White v Brunton* is naturally less compelling; similarly for the views expounded in *Strathmore Group v Fraser*. There is nothing unjust about requiring a party who wishes to appeal against a decision of a judge made in chambers, and which does not dispose of the entire action, to request for further arguments before he may file his notice of appeal.

23 Interestingly, *White v Brunton* disapproved of the "order" test and instead adopted the "application" test expounded in *Salaman v Warner*. In *White v Brunton*, the relevant statute provided that no appeal would lie to the Court of Appeal from any interlocutory order or interlocutory judgment without the leave of court. There, the decision on a preliminary issue was considered by the Court of Appeal to be a final order which did not require leave to appeal. The court held that the preliminary issue was "not … an issue preliminary to a final hearing, but the first part of a final hearing" (at 573).

24 We understand the approach taken in *White v Brunton*. Perhaps the fact that there was no right of appeal on an interlocutory order might have prompted the court there to give the word "final" and "rights" an extended meaning. Thus, the court there held that the preliminary issue was "the first part of a final hearing". In any event, in the context of s 34(1)(*c*), to hold that an interlocutory judgment made in chambers, with damages to be assessed, to be an interlocutory order would not deprive a party of his right of appeal, a point so strongly alluded to in *Strathmore Group v Fraser.* All that the provision in s 34(1)(*c*) requires is that the party should, within seven days, write to the judge to ask for further arguments before he can appeal. That can hardly be considered to be an

onerous burden. Moreover, there is also a certain practical logic in this requirement. If no request for further arguments is made within seven days, the case can then proceed very quickly to the next stage.

25 In passing, we would observe that the conduct of the appellant is not consistent with the stand it now takes on this issue. Upon being aware of the respondent's request for further arguments made on 22 July 2005, the appellant did not raise any objection to the request. It did not argue that the request was too late, or that the order was a final order and had been perfected. It went through the process of making further submissions. After the decision of the judge on 23 September 2005, which was not in its favour, the appellant filed its notice of appeal against the decision of 23 September 2005. If the argument made by the appellant on the present issue is correct it must follow that the order of 23 September 2005 is of no effect and that the order of 15 July 2005 still stands. The appellant should not have participated in the further arguments.

26 Before we turn to the second issue, we will refer to the recent High Court decision in *Lim Chi Szu Margaret v Risis Pte Ltd* [2005] SGHC 206, also a decision of Phang JC (as he then was). The main issue there was whether the court should grant an extension of time to the plaintiffs to file an application for leave to appeal from the decision of the High Court to the Court of Appeal. There, the substantive bone of contention related to an interlocutory judgment, with damages to be assessed. Phang JC, while recognising that there had not been any specific decision of this court dealing with the nature of an interlocutory judgment with damages to be assessed, seemed to think that such an order was a final order. He offered the following tentative proposition (at [15] and [16]):

> The appellation "interlocutory" is not, in my view conclusive: It only denotes the fact that the quantum of damages remains to be assessed. However, in so far as *liability* is concerned, the order of the High Court, affirming that of the District Court, must surely be treated as *final.*
>
> On another view, however, it could be argued that, taking the proceedings as a *whole*, the fact that damages remained to be assessed meant that the order made by the High Court in the present proceedings was interlocutory in nature. Whilst this argument is not unpersuasive at first blush, the weakness in its reasoning is that both the District Court and (subsequently) the High Court were dealing with appeals (stemming from the original order of the assistant registrar) with respect to the correctness of the interlocutory judgment, which related to *liability* (although the *quantum* of damages remained to be assessed at a *separate* hearing). In this regard, and as pointed out in the preceding paragraph, the respective orders made by both these courts (affirming the decision of the learned Assistant Registrar) must surely be considered to be *final* orders in so far as they *finally* disposed of the substantive rights of the parties in so far as *liability* was concerned.
>
> [emphasis in original]

These views were clearly *obiter*.

27 Accordingly, we hold that the decision of 15 July 2005 was interlocutory for two separate and distinct reasons. First, there was no determination on the merits as to the rights of the parties. Second, and more importantly, the decision was in any event, interlocutory.

Default judgment

28 We now turn to the second issue, which is, whether the decision of the judge made on 23 September 2005 fell within s 34(1)(*a*) of the SCJA which reads:

No appeal shall be brought to the Court of Appeal in any of the following cases:

(*a*) where a Judge makes an order giving unconditional leave to defend an action or an order setting aside unconditionally a default judgment;

It is under this provision that the respondent seeks to strike out the notice of appeal, namely, that the decision of 23 September 2005 is non-appealable, it being an order "setting aside unconditionally a default judgment".

29 The contention of the appellant in this regard is that the term "default judgment" in s 34(1)(*a*) refers only to a judgment obtained in default of appearance or defence, relying on O 13 and O 19 of the ROC. While those two orders do contain provisions for judgment to be entered against a party in default, they are not the only such provisions in the ROC. Equally applicable is O 25 r 3(2) which reads:

Where any party fails to comply with the Court's directions for the filing and exchange of affidavits, an application may be made by summons at any time after the default for an order to enter judgment or to dismiss the action, as the case may be, or for such other order as to costs or otherwise that the Court thinks just in the circumstances.

30 Admittedly, the "default" in O 25 r 3(2) (like that in the present case), relates to a default in complying with an order of court, unlike a default under O 13 and O 19 of the ROC which relates to a default in complying with the procedures prescribed in those orders of the ROC. But there is nothing in s 34(1)(*a*) to suggest that the "default judgment" referred to in the provision is limited only to a judgment obtained by default in complying with the procedures prescribed in the ROC and not default in complying with an order of court. We can see no justification to give such a restrictive meaning to the word "default" which means non-compliance with something. To so restrict its meaning would be to read, quite unwarrantably, additional words into the provision, words which are not there.

31 The appellant next argued that in order to set aside a regular default judgment, an applicant must show that his case has a reasonable prospect of success on the merits. Here the judge, in setting aside the default judgment did not address the substantive merits of the law. Thus, the true nature of the order of 23 September 2005 was really an order to set aside the unless order.

32 It seems to us that, in the instant case, it would be quite artificial to draw a distinction between setting aside the unless order and setting aside the default judgment as the two are inextricably linked. One formed the basis for the other and the court cannot set aside one without also setting aside the other. There would be no legal basis to set aside the default judgment unless the court was also of the opinion that the unless order should be set aside because there was no contumelious breach on the part of the respondent. Here, the judge did expressly set aside the default judgment. He stated at [112] of his grounds of decision:

[I]t is surprising that the present appeal was in fact brought in the first instance, simply because my decision was one setting aside a default judgment unconditionally. In this regard, I should have thought that s 34(1)(*a*) of the … SCJA … would have precluded such an appeal.

33 In this connection, we ought to refer to the case of *S3 Building Services Pte Ltd v Sky Technology Pte Ltd* [2001] 4 SLR 241 ("*Sky Technology*") which is relied upon by the appellant. There, the defendant was granted unconditional leave to defend the action by an assistant registrar. On 13 February 2001, Lai Siu Chiu J dismissed the appeal against that decision. On 27 February 2001, rather belatedly, the plaintiff wrote to ask for further arguments and it was granted. On 5 March

2001, Lai J altered her decision and gave conditional leave to the defendant to defend the action upon the provision of security. The defendant further appealed to the Court of Appeal against the conditional leave. The appeal was heard on an expedited basis and dismissed on 22 March 2001. In the meantime, on 28 February 2001, at a hearing for directions, the Registrar ordered the parties to exchange AEICs by 30 March 2001. However, after the appeal was dismissed on 22 March 2001, the defendant could not meet this deadline. The plaintiff refused the defendant's request for an extension of time to exchange the AEICs and instead took out an application to strike out the defence and counterclaim of the defendant. On its part, the defendant took out an application praying for an extension of time to effect the exchange of the AEICs. The Registrar refused the request for an extension of time and granted the plaintiff's application to have the defendant's defence and counterclaim struck out and ordered that judgment be entered for the plaintiff. Subsequently, the defendant succeeded in its appeal to Woo Bih Li JC (as he then was), who granted the defendant's application for an extension of time and set aside the default judgment entered for the plaintiff. This time the plaintiff appealed and it was dismissed by the Court of Appeal.

34 On these facts, we do not see how *Sky Technology* can be of much assistance to the appellant here. We must point out that the parties in *Sky Technology* did not raise the applicability of s 34(1)(*a*) and no application was made there to have the appeal struck out on the basis of s 34(1)(*a*). The appeal in *Sky Technology* was decided purely on the basis whether the delay in the defendant filing the AEIC could be considered to be "unjustified". The court there ruled that the delay was not unjustified and accordingly set aside the default judgment. *Sky Technology* can hardly be an authority supporting the plaintiff's argument that the default judgment in the present case does not fall within s 34(1)(*a*).

35 In our judgment, the decision of 23 September 2005 was an order setting aside unconditionally a default judgment and no appeal may be brought thereon. The policy behind a provision such as s 34(1)(*a*) is really to ensure that appeals are not unnecessarily taken to the Court of Appeal. No one really suffers if the effect of an order is that the trial should proceed.

36 Accordingly, we would grant the motion herein and strike out the notice of appeal. The respondent shall have the costs of the motion as well as one-third of the costs of the appeal which is struck out.

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