Tan Chiang Brother's Marble (S) Pte Ltd v Permasteelisa Pacific Holdings Ltd [2002] SGCA 21

Case Number : CA 8/2001, NM 8/2002

Decision Date : 04 April 2002

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Tan Lee Meng J

Counsel Name(s) : Ng Yuen (Ng & Koh) for the applicants/appellants; Neo Kim Cheng Monica (Chan Tan LLC) for the respondents

Parties : Tan Chiang Brother's Marble (S) Pte Ltd — Permasteelisa Pacific Holdings Ltd

Civil Procedure – Appeals – Leave – Claim at trial exceeding $250,000 – Subject matter of appeal to Court of Appeal not exceeding $250,000 – Bona fide claim – Whether need for leave to file appeal – s 34(2)(a) Supreme Court of Judicature Act (Cap 322, 1999 Ed)

Civil Procedure – Appeals – Notice – Notice of appeal served out of time – Whether extension of time for service should be granted – Factors to consider

Civil Procedure – Extension of time – Notice of appeal served out of time – Whether extension of time for service should be granted – Factors to consider

Courts and Jurisdiction – Jurisdiction – Interlocutory – Single judge of Court of Appeal striking out notice of appeal on ground that leave required and not obtained – Whether single judge has jurisdiction to strike out appeal – s 36(1) Supreme Court of Judicature Act (Cap 322, 1999 Ed)

Words and Phrases – 'At the trial' – s 34(2)(a) Supreme Court of Judicature Act (Cap 322, 1999 Ed)

On 30 Nov 2001, Lai Siu Chiu J delivered her judgment. Tan Chiang informed PPH on 26 Dec 2001 of their intention to appeal, and on 31 Dec 2001 they filed their notice of appeal against part of the judgment. However, the notice was not served on PPH until 11 Jan 2002. Subsequently, on 25 Jan 2002, PPH notified Tan Chiang that the notice of appeal was not validly filed and asked them to rectify the same. As Tan Chiang disagreed, PPH filed Motion No. 3 of 2002/D on 2 Feb 2002 to set aside the notice of appeal on two broad grounds: first, that leave to appeal should have been obtained as required under s 34(2)(a) of the Supreme Court of Judicature Act (Cap. 322)('SCJA'); and second, that the notice of appeal was not served on PPH within the period of one month from the date of the judgment as prescribed under O 57 r 4 of the Rules of Court.

Rajendran J, who heard Motion No. 3/2002/D on 15 Feb 2002 as a single judge of the Court of Appeal pursuant to s 36(1) SCJA, was inclined to grant an extension of time to serve the notice of appeal on PPH. Nevertheless, he struck out the notice filed on 31 Dec 2001 on the ground that it was necessary for Tan Chiang to have first obtained leave of court before any notice of appeal could be filed. He ruled that such leave was required under s 34(2)(a) SCJA because the value of the subject matter was less than $250,000. Although it was not in dispute that the amount of Tan Chiang's claim at the trial well exceeded $250,000, the contention was that they had only appealed against, firstly, a part of the claim in which they had not succeeded, and secondly, PPH's counterclaim awarded against Tan Chiang, and the total of these two items did not exceed $250,000.

Tan Chiang filed the present Motion No. 8 of 2002/A to ask the Court of Appeal to review and set aside the ruling made by Rajendran J on Motion No. 3/2002/D. The substantive issue concerned the interpretation of s 34(2)(a) SCJA.

Held,

allowing the application:

(1) A single judge did not have the jurisdiction under s 36(1) SCJA to set aside a notice of appeal and correspondingly to strike out an appeal. The orders that could be made under s36(1)(i) and (ii) were premised on the existence of an appeal and the need for certain interim orders or directions to safeguard the interest of the parties pending disposal of the appeal. An application to strike out an appeal could not be considered to be an order of that interlocutory nature (see 9).

(2) Whichever way the jurisdictional issue was determined, the Court of Appeal was properly seized of the matter – if the single judge had no such jurisdiction under s 36(1), then the Court of Appeal could deal with the issues in N/M No. 8/2002/A as if the order made in N/M No. 3/2002/D was never made; if the single judge had such jurisdiction, then by virtue of s 36(3) SCJA, this Court had the power to review the order made as an application for review is not an appeal (see 10 and 11); Boyd v Bishoffsheim [1895] 1 Ch 1 followed.

(3) The words "at trial" in s 34(2)(a) SCJA should not be read to mean "at the appeal". To do so would do violence to the ordinary meaning of that word and would be wholly unwarranted. Since the quantum of Tan Chiang's claim at trial was well in excess of S$250,000, there was no need to obtain leave of court to file the present appeal, namely Civil Appeal No. 600133 of 2001 (see 20 to 23 and 25); Chan Kee Beng v Ramasamy Naidu [1939] MLJ 92, Yai Yen Hon v Teng Ah Kok & Sim Huat Sdn Bhd & Anot [1997] 1 MLJ 136, Dreesman v Harris (1854) 9 Exch 485 followed.

(4) It could be different if bad faith could be shown in the formulation of the claim (see 24); Mason v Burningham [1949] 2 KB 545, Mayer v Burgess (1855) 4 E&B 655 followed; There was no suggestion here that this was not a bona fide claim. Furthermore, a party who unreasonably inflates his claim may be penalised when the question of costs arises for consideration.

(5) PPH's argument, that although s 34(2)(a) SCJA spoke of the value of the subject matter at trial, it was also intended to refer to the amount of the subject matter on appeal, could have arisen from a misunderstanding of the decision of the Court of Appeal in Spandeck Engineering (S) Pte Ltd v Yong Qiang Construction [1999] 4 SLR 401. All that the court decided was that the word 'trial' should not be read to mean only a "hearing in open court with the calling of witnesses". There could be a 'trial' when the 'hearing' was based purely on affidavits. Nothing in Spandeck Engineering suggested that the words "at the trial" in s 34(2)(a) SCJA should be read to mean "at the appeal". To that extent, the views expressed by the High Court in Twin Enterprises Pte Ltd v Peter Lim Heng Wah (S1712/94) would be overruled (see 15 and 20).

(6) The factors which a court should take into account in exercising its discretion whether or not to extend time to enable a party to file a notice of appeal out of time are: (i.) the length of the delay; (ii.) the reason of the delay; (iii.) the chances of the appeal succeeding if the application is granted; and (iv.) the degree of prejudice to the would-be respondent if the application is granted (see 27); Pearson v Chen Chien Wen Edwin [1991] SLR 212, Nomura

Regionalisation Venture Fund Ltd v Ethical Investments Ltd [2000] 4 SLR 46 followed.

(7) In the circumstances of the case, an extension of time for service ought to have been given. First, the Electronic Filing System of the Supreme Court was only recently extended to include documents filed in Civil Appeals to the Court of Appeal. Second, Tan Chiang initiated the process to file the notice of appeal on 28 Dec 2001 but due to certain technicalities only managed to file the notice on 31 Dec 2001. Third, certain situations arose which had a bearing on the oversight. Fourth, and most importantly, PPH were notified on 26 Dec 2001 that Tan Chiang were filing a notice of appeal. In view of this and the fact that the delay was only some nine days, there could be no question of any prejudice (see 28 to 30).

Case(s) referred to

Twin Enterprises Pte Ltd v Peter Lim Heng Wah (Unreported) S 1712/94 – delivered on 29 Nov 2000 (overd)
Spandeck Engineering (S) Pte Ltd v Yong Qiang Construction [1999] 4 SLR 401 (refd)
Chan Kee Beng v Ramasamy Naidu [1939] MLJ 92 (folld)
Yai Yen Hon v Teng Ah Kok & Sim Huat Sdn Bhd & Anot [1997] 1 MLJ 136 (folld)
Dreesman v Harris (1854) 9 Exch 485 (folld)
Mason v Burningham [1949] 2 KB 545 (folld)
Mayer v Burgess (1855) 4 E&B 655 (folld)
Pearson v Chen Chien Wen Edwin [1991] SLR 212 (folld)
Nomura Regionalisation Venture Fund Ltd v Ethical Investments Ltd [2000] 4 SLR 46 (folld)

Legislation referred to

Supreme Court of Judicature Act (Cap 322, 1999 Rev. Ed.), ss 34(2)(a), 36(1), 36(3)
Rules of Court, O 57 r 4

Judgment

GROUNDS OF DECISION

1. This motion (No 8/2002A), filed by the appellants, Tan Chiang Brother's Marble (S) Pte Ltd (Tan Chiang), was essentially to ask this Court to review and set aside a ruling made by Rajendran J, in exercise of the power of a single Judge of the Court of Appeal under s 36 of the Supreme Court of Judicature Act (Cap 322) (SCJA) on an earlier motion (No 3/2002D) filed by the respondents. The substantive issue in question concerned the interpretation of s 34(2)(a) of the SCJA. At the conclusion of the hearing we set aside the ruling of the Judge and now give our reasons.

The background

2. By three separate contracts, Tan Chiang were engaged by the respondents, Permasteelisa Pacific Holdings Ltd (PPH), as sub-contractors to carry out works in relation to three projects namely, the Cuppage Centre project, the Goldbell Tower Project and the China Square project. Tan Chiang instituted Suit No 14/2001/D against PPH for the balance of the payments due under the three projects.

3. PPH did not dispute the claim of Tan Chiang in relation to the Goldbell Tower and China Square projects. In essence, what was in dispute concerned 46 items of variation works undertaken by Tan Chiang in relation to the Cuppage Centre project. Eventually, on account of amendments made to the pleadings, the dispute was reduced to 36 items. On 33 of the items, PPH disputed only the quantum thereof. But in respect of the remaining 3 items, PPH disputed both liability and quantum.

4. We should add that PPH had also counterclaimed against Tan Chiang in respect of the work done on the Cuppage Centre and the Goldbell Tower projects.

5. After a 5-day trial, Lai Siu Chiu J delivered her judgment on 30 November 2001. On 31 December 2001 Tan Chiang filed their notice of appeal against part of the judgment, having on 26 December 2001 informed PPH of their intention to appeal. However, the notice was not served on PPH until 11 January 2002. Subsequently, on 25 January 2002, PPH notified Tan Chiang that the notice of appeal filed was not valid and asked Tan Chiang to rectify the same. As Tan Chiang disagreed, PPH, on 2 February 2002, filed a Motion (No. 3 of 2002/D) to set aside the notice of appeal on two broad grounds:

(i) leave to appeal should have been obtained as required under s 34(2)(a) of SCJA; and,

(ii) that the notice of appeal was not served on PPH within the period of one month from the date of the judgment as prescribed under O 57 r 4 of the Rules of Court.

6. Motion No 3/2002/D came before Rajendran J on 15 February 2002, sitting as a single Judge of the Court of Appeal under s 36(1) of SCJA. Though he was inclined to grant an extension of time to serve the notice of appeal on PPH, he nevertheless struck out the notice filed on 31 December 2001 on the ground that it was necessary for Tan Chiang to have first obtained the leave of court before any notice of appeal could be filed. He ruled that such leave was required because the value of the subject matter of the appeal was less than $250,000.

Preliminary issues

7. Before us counsel for Tan Chiang submitted that a single Judge has the jurisdiction under s 36(1) of the SCJA to set aside a notice of appeal and correspondingly strike out an appeal. Section 36(1) and (3) provides as follows:-

"(1) In any proceedings pending before the Court of Appeal any direction incidental thereto not involving the decision of the appeal, any interim order to prevent prejudice to the claims of the parties pending the appeal, and any order for security for costs and for the dismissal of an appeal for default in furnishing security so ordered, may at any time be made by a Judge.

(3) Every order so made may be discharged or varied by the Court of Appeal."

8. Counsel for PPH did not disagree that a single Judge has the jurisdiction to make such an order. After all, it was PPH who asked the single Judge to make the order. It would lie ill in the mouth of PPH to contend otherwise. If a single Judge does have the power under s 36(1) to make such an order, this Court would, under s 36(3), have the power to set it aside or vary it. Both parties went before Rajendran J assuming that he had the jurisdiction to consider and, if thought appropriate, grant the application. Thus, the Judge's attention was not drawn to the issue of the extent of his power.

9. However, we had serious reservations whether such an order may be made by a single Judge

pursuant to s 36(1). There are three broad categories of orders which a single Judge may make under that provision:

(i) any incidental direction;

(ii) any interim order to prevent prejudice; and

(iii) any order for security for costs and the consequential order for dismissal of appeal for default.

Quite clearly, the present case does not come within the third category. The question is whether the order made falls within the first two categories. As we see it, the order made on 15 February 2002 could hardly be considered to fall within those two categories. The orders to be made under both categories are premised on the existence of an appeal and the need for certain interim orders or directions to safeguard the interest of the parties pending the disposal of the appeal. An application to strike out an appeal can, in no circumstances, be considered to be an order of that interlocutory nature. Indeed, it is an application with the object of putting an end to an appeal and not to obtain any interlocutory or further reliefs. Accordingly, it was and is our opinion that such an application cannot be heard by a single Judge pursuant to s 36(1).

10. Reverting to the matter in hand, we would add that whichever way one may determine the jurisdictional issue of the single Judge under s 36(1), this Court was properly seized of the matter. If, as we thought, a single Judge has no jurisdiction to order the setting aside and striking out of an appeal then the order of the single Judge made on 15 February 2002 in N/M No. 3/2002/D was not valid and could have no effect. Thus, this Court could deal with the issues raised in N/M No. 8/2002/A as if the order made in N/M No 3/2002/D had never been made.

11. On the other hand, if we assumed that the single Judge could make the order as he actually did in N/M No. 3/2002/D, then by virtue of s 36(3), this Court would have the power to review the order made by the Judge. Such an application to the court for a review is not an appeal: see *Boyd v Bischoffsheim* [1895] 1 Ch 1.

Section 34(2)(a) of SCJA

12. We now turn to consider section 34(2)(a) which provides that where "the amount or value of the subject matter at the trial is $250,000 or less" no appeal will be brought to the Court of Appeal except with the leave of the Court of Appeal or a Judge. It will be seen that this operates as a restriction on the right of appeal from a decision of the High Court.

13. Decisions of the High Court can either be in relation to an action commenced in the High Court or in relation to an action commenced in the Subordinate Courts which comes on appeal before the High Court. The jurisdictional limits of the District Court is $250,000 or less. A claim exceeding that limit must be commenced in the High Court. Implicit in the scheme of things is that there should, as a rule, be only one-tier of appeal. In 1998, when the figure in s 34(2)(a) of SCJA was raised to make it fall in line with the enhanced civil jurisdiction of the District Court, the Minister of Law, Prof S Jayakumar, in his second reading speech in Parliament when moving an amendment Bill to the SCJA, said:

"In view of the enhanced District Courts' jurisdiction to $250,000 in civil matters, the Chief Justice has proposed that the existing $30,000 limit in section 34(2)(a) be raised to $250,000. In

other words, bring its limit in line with the enhancement. If the limit is not raised to $250,000, District Court cases of less than $250,000 can first go on appeal to the High Court and then Court of Appeal. This would strain the limited resources of the Court of Appeal."

14. In the present case, it was not in dispute that the amount of Tan Chiang's claim at the trial well exceeded $250,000. The contention of PPH was that as Tan Chiang had only appealed against (i) a part of the claim which they had not succeeded; and (ii) the counterclaim of PPH awarded against them, and as the total of these two items did not exceed $250,000, Tan Chiang must, as required under s 34(2)(a), first have obtained leave before they could proceed to file their notice of appeal.

15. PPH also relied upon the views expressed by the High Court in the unreported decision of *Twin Enterprises Pte Ltd v Peter Lim Heng Wah* (S 1712/94 – delivered on 29 November 2000) where the judge said:–

"Although the said section (s 34(2)(a)) bespeaks the value of subject matter at the trial, it is also intended to refer to the amount of the subject matter on appeal."

16. It seems to us that the arguments raised by counsel for PPH could be due to a misunderstanding of the decision of this Court in *Spandeck Engineering (S) Pte Ltd v Yong Qiang Construction* [1999] 4 SLR 401. In 30 of PPH's written submission they stated –

"this Court has in *(Spendeck)* construed the term 'amount in dispute or the value of the subject matter' in s.21(1) of the SCJA to mean the amount in dispute or the value of the subject or matter against which the appeal was brought."

17. We will deal with the *Spendeck Engineering* case in some detail. There, a sub-contractor instituted a writ in the District Court claiming a sum of $62,275.51 from the main contractor. Judgment was entered against the main contractor in default of defence. Later, the main contractor filed an application to set aside the default judgment. The Deputy Registrar granted the application. On appeal, the District Judge reinstated the default judgment. On further appeal, the High Court affirmed the decision of the District Judge. The main contractor appealed to the Court of Appeal. This Court granted the sub-contractor's application to strike out the appeal.

18. Counsel for the main contractor argued that s 34(2)(a) only applied where there was a trial below. As in that case there was no trial, the provision could have no application. This Court ruled that a "trial" did not necessarily involve the calling of witnesses and the taking of oral evidence. A trial could be based on the evidence given in affidavits. This court ruled that if the main contractor's arguments were to be accepted it would lead to anomalous results and gave this illustration (at p. 404):-

"For instance, an interlocutory or final judgment is given in the District Court (in which there has not been a trial) in a suit in which the value of the subject matter exceeds $50,000 but not $250,000, as in the present case. From such judgment, whether it be interlocutory or final, an appeal may be taken to the High Court as of right. Now, if the appellants' contention is accepted, the decision of the High Court on that appeal may be taken further on appeal, as of right, to this Court (without leave) on the ground that s 34(2)(a) of the SCJA is not applicable as there has been no "trial" before either the District Court or the High Court. On the other hand, if the suit is finally disposed of by the District Court at a trial resulting in a final judgment being given, that judgment may be taken on appeal to the High Court, but from the decision of the High Court on that appeal, there would be no further appeal to this court, unless leave under s 34(2)(a) is obtained."

19. In order to ensure that the application of s 34(2)(a) does not lead to anomalous results this Court felt that the word "trial" should be interpreted purposively. It noted that as the limit of $250,000 in s.34(2)(a) was also the upper limit of the District Court's jurisdiction, the objective of s.34(2)(a) was to ensure that where appeals from the decision of the District Court had been heard and disposed of by the High Court, there should be no further appeals therefrom to the Court of Appeal unless (on sufficient grounds shown) leave of either the High Court or this Court was obtained. The provision provide for a process to screen appeals to be brought to this Court, thus preventing the clogging up of this Court by all kinds of appeals. What was contemplated by the legislature in relation to an action commenced in the District Court was that there should be only two tiers of hearing – the first instance hearing and an appeal. A further appeal to the Court of Appeal was only possible with leave.

20. Nothing in *Spandeck Engineering* suggests that the words "at the trial" in s 34(2)(a) should be read to mean "at the appeal". All that *Spandeck Engineering* decided was that the word "trial" should not be read to mean only a "hearing in open court with the calling of witnesses". There could be a "trial" when the "hearing" was based purely on affidavits. In our judgment, to read the word "trial" to mean "appeal" would do violence to the ordinary meaning of that word and would be wholly unwarranted.

21. In this regard two Malaysian cases are germane. In *Chan Kee Beng v Ramasamy Naidu* [1939] MLJ 92, the material provision was "if the amount or value of the subject matter of any civil suit does not exceed $100, no appeal shall lie." Mill J held that the determining factor was not the amount or the value of the subject matter of the appeal, but the amount or value of the subject matter of the civil suit.

22. In a recent Malaysian Federal Court case, *Yai Yen Hon v Teng Ah Kok & Sim Huat Sdn Bhd & Anor* [1997] 1 MLJ 136, a similar point arose. Under the Malaysian Courts of Judicature Act 1964, leave to appeal was required "when the amount or value of the subject matter of the claim" was less than M$100,000/-. There, the plaintiff's claim was well in excess of M$100,000 but the High Court only gave judgment to the plaintiff in the sum of M$62,400. The Federal Court held that whether there was a right to appeal depended on the value of the claim and not the award given by the trial judge.

23. A much earlier English case, *Dreesman v Harris* (1854) 9 Exch 485, had also decided to a similar effect. That was an action in the county court for breach of contract and the claim exceeded 20, though the judge gave judgment only for 12. The court held that no leave need be obtained to appeal. It was argued there that such a construction would mean that a plaintiff could reserve to himself the right of appeal in all cases by extending his claim to a sum exceeding 20. This argument was rejected.

24. We accept that it could be different if bad faith could be shown in the formulation of the claim: see *Mason v Burningham* [1949] 2 KB 545 and *Mayer v Burgess* (1855) 4 E&B 655. We would further add that a party who unreasonably inflates his claim may be penalised when the question of costs arises for consideration. This would undoubtedly act as a deterrence.

25. In the instant case, the quantum of the claim at the trial was well in excess of S$250,000. There was no suggestion that this was not a *bona fide* claim. Accordingly, we held that no leave of court need be obtained by Tan Chiang to file the present appeal (CA 600133/2001), which is now pending.

Extension of time for service

26. Finally, we turn to consider briefly the question of an extension of time to enable Tan Chiang to serve the notice of appeal on PPH out of time. As mentioned before, the notice was served on PPH on 11 January 2002. It is clear that under O 57, r 4 the notice should have been served on PPH on 31 December 2002, the day it was filed. This is because the filing and service must both be done within a month of the judgment appealed against.

27. The factors which a court should take into account in exercising its discretion whether or not to extend time to enable a party to file a notice of appeal out of time were considered and reiterated by this Court in *Pearson v Chen Chien Wen Edwin* [1991] SLR 212. The factors are: (i) the length of the delay; (ii) the reason of the delay; (iii) the chances of the appeal succeeding if time for appealing is extended; and (iv) the degree of prejudice to the would-be respondent if the application is granted. The governing principles were recently reviewed by this Court in *Nomura Regionalisation Venture Fund Ltd v Ethical Investments Ltd* [2000] 4 SLR 46.

28. There were circumstances in the case which deserved the court's consideration. First, the electronic filing system (EFS) of the Supreme Court was only recently extended to include documents filed in Civil Appeals to the Court of Appeal. Second, Tan Chiang initiated the process to file the notice of appeal at 1.00pm on 28 December 2001. Due to certain technicalities, Tan Chiang only managed to file the notice on 31 December at 11.51am. Third, certain situations arose which had a bearing on the oversight and here we would quote from an affidavit filed by the solicitor on behalf of Tan Chiang:-

> "The Applicants waited for the Certificate for Security for Costs and Notice of Appeal to be approved before service on the respondents. My staff who was in charge of the EFS filing of the Notice of Appeal left our employment. Another staff was assigned to monitor the same.
>
> > The appellants were distracted the next few days by a dispute between the applicants and the respondents over the wording of the judgment of the court below.
>
> The new staff retrieved the Notice of Appeal from the EFS system on 9 January 2002 and served the same on 11 January 2002."

Further amplification of these was set out in a later affidavit. Fourth, and more importantly, PPH were notified on 26 December 2001 that Tan Chiang were filing a notice of appeal.

29. The delay in the service was only some nine days, as 1 January 2002 was a public holiday. Tan Chiang had provided some reasons to explain the delay, caused in part by the change in the system of filing following the expansion of the EFS to civil appeals. It could not be seriously argued that the appeal was without merits. In view of the fact that the delay was only some nine days and PPH was notified that an appeal was being filed, there could be no question of any prejudice.

30. As we have stated, Rajendran J was favourably inclined towards granting an extension of time for service if not for the fact that he held the view that the notice of appeal was invalid because leave was required and not obtained. For the foregoing reasons, we were similarly of the opinion that in the circumstances of this case an extension of time for service ought to be given, which we duly granted.

Sgd:

CHAO HICK TIN
JUDGE OF APPEAL

Sgd:

TAN LEE MENG
JUDGE