IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 162

Suit No 449 of 2013
(Summons No 3755 of 2016)

Between

UTOC Engineering Pte Ltd

… *Plaintiff*

And

ASK Singapore Pte Ltd

… *Defendant*

GROUNDS OF DECISION

[Civil procedure] — [Costs] — [Principles]

[Civil procedure] — [Stay of proceedings]

UTOC Engineering Pte Ltd
v
ASK Singapore Pte Ltd

[2016] SGHC 162

High Court — Suit No 449 of 2013 (Summons No 3755 of 2016)
Lee Seiu Kin J
10 August 2016

16 August 2016

Lee Seiu Kin J

1 On 22 July 2016, I dismissed the defendant's application for a stay of assessment of damages pending the defendant's appeal to the Court of Appeal against my decision on liability. On 1 August 2016, the defendant filed the present summons for leave to appeal against my decision of 22 July 2016.

2 On 3 August 2016, counsel for the plaintiff, Mr Eusuff Ali s/o N B M Mohamed Kassim, wrote to counsel for the defendant, Mr Lee Hwee Khiam Anthony, to state that it was "incorrect" to apply for leave to appeal. Mr Lee replied on 4 August 2016 to register his disagreement on this point, whereupon Mr Eusuff replied on the same day, citing O 57 rr 15(1) and 16(4) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC").

3 At the hearing on 10 August 2016, Mr Eusuff raised a preliminary objection to the defendant's application for leave to appeal. He contended that

there was no basis for such an application as the defendant could apply directly to the Court of Appeal for the stay that was refused by me on 22 July 2016. This is because the Court of Appeal has concurrent jurisdiction pursuant to O 57 r 15(1) of the ROC, which provides as follows:

> **15.**—(1) Except so far as the Court below or the Court of Appeal may otherwise direct —
>
> (*a*) an appeal shall not operate as a stay of execution or of proceedings under the decision of the Court below; and
>
> (*b*) no intermediate act or proceeding shall be invalidated by an appeal.

Further, O 57 r 16(4) of the ROC specifically provides that where both courts have concurrent jurisdiction, the application must first be made to the court below (unless there are special circumstances). In the present case, I had dismissed the defendant's application for stay. Therefore, the defendant was not precluded from making the same application to the Court of Appeal by invoking its concurrent jurisdiction.

4 Mr Eusuff referred to *Cropper v Smith* (1883) 24 Ch D 305 ("*Cropper*"), where the English Court of Appeal considered the English equivalent of O 57 r 15(1) of the ROC. Brett MR held (at 308) that "[b]y that rule it is assumed that the Court of Appeal has … an independent jurisdiction" to order a stay. Cotton LJ held (at 313) that the rule "gives co-ordinate jurisdiction" to both the court below and the appellate court. The Court of Appeal in *Au Wai Pang v Attorney-General and another matter* [2014] 3 SLR 357 ("*Au Wai Pang*") considered *Cropper* (at [76]) and opined (at [77]) that such jurisdiction was conferred by s 19 of the UK Supreme Court of Judicature Act 1873 (c 66) (UK). In *Naseer Ahmad Akhtar v Suresh Agarwal and another* [2015] 5 SLR 1032, Hoo Sheau Peng JC affirmed this position (at [108]) and referred to the decision of the Court of Appeal in *Au Wai Pang*. I

should add that it seemed to me that jurisdiction to grant leave is vested in both the High Court and the Court of Appeal pursuant to s 34(2) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA"), the opening words of which state "[e]xcept with the leave of the High Court or the Court of Appeal, no appeal shall be brought to the Court of Appeal in any of the following cases". Therefore, the concurrent jurisdiction of both courts is derived from s 34(2) of the SCJA rather than O 57 r 15(1) of the ROC.

5 Mr Lee did not dispute that the Court of Appeal has co-ordinate jurisdiction to order a stay. He candidly admitted that he was not aware of this until he received Mr Eusuff's letter of 4 August 2016. However, he said that this did not preclude the defendant from appealing against my refusal to grant a stay. This is because s 29A(1) of the SCJA has vested the Court of Appeal with the jurisdiction to hear "appeals from any judgment or order of the High Court in any civil cause or matter". Mr Lee referred to *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 ("*Dorsey James Michael*"), where the Court of Appeal held (at [11]) that the effect of s 29A(1) of the SCJA is that "any judgment or order of the High Court is ordinarily appealable as of right", subject to any contrary provisions in the SCJA or any other written law. One example of a contrary provision is s 34 of the SCJA, sub-section (1) of which sets out the cases where no appeal may be brought to the Court of Appeal and sub-section (2) of which requires leave to be obtained before an appeal may be brought in certain categories of cases. Mr Lee submitted that there is nothing in the SCJA that prohibits an appeal in the present case and that s 34(2)(*d*) of the SCJA read with paragraph (*d*) of its Fifth Schedule permits an appeal with leave of the High Court. The availability of a direct application to the Court of Appeal pursuant to O 57 r 15(1) of the ROC (more correctly, s 34(2) of the SCJA) does not preclude the

defendant from exercising its right of appeal. Mr Lee argued that the preliminary objection was therefore unsustainable.

6 Mr Eusuff submitted that on the strength of *Cropper*, the right of appeal has been removed. However, he was unable to point to anything in that authority to support this proposition. On my part, I found that there was nothing in *Cropper* that affected the jurisdiction vested in the Court of Appeal to hear an appeal against my refusal to stay the assessment of damages. The Court of Appeal is a creature of statute and it is only by statute that its jurisdiction may be altered. I therefore dismissed the preliminary objection.

7 Before commencing to hear Mr Lee on his application for leave to appeal, I asked him whether there was any point in my doing so when the defendant had the right to apply directly to the Court of Appeal for a stay after I had refused it. Mr Lee candidly stated that it would definitely be more convenient for the defendant to proceed by way of a direct application to the Court of Appeal. He then applied to withdraw the leave application. He also suggested that there should be no order as to costs as he was withdrawing his application.

8 Mr Eusuff did not object to the withdrawal but asked for costs. Mr Eusuff said that the hearing was unnecessary and that Mr Lee knew this at least by 4 August 2016. Mr Eusuff also pointed out that the defendant had obtained a *de facto* stay from the date of my refusal to grant one on 22 July 2016. Mr Eusuff submitted that the defendant's conduct in these applications was not *bona fide* and that the applications were made to delay proceedings.

9 Mr Lee disagreed that the defendant's applications were made for a collateral purpose. He said that when Mr Eusuff wrote to him on 4 August 2016 to object to the application, it was on the basis that there was no right to appeal (with leave) and he had disagreed with this. That was why he had proceeded with the present application.

10 I did not find sufficient evidence showing that the application was made for a collateral purpose, although I must state that if I did I would have ordered costs on an indemnity basis. I also found no basis not to order costs simply because the application was withdrawn. Many counsel appear to take the view that an application that is withdrawn stands on a different footing from one that has been dismissed. I have had counsel appearing before me who, in the course of submissions, when it appears that the application is likely to be dismissed, forestall the event by applying to withdraw it (although I must stress that such was not the situation in the present case). The basis for ordering costs is not whether the application is labelled as dismissed or withdrawn but whether it is in the interest of justice that the respondent be compensated for the costs incurred in relation to the application.

11 The present case involved a party that was dissatisfied with an order of the High Court refusing a stay of the assessment of damages pending appeal against the decision on liability. The defendant had the option of proceeding to the Court of Appeal by way of a direct application to that court, or by way of an appeal. The first option is much faster and cheaper than the second. More importantly, the procedures involved in the first option would tie down much less court resources and involve less legal fees for the parties. Unless there is a special reason for doing so (*eg*, if a party would suffer prejudice by making a direct application or if a party would gain a valid advantage by proceeding with an appeal), the court will not entertain any application for the second

option. This policy is self-evident and ought to have been well within the anticipation of Mr Lee. On that ground alone, I would not have given leave to appeal had Mr Lee proceeded with the application. Therefore, the defendant should have withdrawn this application before it came up for hearing and both parties could have saved on legal fees for this hearing. Furthermore, valuable court time could have been freed up for other matters. For these reasons, I ordered the defendant to pay costs to the plaintiff fixed at $3,000, inclusive of disbursements.

Lee Seiu Kin
Judge

Eusuff Ali s/o N B M Mohamed Kassim (Tan Rajah & Cheah) for the plaintiff;
Lee Hwee Khiam Anthony and Cheng Geok Lin Angelyn (Bih Li & Lee LLP) for the defendant.
