IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 114

Originating Summons No 17 of 2021

Between

Commodities Intelligence Centre Pte Ltd

… *Applicant*

And

Hoi Suen Logistics (HK) Ltd

… *Respondent*

GROUNDS OF DECISION

[Civil Procedure] — [Appeals] — [Leave]
[Civil Procedure] — [Extension of time]

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Commodities Intelligence Centre Pte Ltd
v
Hoi Suen Logistics (HK) Ltd

[2021] SGCA 114

Court of Appeal — Originating Summons No 17 of 2021
Andrew Phang Boon Leong JCA, Judith Prakash JCA and Steven Chong JCA
3 September 2021

30 November 2021

Judith Prakash JCA (delivering the grounds of decision of the court):

Introduction

1 This application arises from the High Court judge's ("the Judge's") decision to dismiss the applicant's application ("SUM 5227") to set aside a court order ("ORC 6140") granting the respondent leave to enforce an arbitral award ("the Award") against the applicant.

2 As background, the applicant had entered into a contract with China Petroleum and Gas (S) Pte Ltd ("CPAG") for the sale and purchase of nickel ore ("the Contract"). Clause 9 of the Contract was an arbitration clause and provided that the Contract was governed by Chinese law. Clause 12 of the Contract ("cl 12") was an anti-assignment clause which prohibited the assignment of either party's rights and obligations under the Contract without the prior written consent of the other.

3 CPAG subsequently commenced arbitration proceedings against the applicant for alleged breaches of the Contract and obtained the Award. By way of a deed of assignment, CPAG assigned its rights in and benefits under, arising from and/or in connection with, the Award to the respondent ("the Assignment").

4 In SUM 5227, the applicant argued that the Assignment was invalid under Chinese law, which was the governing law of the Contract. The Judge dismissed SUM 5227. Dissatisfied with the Judge's decision, the applicant filed this application, which comprised prayers for:

(a) a declaration that the applicant did not require leave to appeal against the Judge's decision ("the Declaration Prayer");

(b) an extension of time to seek leave to appeal or to file a notice of appeal, as the case might be;

(c) leave to appeal, if such leave was required ("the Leave Prayer"); and

(d) a stay of execution of the Judge's decision, pending the disposal of the applicant's application for leave to appeal and/or appeal.

5 Although we agree with the applicant's primary position that it does not require leave to appeal against the Judge's decision, it is in the circumstances inappropriate to grant the declaration sought. Consequently, the main question that we have to consider is whether to grant the applicant an extension of time to appeal against the Judge's decision.

6 We now provide the grounds for our decision.

The Declaration Prayer

7 We turn first to the Declaration Prayer, which raises two sub-issues: (a) whether the Court of Appeal has the jurisdiction to grant the declaration sought; and (b) whether the applicant requires leave to appeal against the Judge's decision. We deal with each of these sub-issues in turn.

Whether the Court of Appeal has the jurisdiction to grant the declaration sought

8 Although the applicant's primary position was that it did not require leave to appeal against the Judge's decision in SUM 5227, it sought the Declaration Prayer as it considered that it was arguably unclear if such leave was required. The applicant argued that the Court of Appeal had the jurisdiction to grant the declaration sought for two key reasons.

9 First, and relying on *The "Xin Chang Shu"* [2016] 3 SLR 1195 ("*Xin Chang Shu*"), the applicant submitted that where there was uncertainty as to whether leave to appeal was required, an application for a declaration that such leave was not required ("declaration application") should be made to the judge who had issued the decision that was being appealed against, alongside an application for leave to appeal as a fallback. In this case, since the applicant had to seek leave to appeal from the Court of Appeal (under s 29C(2) read with para 1(*c*) of the Sixth Schedule to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA")), it followed that the declaration application also had to be made to the Court of Appeal.

10 Second, the applicant contended that there were "special circumstances" within the meaning of O 57 r 16(4) of the Rules of Court (2014 Rev Ed) ("ROC") which made it "impossible or impracticable" to apply to the General

Division of the High Court ("the General Division") for declaratory relief. These "special circumstances" were as follows: if the applicant had filed the declaration application in the General Division, and if the General Division were to hold that leave to appeal was in fact required, the applicant would have had to seek leave to appeal out of time *after* the declaration application had been dealt with, thereby protracting the appellate proceedings. The applicant thus submitted that it would have been impracticable to file the declaration application in the General Division.

11 We agree with the applicant that the Court of Appeal has the jurisdiction to grant the declaration sought. It is well established that the Court of Appeal, as a creature of statute, can only be seised of statutorily conferred jurisdiction (see *Re Nalpon Zero Geraldo Mario* [2013] 3 SLR 258 at [14]). In this case, our first statutory port of call was s 57 of the SCJA, which provides that "[w]here an application may be made either to the Court of Appeal or to another court, it must first be made to the other court". Since the General Division has the jurisdiction to hear applications for declaratory relief (under s 16(1) of the SCJA), the starting point is that such applications ought to be made to the General Division at first instance.

12 In our judgment, however, this starting point ought to be departed from in this case as there are "special circumstances" within the meaning of O 57 r 16(4) of the ROC which made it "impracticable" for the applicant to file the declaration application in the General Division. Order 57 r 16(4) of the ROC provides as follows:

> Whenever under these Rules an application may be made either to the Court below or to the Court of Appeal, it shall not be made in the first instance to the Court of Appeal, except where there are special circumstances which make it impossible or impracticable to apply to the Court below.

13 The "special circumstances" which made it "impracticable" for the applicant to make the declaration application in the General Division are precisely those identified by the applicant (see [10] above). If the applicant had filed the declaration application in the General Division, and if the court found that leave to appeal *was* required, the applicant would have had to apply for an extension of time to seek leave to appeal upon the disposal of the declaration application. Even if the General Division found that leave to appeal was *not* required, the applicant would similarly have had to seek an extension of time to file a notice of appeal after the declaration application had been dealt with. We do not see any sense in prolonging the appeal proceedings in this manner.

14 We add that the court expressly cautioned in *Xin Chang Shu* at [9] that prospective appellants should take all necessary steps to avoid ending up with insufficient time to seek leave to appeal, in the event that such leave is found to be required. In the circumstances that we have just contemplated, however, the applicant would have been left with insufficient time to seek leave to appeal or to file an appeal, contrary to the court's guidance in *Xin Chang Shu*. Any subsequent application for an extension of time would have unnecessarily delayed the appeal process.

15 The respondent took the position that only the General Division, in the exercise of its original jurisdiction, could grant the declaration sought. According to the respondent, the applicant should have *concurrently* filed a declaration application in the General Division and a leave application in the Court of Appeal, and the applicant could have sought to adjourn the hearing of the leave to appeal application pending the determination of the declaration application. With respect, the respondent's proposed approach is wholly impracticable. We consider that this approach would not only delay the appeal

proceedings but also give rise to the risk of inconsistent findings. Our reasons for this conclusion are as follows.

(a) First, there would have been a risk of inconsistent findings by the General Division and the Court of Appeal. Put simply, the court hearing the declaration application (*ie*, the General Division) and the court deciding whether to grant leave to appeal (*ie*, the Court of Appeal) might reach conflicting decisions on whether leave was required.

(b) Second, if the General Division found that leave to appeal was not required, the applicant would have proceeded to file its notice of appeal. However, if the Court of Appeal took the view at the appeal hearing that leave was in fact required and that the appeal was unmeritorious, the parties and the Court of Appeal would have wasted significant resources and time in preparing for a hearing on the merits of the appeal.

(c) Conversely, the General Division might have found that leave to appeal was required, in which case the applicant would have applied to the Court of Appeal for such leave. However, if the Court of Appeal was of the view that leave was not required, the leave to appeal application would be rendered otiose, and the parties would likewise have incurred unnecessary expenses and delay.

(d) In any event, the parties might have appealed against the General Division's decision on the declaration application. This would have further prolonged proceedings as the leave application and/or appeal could only have proceeded upon the conclusion of the appeal against the General Division's decision on the declaration application. Moreover,

the applicant/appellant would also have had to seek an extension of time to apply for leave to appeal or to file its appeal.

16 It is therefore clear to us that the Court of Appeal has the jurisdiction to grant the declaration sought by the applicant. It follows that, in appropriate cases, prospective appellants ought to adopt the applicant's approach in filing a *single* application comprising *both* the Declaration Prayer and the Leave Prayer ("composite application"). In this regard, we would remind the parties that the grant of a declaration is a discretionary relief. Thus, for the court to make a declaration, it is not enough for an applicant to put forward a proposition of law which the court accepts as correct. There must also be a genuine dispute which will be resolved by the issue of the declaration.

17 In our view, this was *not* an appropriate case for the applicant to file a composite application because it plainly did not require leave to appeal against the Judge's decision in SUM 5227. Composite applications should only be made if there is *genuine* uncertainty over whether leave to appeal is required; litigants should not rush to court for such rulings as a matter of course (see *Xin Chang Shu* at [9]). Since there was no such genuine uncertainty in this case, we decline to grant the declaration which, in the circumstances, had been unnecessarily sought.

Whether there was genuine uncertainty as to whether the applicant required leave to appeal

18 Even though the applicant primarily contended that it did not require leave to appeal, it nonetheless sought the Declaration Prayer on the basis that it was uncertain if such leave was required.

19 Pursuant to s 29A(1)(*c*) read with para 3(*l*) of the Fifth Schedule to the SCJA, leave of the appellate court is required to appeal against a decision of the General Division "where a Judge makes an order at the hearing of any interlocutory application". The word "order", as used in para 3(*l*) of the Fifth Schedule, refers to an interlocutory order that does not finally dispose of the parties' substantive rights (see *The "Nasco Gem"* [2014] 2 SLR 63 ("*Nasco Gem*") at [9(c)], [13] and [14(b)]). The applicant did not dispute that the Judge's dismissal of SUM 5227 was a final order but argued that it was unclear if SUM 5227 was an interlocutory application. In our judgment, such ambiguity was both non-existent and immaterial.

20 First, SUM 5227 was clearly *not* an interlocutory application. An interlocutory application is "an application which relates to a matter arising in the course of the proceedings and which does not concern the eventual outcome of those proceedings" (see *Xin Chang Shu* at [17(a)]). In HC/OS 1117/2020 ("OS 1117"), the respondent successfully obtained leave to enforce the Award as a judgment or order of the High Court against the applicant. ORC 6140 was thus issued in the respondent's favour. The applicant then filed SUM 5227, the sole and entire purpose of which was to set aside ORC 6140. In other words, the dismissal of SUM 5227 disposed of the parties' substantive rights in OS 1117; there was nothing further for the Judge to deal with after dismissing SUM 5227 (see *Maldives Airports Co Ltd and another v GMR Malé International Airport Pte Ltd* [2013] 2 SLR 449 at [15]). We add that, contrary to what the applicant suggested, nothing turned on the fact that SUM 5227 was a summons filed under OS 1117, rather than an originating summons in and of itself.

21 Second, para 3(*l*) of the Fifth Schedule to the SCJA specifies two *conjunctive* prerequisites that must be satisfied before leave to appeal is

required: there must be an *interlocutory order* made at the hearing of an *interlocutory application*. This position is confirmed by *Nasco Gem*, where the court stated (at [9(c)]) that an appeal to the Court of Appeal would generally be as of right if a *final* order was made at an interlocutory application. In this case, the applicant accepted that the Judge's dismissal of SUM 5227 was a final order (see [19] above). Hence, any uncertainty as to whether SUM 5227 was an interlocutory application was ultimately immaterial.

22 Aside from the fact that SUM 5227 was plainly not an interlocutory application, it was obvious that the two conjunctive prerequisites for requiring leave to appeal were not satisfied. The applicant was fully aware of this position at all times (and indeed propounded it) and therefore should never have sought the Declaration Prayer at all.

Whether the applicant should be granted an extension of time to file a notice of appeal

23 The applicant did not file its notice of appeal within time and, therefore, included in its application a prayer for an extension of seven days in which to file its notice of appeal should we find that leave to appeal was not required. Accordingly, the next issue that arises for our determination is whether the applicant ought to be granted such an extension.

24 The parties agreed that the relevant factors for determining if the court ought to grant an extension of time to file a notice of appeal are: (a) the length of delay; (b) the reasons for the delay; (c) the applicant's chances of success on appeal; and (d) any prejudice that the respondent would suffer if the extension of time is granted (see *Lee Hsien Loong v Singapore Democratic Party and others and another suit* [2008] 1 SLR(R) 757 ("*Lee Hsien Loong*") at [18]).

25 The applicant focused on the second and third factors. It attributed the delay to the purported uncertainty as to whether a composite application should be made to the General Division or to the Court of Appeal. It also contended that the respondent was partly responsible for the delay. According to the applicant, it could only file a notice of appeal following our decision on the Declaration Prayer and the Leave Prayer. However, even though the filing of this application had been accepted on 10 August 2021, the respondent "waited until 16 August 2021" to "falsely allege that [the applicant] had failed to serve the application papers", which delayed the timelines for this application and, hence, the applicant's filing of a notice of appeal. As for its chances of success on appeal, the applicant submitted that its appeal could not be said to be hopeless as its Chinese law expert had given evidence that the prohibition in cl 12 extended to the assignment of any rights under the Award.

26 On the other hand, the respondent emphasised that the applicant's chances of success on appeal were hopeless. The respondent highlighted that even though the applicant bore the burden of proof, the applicant did not adduce expert evidence to show that, under Chinese law, rights under an arbitral award were equivalent to rights under the underlying contract. Nor did the applicant adduce expert evidence to show that, as a matter of interpretation under Chinese law, cl 12 prohibited the assignment of rights under the Award.

27 We decline to grant the applicant the extension of time sought and explain our decision with reference to the four factors set out at [24] above. There is no prospect of the applicant succeeding on appeal because it had failed to adduce the requisite evidence to discharge its burden of proof. In our view, this is the strongest factor militating against the grant of an extension of time.

The applicant's chances of success on appeal

28 In an application for an extension of time to file a notice of appeal, the merits of the intended appeal are a neutral factor unless the appeal has no prospect of success (see *Lee Hsien Loong* at [19] and *Mah Kiat Seng v Attorney-General and others* [2020] 3 SLR 918 ("*Mah Kiat Seng*") at [24]). In our judgment, there is in fact no prospect of the applicant succeeding on appeal.

29 Foreign law is an issue of fact which must be proved, either by adducing raw sources of foreign law as evidence or by adducing the opinion of an expert in foreign law (see *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 at [54]). In SUM 5227, the applicant asserted that, in Chinese law, rights under an arbitral award were no different from rights under the underlying contract. On this basis, it argued that a prohibition on the assignment of contractual rights necessarily entailed a prohibition on the assignment of any rights arising from an arbitral award. However, the applicant did not adduce *any* expert evidence in this regard even though it conceded that it bore the burden of proof.

30 Before the Judge, the applicant relied primarily on Art 79(2) of the Contract Law of the People's Republic of China ("the Contract Law"), which prohibits the assignment of contractual rights where the contract contains an anti-assignment clause. Article 79(2) of the Contract Law, however, deals only with *contractual* rights. It in no way indicates that Chinese law regards rights arising from an arbitral award as contractual rights that would be caught by a clause such as cl 12. Indeed, the applicant was unable to explain why an arbitral award would be governed by the Contract Law rather than by the Arbitration Law of the People's Republic of China ("the Arbitration Law"). It appeared to us that there was considerably greater support for the respondent's position that

Chinese law regards rights under an arbitral award as separate and distinct from rights under the underlying contract. Implicit in Art 9 of the Arbitration Law, which stipulates that an arbitral award is final, is the separate and distinct nature of an award. Article 57 of the Arbitration Law also provides that an arbitral award takes legal effect upon its issuance – in other words, as a bag of rights unmolested by the rights in the underlying contract. We therefore agree with the Judge that the applicant had failed to even establish that the position in Chinese law was as it had argued.

31 Furthermore, even if an anti-assignment clause *could* extend to the assignment of any rights arising from an arbitral award, the applicant did not adduce any evidence on the Chinese principles of contractual interpretation to show that cl 12 ought to be construed as prohibiting the Assignment. We note that the Judge did not make any finding on the proper construction of cl 12 and instead dismissed SUM 5227 on the sole ground that the applicant had failed to establish the relevant position in Chinese law. Nonetheless, we are of the view that the applicant's failure to adduce any evidence in support of its interpretation of cl 12 is yet another reason why its appeal would be hopeless.

32 While the applicant did not have to show that it would succeed on appeal, its failure to adduce the requisite evidence in SUM 5227 to discharge its burden of proof was fatal. In the circumstances, the grant of an extension of time would be nothing more than an exercise in futility (see *Lee Hsien Loong* at [20]).

Length of delay and reasons for the delay

33 The Judge dismissed SUM 5227 on 7 July 2021. Under O 57 r 4(*b*) read with O 3 r 3 and O 1 r 4(1) of the ROC, the deadline for the applicant to file a notice of appeal was 10 August 2021. Yet even though the applicant filed

this application on 23 July 2021 (which filing was accepted on 10 August 2021), it inexplicably chose not to concurrently file a notice of appeal. The length of delay was thus approximately three and a half months. This was an undoubtedly substantial delay; in *AD v AE* [2004] 2 SLR(R) 505 ("*AD*"), we observed (at [11]) that the delay of 49 days in that case was "very substantial". The onus was therefore on the applicant to furnish good reasons for the delay (see *Lee Hsien Loong* at [22] and [53]).

34 The applicant's main justification for the delay was that it was unclear if this application ought to be heard by the General Division or by the Court of Appeal. We reject this explanation for two reasons.

35 First, it was clear that the applicant did not require leave to appeal against the Judge's decision and ought to have filed a notice of appeal to the Court of Appeal by 10 August 2021 (see *Aberdeen Asset Management Asia Ltd and another v Fraser & Neave Ltd and others* [2001] 3 SLR(R) 355 ("*Aberdeen Asset*") at [42]). The applicant had thus either misconstrued the authorities on what constituted an "interlocutory application" or wilfully chosen not to file a notice of appeal in time; neither reason justified granting an extension of time (see *Aberdeen Asset* at [41]–[42]). Even assuming that the delay was due to the applicant's genuine mistake instead of wilful neglect, that was hardly a sufficient reason for the delay, particularly since there was no real difficulty as to whether the applicant required leave to appeal (see *Aberdeen Asset* at [41] and *AD* at [11]).

36 Second, even if the applicant had fairly entertained doubts as to whether leave to appeal was required, it should have filed a notice of appeal and this application concurrently. *If* we had ruled that leave to appeal was required, the

applicant could have simply withdrawn the notice of appeal (see *Lee Hsien Loong* at [35]). In the context of appeals, the paramount consideration is the need for finality. If no appeal is filed within the prescribed time, the successful party (in this case, the respondent) should ordinarily be entitled to assume and act as if the judgment is final (see *Lee Hsien Loong* at [33]–[34]).

37 The applicant's claim that the respondent was partly responsible for the delay is likewise without merit. According to the applicant, the respondent had contributed to the delay by waiting until 16 August 2021 to allege that the applicant had failed to serve the papers for this application. However, the only result of the respondent's conduct was that it was directed to file its written submissions and reply affidavit by 25 August 2021 instead of 19 August 2021. Under O 57 r 4(*b*) of the ROC, the applicant ought to have filed and served a notice of appeal within one month from 7 July 2021, which was the date of the Judge's refusal of SUM 5227. The fact that the respondent filed its written submissions and reply affidavit four working days late was hence entirely irrelevant to the prescribed timelines for the applicant to file a notice of appeal.

38 For these reasons, we are unpersuaded by the applicant's explanations for the substantial delay. These considerations strongly weighed against the grant of an extension of time.

Prejudice to the respondent

39 The last factor that we have to consider is whether the respondent will suffer any prejudice if we grant the applicant an extension of time. The onus of demonstrating prejudice lies on the respondent (see *Mah Kiat Seng* at [37]). Any prejudice to the respondent must be tangibly proven and must be incapable of

compensation by an appropriate costs order (see *Lee Hsien Loong* at [25] and [27] and *Mah Kiat Seng* at [37]).

40 The respondent argued that it would suffer substantial prejudice if we granted the applicant the extension of time sought. This was because the respondent would be deprived of its rightful payment under the Award until the final determination of any appeals arising from SUM 5227 in its favour.

41 With respect, we find the respondent's argument to be untenable. First, the respondent did not explain why it would be prejudiced if it enforced the Award only upon the conclusion of any appeals arising from SUM 5227. The prejudice suffered by the respondent could not possibly be the very continuation of the applicant's intended appeal; otherwise, there would invariably be prejudice in every case where the court considered whether to grant an extension of time to file a notice of appeal (see *Lee Hsien Loong* at [25] and *Aberdeen Asset* at [44]). Second, and in any event, any prejudice occasioned by the delayed enforcement of the Award could be easily remedied by an appropriate order as to costs; the respondent did not contend otherwise.

42 The grant of an extension of time for the applicant to file a notice of appeal would therefore not have caused the respondent any real prejudice. Nonetheless, the applicant failed to provide sufficient reasons for the substantial delay and its intended appeal is hopeless. The overall circumstances of the case hence do not justify the grant of an extension of time.

Conclusion

43 For the reasons set out above, we dismiss the application with costs. We fix the costs of this application at $12,000, inclusive of disbursements. There will be the usual consequential orders.

Andrew Phang Boon Leong
Justice of the Court of Appeal

Judith Prakash
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

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