IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2016] SGCA 31

Civil Appeal No 183 of 2015
(Summons No 41 of 2016)

Between

CLEARLAB SG PTE LTD

… *Appellant*

And

(1) MA ZHI
(2) LI YUEXIN

… *Respondents*

GROUNDS OF DECISION

[Civil Procedure] — [Appeals] — [Leave]

Clearlab SG Pte Ltd
v
Ma Zhi and another

[2016] SGCA 31

Court of Appeal — Civil Appeal No 183 of 2015 (Summons No 41 of 2016)
Sundaresh Menon CJ, Chao Hick Tin JA and Judith Prakash J
19 April 2016

20 May 2016

Sundaresh Menon CJ (delivering the grounds of decision of the court):

Introduction

1 The question to be determined in this case was whether an appellant who commences appeals separately against the substantive merits of the decision of a High Court judge ("the Judge") and then against the costs order that is subsequently made in the same matter requires leave to pursue the latter appeal which concerns only the question of costs. The answer turned on the interpretation of s 34(2)(*b*) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) (the "SCJA") and in our judgment, it was an unequivocal "yes". We were satisfied that leave was required; and as the application for leave to appeal had been filed before us very late in an attempt to regularise the fact that the appeal had been brought without leave and as we were satisfied that there was no justification for the delay, we refused leave to appeal. We

therefore dismissed the appeal. We now give the detailed reasons for our decision.

Background

2 In 2011, the appellant commenced Suit No 691 of 2011 ("the Suit") against nine defendants for breach of confidence, amongst other claims. It was contended that the defendants had used the appellant's confidential information wrongfully to set up a competing business, namely, Aquilus Lens International Pte Ltd, the fifth defendant in the Suit. On 3 November 2014, the Judge after a 49-day trial delivered his written judgment (*Clearlab SG Pte Ltd v Ting Chong Chai and others* [2015] 1 SLR 163 ("the Judgment")) allowing the claims in part, but dismissing the claims against the present respondents, who were the seventh and eighth defendants in the Suit. The Judge did not make his costs order on the same occasion, but stated in the Judgment (at [347]) that he would hear counsel on the issue of costs at a later date.

3 One month after the Judgment was delivered, the appellant appealed against part of the Judgment in Civil Appeal No 195 of 2014 ("the Substantive Appeal"). Prior to the hearing of the Substantive Appeal in the Court of Appeal, the Judge heard the parties on their submissions on costs in respect of the Suit and made various costs orders including an award of costs in favour of the respondents in the sum of $270,000 plus reasonable disbursements. The Judge allowed further arguments to be made at a subsequent hearing on 7 September 2015 in respect of the costs awarded to the respondents, but declined to alter his original costs order ("the Costs Order"). The appellant then filed a Notice of Appeal on 22 September 2015 against the whole of the Costs Order which led to the present appeal ("the Costs Appeal").

4 After both appeals had been filed, the parties appeared before an Assistant Registrar of the Court of Appeal ("CA AR") at a case management conference on 28 October 2015 in the course of which the CA AR referred counsel for the appellant to s 34 of the SCJA and in particular to the requirement for leave to appeal. The Supreme Court Registry also sent a letter to both counsel two days later to ask, amongst other things whether (a) the appellant would be applying for leave to appeal; and (b) the parties had any objections to the Substantive Appeal and the Costs Appeal being fixed for hearing together. Counsel for the respondents replied stating that they objected to the appeals being heard together. Their reason was that if the appellant was to succeed in the Substantive Appeal, this would render the Costs Appeal unnecessary since in that event, costs would be awarded to the appellant and a fresh taxation hearing would be required in any case.

5 The appellant, in turn, replied to the Supreme Court Registry by way of letter dated 11 November 2015, stating the following:

> We write to clarify that [the Substantive Appeal] … and [the Costs Appeal] … need not be fixed together for hearing as we agree with the counsel for the Respondents that it would be more expedient for [the Substantive Appeal] to be heard prior to [the Costs Appeal]. Accordingly, the present arrangement should remain.
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> … the Appellant is of the view that *leave to appeal the costs order is not required* because the appellant had already filed an appeal previously which touches on the merits of the case as between the Appellant and the Respondents. … Nevertheless, having regard to the views expressed by the learned Assistant Registrar at the same conference, in order not to unnecessarily burden the Court of Appeal with this procedural issue at a later stage, the Appellant *intends to shortly make an application for a declaration that leave to appeal in CA 195/2015 is not necessary* and in the alternative, if leave to appeal is necessary, for leave to appeal out of time.
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> [emphasis added]

6 In short, the appellant took the affirmative position that it did not wish the appeals to be consolidated. It also took the position that leave was not required though it foreshadowed an intention to "shortly" apply for a declaration to this effect or alternatively for leave. It did not do so until more than *five months* later (Summons No 41 of 2016), and just five days before the date for the hearing of the Costs Appeal. In the meantime, in the light of the objections raised to the consolidation of the appeals by both parties, the appeals were fixed for hearing separately. The appellant appeared before the Court of Appeal on 4 February 2016 solely in respect of the Substantive Appeal. That appeal was dismissed and the costs of the appeal were fixed in the sum of $50,000 inclusive of disbursements and awarded to the respondents.

The Costs Appeal and the summons for leave to appeal

7 We heard the Costs Appeal on 19 April 2016. The outcome of the Costs Appeal turned on the application of s 34(2)(*b*) of the SCJA which reads:

> (2) Except 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:
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> …
>
> (*b*) where the only issue in the appeal relates to costs or fees for hearing dates; …

8 The appellant submitted that a purposive interpretation of s 34(2)(*b*) of the SCJA should be adopted. It contended that this would lead the court to conclude that no leave was required because the appellant had *also* lodged an appeal against the substantive merits of the lower court's decision, albeit separately, and that therefore it could not be said in substance that the "only" issue between the parties was one of costs. Taking the two appeals cumulatively, the appellant submitted, would demonstrate that there was no

requirement for leave to pursue the Costs Appeal. The appellant seemed to concede that a literal reading of s 34(2)(*b*) of the SCJA would result in the conclusion that leave to appeal is required. The appellant argued, however, that adopting a literal reading of the provision would result in arbitrariness because parties appealing a decision on the merits and a costs order separately would be unjustifiably disadvantaged in comparison to parties who were appealing a decision that included an order on costs. Lastly, the appellant relied on Lord Denning MR's observations in the decision of the English Court of Appeal in *Wheeler v Somerfield and others* [1966] 2 QB 94 ("*Wheeler*") to buttress its case. In particular, the appellant relied on that part of Lord Denning's judgment in which he said (at 106):

> ... if [the appellant] makes a complaint, not only about the costs but also about matters, then he can appeal both on those other matters and also on the costs; and the court has full jurisdiction to deal with them. ...

9 In our judgment, *Wheeler* is not relevant to the present appeal because it concerned a different situation and the extract from the judgment that was relied on by the appellant had been taken out of context. The appellant in *Wheeler* had brought an action in the lower court claiming damages for libel against the respondents. He was granted leave to amend his statement of claim before the commencement of the trial pursuant to which he listed various other articles. At trial, the judge rejected the amendment made to the statement of claim and also rejected the appellant's request for a further amendment to be made, resulting in a withdrawal from the jury of the evidence relating to both amendments. However, the appellant was nonetheless successful in the action. The trial judge awarded damages to the appellant and half his costs of the action. But this initial costs order was subsequently amended to an order giving the appellant his general costs of the action save for the costs attributable to the statement of claim. The judge ordered that the latter costs be

paid by the appellant to the respondents, which as it turned out, amounted to a sum far in excess of the costs the appellant would receive.

10 The appellant appealed against the trial judge's order to withdraw the amendment and the proposed amendment from the jury (which was an issue concerning the substantive merits of the case), *and* the costs order to pay the respondents' costs relating to the amendment of the statement of claim. The argument raised by the respondents on appeal (and which Lord Denning was addressing in his judgment) was that if the appellant failed on the substantive points, the only thing left would be an appeal as to costs only, and this would be prohibited without the leave of the trial judge (leave being required in similar circumstances to s 34(2)(*b*) of the SCJA).

11 It will immediately be evident that unlike the present case, in *Wheeler,* both matters were being pursued within a *single appeal* and the hearing concerned *both* issues. Herein lies the critical distinction from the present case. Turning to the case before us, it is clear that a literal reading of the provision would lead to the conclusion that leave to appeal was required in this case. The putative appeal before us concerned only one issue, and that was the quantum of costs fixed by the Judge. In such a scenario, on the plain words of the provision, leave to appeal would be required. This of course, is a separate question from whether leave should be given.

12 However, we were also satisfied that the purposive interpretation of s 34(2)(*b)* of the SCJA leads to the same result. In *Kosui Singapore Pte Ltd v Thangavelu* [2016] 2 SLR 105 ("*Thangavelu*") (at [33]), we held that Parliament's intention in making the amendments to the SCJA to regulate or restrict the right to appeal to the Court of Appeal was to enable the Court's efficient working by screening certain categories of appeals. Even though any

judgment or order of the High Court would ordinarily be appealable as of right, this right is subject to any contrary provisions in the SCJA (*Thangavelu* at [25]). In our judgment, to conserve the judicial resources of our apex court, Parliament has enacted a subject-matter restriction by way of s 34(2)(*b*) so that appeals solely on questions of costs or hearing fees can only be made with leave. In circumstances like the present, where the putative appeal relates *only* to the question of costs, and is pursued regardless of the outcome of the substantive merits of the case, the appeal would in every sense be a standalone appeal and the quintessential type of case which the Court of Appeal should not be troubled with unless there is a reason justifying the grant of leave.

13 In the course of the arguments, we put to Mr Lok Vi Ming, SC, counsel for the appellant, the hypothetical situation where no order for costs was made by the court below until after the substantive appeal had been disposed of. In that setting, it would be clear beyond doubt that any appeal against such a costs order would have required leave. In the final analysis, that is not at all different from the present situation. Mr Lok suggested that the bifurcation of the judge's decision on the merits and on costs was purely fortuitous. That might well be so. But it does not change the analysis as long as one has regard to the real purpose of the rule which is to conserve judicial resources by not imposing undue burdens on the apex court in our judicial system. Had the issue of costs been dealt with as a part of the same appeal dealing with the substantive issues, there would have been little, if any, concern with the wastage of scarce judicial resources because the court in dealing with the substantive issues would have already become familiar with the facts and it would not have required much more for it to then also deal with any question as to costs. But once the appeals are separated, the whole

matter will have to be got up again. This is the mischief that the leave requirement seeks to avoid. There is nothing arbitrary in this.

14 As to whether it would have made a difference had the two appeals been consolidated and the application for leave been filed on time, in our judgment, this might well have led to a different outcome as a matter of practical application rather than of principle. We consider that in such a situation, leave would still have been required simply because the legislation is structured in such a way that a subject-matter restriction is imposed in appeals lodged solely on questions of costs; but if an application had been made for leave to appeal the question of costs on the basis that the appeals on costs and on the substantive merits would then be consolidated, then as a practical matter one would expect that leave would likely have been given. This follows because in substance, there would not have been a real issue of wasting scarce judicial resources. In essence, this would have been akin to a situation where the appeal was not one of costs only but extended also to the substantive merits and the Court of Appeal would have been in a position to deal with both issues readily without having to expend much in the way of additional resources. We reiterate that we make these observations not as a pronouncement of a rule of law but as a matter of common sense because in our judgment that is how the rules regulating the processes of the court should generally be approached.

15 Returning to *Wheeler*, the court in that case would already have been fully apprised of the facts of the case when it turned to consider the issue of costs given that it had been called on to review both aspects of the appeal. There was thus no cause for concern as to the court's resources and time being wasted unnecessarily. The observations of Lord Denning do not suggest that when one fails on an appeal on the substantive merits of a case, one can bring

a *separate* appeal merely on the issue of costs ordered at a subsequent hearing, as that situation simply did not arise on the facts of the *Wheeler* case. This is also made amply clear in the judgment of Harman LJ at 107:

> … It cannot be right to say that the question of jurisdiction to deal with the costs *depends* on whether the appellant succeeds on some other issue in the action. Suppose he appeals on six points and he fails on five of them and there remains the sixth point, which is an appeal against the order as to costs. If the points he has taken are *genuine* points, he can at the end appeal on the costs issue although his opponent has knocked out his other points one by one. If, of course, his appeal is as to the costs only, or if the court should be satisfied that that is all he really intended to appeal about and has put in the other issues as a kind of "smoke screen," it may be that the court will refuse to entertain the real object of the appeal, which is in truth against the order as to costs only. If there is a *genuine appeal of substance*, the fact that it fails does not make it impossible for the court to go on and deal with the costs …
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> [emphasis added]

16 The issue that concerned the court in *Wheeler* was whether the appeal on the substantive issues raised genuine issues or had merely been put forward as a sort of "smoke screen" to smuggle into the appeal, issues on costs without getting leave. If the substantive issues were genuine, it would not be right to then say that the only issue on appeal was one of "costs" even if the appellant did not succeed on the substantive issues. That was the only point in *Wheeler* and it is a proposition we readily accept; but it has no bearing on the present appeal.

17 We also note that the appellant in this case did not suffer any undue hardship or prejudice because there were several options available to it prior to the hearing, all of which it chose not to pursue. In fact, these alternative options would have allowed the issue of costs to be dealt with in a manner that

would not have unnecessarily burdened the Court of Appeal or wasted its time and resources by having to hold a *separate* hearing.

18 For example, the appellant could have applied for an extension of time to file the Substantive Appeal until the question of costs was resolved by the High Court judge, which would have allowed both issues to be ventilated concurrently in a single appeal. Alternatively, the appellant could have sought leave to appeal the costs order and then for both appeals to be consolidated given the overlapping facts. The latter option to apply for leave and then to have both appeals consolidated was not only open to the appellant, it was in fact *highlighted* to the appellant when the Supreme Court Registry wrote to the parties on 30 October 2015. The appellant, however, declined it.

19 Given that leave to appeal was required, we turned to consider whether leave should now be granted for the Costs Appeal to proceed. As noted above at [6], the application for leave to appeal was filed more than five months after the appellant had indicated to the Supreme Court Registry that it would do so, and almost seven months after the Notice of Appeal in respect of the present appeal had been filed. No explanation was given for the undue delay and we therefore dismissed the application for leave to appeal. We make a further point: the Appellant should first have applied for leave before the High Court. Applications for leave to appeal which are brought to the Court of Appeal in the first instance, and are in substance attempts to regularise appeals that have been brought without leave will generally not be received sympathetically by us.

Conclusion

20 We therefore dismissed the appeal and the summons for leave to appeal, and upheld the Judge's Costs Order in favour of the respondents in the sum of $270,000 excluding disbursements. We ordered that costs of the present appeal and the present summonses be fixed at $20,000 inclusive of disbursements. The usual consequential orders were to apply.

Sundaresh Menon Chief Justice	Chao Hick Tin Judge of Appeal	Judith Prakash Judge

Lok Vi Ming SC, Joseph Lee and Tang Jiasheng (Rodyk & Davidson LLP) for the appellant;
Jason Chan, Melvin Pang and Nicholas Ong (Amica Law LLC) for the respondents.