Marplan Private Limited *v* Attorney-General
[2013] SGHC 80

Case Number : Originating Summons No 166 of 2013

Decision Date : 16 April 2013

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Glen Koh (Glen Koh) for the applicant; Khoo Boo Jin and Linda Esther Foo Hui Ling (Attorney-General's Chambers) for the non-party.

Parties : Marplan Private Limited — Attorney-General

Administrative law – judicial review – ambit

Administrative law – remedies – quashing order

16 April 2013

Andrew Ang J:

1 This was an *ex parte* application for leave pursuant to O 53 r 1 of the Rules of Court (Cap 322, R5, 2006 Rev Ed) ("the Rules") for judicial review to quash Lee Seiu Kin J's decision in District Court Appeal No 24 of 2012 ("the Appeal") which had commenced as Magistrate's Court Suit No 8131 of 2010 ("the Suit").

2 I dismissed the application and now give my reasons.

Background facts

3 The Suit was a claim on a supply and installation contract for gymnastics products supplied to Raffles Gymnastics Academy (S) Pte Ltd ("the Respondent"). Marplan Private Limited ("the Applicant"), was the plaintiff supplier at trial. One issue in dispute was the contractual purchase price of the gymnastics products. There were two sets of February invoices, reflecting different prices. The Applicant claimed that there had been a manufacturer's price increase reflected in the set of February invoices which indicated a higher contractual price ("the Higher February Invoices"). The Respondent claimed that there had been no such price increase, but rather, that a 30% discount had been agreed and applied to the contract price, and reflected in the second set of February invoices.

4 The district judge held that the Higher February Invoices evidenced the parties' agreement on the purchase price. The district judge ordered, *inter alia*, that the Respondent pay the Applicant the balance purchase price of $45,656.85 in respect of the main claim.

5 The Respondent appealed and Lee J allowed the appeal on the basis that the Applicant had failed to discharge his burden of proof. In his decision dated 23 November 2012, Lee J found that evidence showing a manufacturer's price increase would have been in the Applicant's control, but the Applicant had chosen not to disclose such evidence. Lee J drew an adverse inference from the Applicant's non-disclosure of documents evidencing the price increase and found that the Applicant had not discharged its burden of proof in the Suit. Further, he found that the district judge's finding had been based on equivocal evidence. Lee J then reduced the judgment sum by $26,366.38.

6 On 14 January 2013, the Applicant applied to Lee J for leave to appeal to the Court of Appeal, but was refused. In its skeletal arguments for leave, the Applicant submitted:

(a) That the Respondents had in their possession, custody or power, evidence relevant to the case which they had withheld or suppressed from both the appellate and trial courts;

(b) Lee J erred when he found that the district judge had based his decision on equivocal evidence, as the district judge had given six reasons why he made the finding that there had been a manufacturer's price increase; and

(c) An agreement for a discount, if made, would have been in contravention of s 5(*a*) of the Prevention of Corruption Act and illegal, or would have been void for uncertainty or lack of consideration.

7 On 21 January 2013, the Applicant took out Summons No 430 of 2013, seeking leave to appeal to the Court of Appeal against Lee J's decision allowing the Appeal *and* his decision refusing leave to appeal. After it was pointed out to the Applicant by Sr Asst Registrar Cornie Ng, during a pre-trial conference, that Lee J's decision refusing leave to appeal was final, it filed Originating Summons No 166 of 2013 ("the Application") to quash Lee J's decision. The Application was filed and served on the Attorney-General pursuant to O 53 r 1(3) of the Rules.

The judicial review claim

8 The Application asserts two grounds for judicial review:

(a) Lee J erred in drawing an adverse inference as the Applicant's only reason for failing to adduce evidence of the price increase was because it thought it was unnecessary and the trial judge had dismissed the Respondent's specific discovery request for those documents. Accordingly, Lee J's inference of fact that there was no price increase was unreasonable; and

(b) Lee J erred when he found that the district judge had based his decision on equivocal evidence as the evidence was only equivocal because the Respondents had suppressed evidence. This second ground is the same as [6(a)] and [6(b)] above, which were grounds of appeal canvassed before Lee J during the application for leave to appeal.

9 The Applicant also argued that it had exhausted all other available remedies as leave to appeal had been refused.

My decision

10 The test for granting leave to apply for a quashing order was summarised by Philip Pillai J in *Lim Mey Lee Susan v Singapore Medical Council* [2011] SGHC 131 (at [3]). Leave is not granted unless the court is satisfied that:

(a) The matter complained of is susceptible to judicial review;

(b) The Applicant has sufficient interest in the matter; and

(c) The material before the court discloses an arguable or *prima facie* case of reasonable suspicion in favour of granting the public law remedies sought by the applicant.

11 There was no question that the Applicant had a sufficient interest in the matter and it remained for me to assess whether the matter complained of was susceptible to judicial review and whether the material presented disclosed an arguable case of reasonable suspicion in favour of judicial review.

Whether the matter is susceptible to judicial review

Susceptibility to judicial review of the decision-making body

12 I found that the decision of a High Court judge acting in that capacity is not reviewable.

13 The function of a Quashing Order is explained in *Singapore Civil Procedure*, vol 1 (Sweet & Maxwell, 2013) at para 53/1/3:

> A Quashing Order is mainly used to control unlawful exercises of power *by inferior courts, tribunals* and other public bodies by quashing decisions which are reached in excess or abuse of power. [emphasis added]

14 A broad overview of case law shows that where there is a serious or grave breach of natural justice occurring in a Magistrate's (or inferior) court and which results in a criminal conviction, both a right to appeal *and* in serious cases, a right of judicial review may be granted. There is, however, no record of judicial review ever being granted for a superior court.

15 The notion that the supervisory jurisdiction of the court only applies to inferior tribunals is also established in the common law. Lord Diplock's dicta in *Re Racal Communications Ltd* [1981] AC 374 (at 384) which was quoted with approval by the Court of Appeal in *Wong Hong Toy v Public Prosecutor* [1987] SLR(R) 213 (at [51]), sums up the common law position:

> ... The High Court is not a court of limited jurisdiction and its constitutional role includes the interpretation of written laws. ... There is simply no room for error going to [the Judge's] jurisdiction, nor, as is conceded by counsel for the respondent, is there any room for judicial review. *Judicial review is available as a remedy for mistakes of law made by* ***inferior courts and tribunals only.*** *Mistakes of law made by judges of the High Court acting in their capacity as such can be corrected only by means of appeal to an appellate court; and if, as in the instant case, the statute provides that the judge's decision shall not be appealable, they cannot be corrected at all*. [emphasis added in italics and bold italics]

16 I should add that even with inferior courts, judicial review is reserved only for the most extreme situations where it would be "ludicrous" to deny parties the remedy of review, for example, where a man was convicted without the court having heard his evidence: see *The King v Wandsworth Justices, ex parte Read* [1942] 1 KB 281. In Singapore, almost all such cases would fall within the court's powers of criminal revision in the Criminal Procedure Code (Cap 68, 2012 Rev Ed). Moreover, *none* of the considerations set out at [14] above apply to the present case.

17 Even if the common law position were in doubt (which it is not), s 27(1) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") makes clear that the supervisory and revisionary jurisdiction of the High Court is only available over subordinate courts. It reads as follows:

> **27.**—(1) In addition to the powers conferred on the High Court by this Act or any other written law, the High Court shall have general supervisory and revisionary jurisdiction over all *subordinate courts*.

[emphasis added]

18 During the hearing before me, counsel for the Applicant, Mr Glen Koh ("Mr Koh"), attempted to argue that s 27(4) of the SCJA further extended this jurisdiction to cases involving appeals from the Subordinate Courts to the High Court. Section 27 reads as follows:

> **27.**—(1) In addition to the powers conferred on the High Court by this Act or any other written law, the High Court shall have general supervisory and revisionary jurisdiction over all subordinate courts.
>
> (2) The High Court may in particular, but without prejudice to the generality of subsection (1), if it appears desirable in the interests of justice, either of its own motion or at the instance of any party or person interested, at any stage in any matter or proceeding, whether civil or criminal, in any subordinate court, call for the record thereof, and may remove the matter or proceeding into the High Court or may give to the subordinate court such directions as to the further conduct of the matter or proceeding as justice may require.
>
> (3) Upon the High Court calling for any record under subsection (2), all proceedings in the subordinate court in the matter or proceeding in question shall be stayed pending further order of the High Court.
>
> (4) The High Court shall, when exercising (or deciding whether to exercise) its supervisory and revisionary jurisdiction under subsection (1) or powers under subsection (2) in relation to any matter which concerns a case where the High Court has heard and determined an appeal from a subordinate court, have regard to whether that matter was, or could reasonably have been, raised in that appeal.

19 Mr Koh's argument was wholly wrong-headed. Sub-section (1) clearly states that the High Court's general supervisory and revisionary jurisdiction shall be over *subordinate courts*. Sub-section (2) gives the High Court the power to call for the record of any matter in a *subordinate court* and/or transfer cases in the *subordinate court* to the High Court. Both of these sub-sections deal *specifically with the subordinate courts*. Section 27(4) cannot be read disjunctively from ss 27(1) and 27(2). The need to have regard to whether a matter was, or could reasonably have been, raised in an appeal before the High Court *only applies* where a High Court is exercising its supervisory and revisionary jurisdiction over a subordinate court. All s 27(4) does is to introduce a further set of considerations to judicial review of *subordinate court decisions* which had been determined on appeal to the High Court.

20 Section 27(4) is in line with the common law understanding of the interaction between an appeal and a judicial review. The position in relation to judicial review where a statutory right of appeal exists is succinctly summarised in *De Smith's Judicial Review* (Sweet & Maxwell, 6th Ed, 2007) at para 16-018:

> ... Judicial review is essentially a mechanism to be used where there is no statutory right of appeal. In almost all cases the Administrative Court will regard a statutory appeal, whether to a court or a tribunal, as a proper substitute for judicial review, though exceptional circumstances may dictate otherwise.

21 An applicant is expected to raise both a challenge of legality *and* merits on appeal given that if:

> ... the error in law or procedural unfairness was cured in the appeal, then the result of the appeal would render the issue as to the impact of the error of law or procedural unfairness in the first

trial academic ...

see *Regina v Peterborough Magistrates' Court, ex parte Dowler* [1997] QB 911 (at 923). Section 27(4) helps to strain out cases where an applicant is merely seeking to re-litigate an issue which can, and ought, to have been raised on appeal to a superior court. It follows the traditional view that the appropriate place for reviewing a decision of a superior court is by way of appeal and not judicial review. It is *not* authority for the proposition that a superior court is susceptible to judicial review.

22 The High Court is part of the Supreme Court, the superior court of record; see s 3, SCJA. It exercises appellate civil and criminal jurisdiction. As a superior court, its decisions are not susceptible to judicial review. Sinnathuray J opined in *Abdul Wahab bin Sulaiman v Commandant, Tanglin Detention Barracks* [1985–1986] SLR(R) 7 (at [14]):

> ... Where courts are expressly declared by statute to be superior courts, it is *beyond doubt* that the High Court has no supervisory jurisdiction over them. *Their decisions cannot be subject to review by the High Court*. ... [emphasis added]

23 Section 9 of the SCJA states:

> **Constitution of High Court**
>
> **9**. The High Court shall consist of —
>
> (*a*) the Chief Justice; and
>
> (*b*) the Judges of the High Court.

24 Section 2 of the SCJA defines a "Judge of Appeal" as including "the Chief Justice and a Judge of the High Court sitting as a judge of the Court of Appeal under section 29(3)". While the Court of Appeal has a different appellate jurisdiction, there appears to be no distinction in the SCJA between the High Court and the Court of Appeal in terms of its status as a superior court. The High Court and the Court of Appeal are treated as a unitary Supreme (and superior) court where Judges of the High Court may sit as a judge of the Court of Appeal under s 29(3) of the SCJA, and Judges of Appeal may sit in the High Court under s 10(3) of the SCJA.

25 Accepting the Applicant's proposition that a right of judicial review lies against a High Court decision (whether by way of review by another High Court Judge or by the Court of Appeal) would be tantamount to saying that the superior court of Singapore can exercise supervisory jurisdiction over itself. This makes nonsense of the word "supervisory". In *Bright Impex v Public Prosecutor* [1998] 2 SLR(R) 961 ("*Bright Impex*"), it had been ordered by the district judge that the goods the petitioner had acquired be forfeited under s 130(1)(*c*) of the Customs Act (Cap 70, 1995 Rev Ed). The petitioner's appeal was dismissed by the High Court. He then applied to the High Court to exercise its powers of revision under s 266 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) to reverse the forfeiture order. Yong Pung How CJ dismissed the application and held (at [13] and [14]):

> 13 ... The general supervisory and revisionary jurisdiction of the High Court as prescribed in s 27(1) of the Supreme Court of Judicature Act [Cap 322] is… *limited to jurisdiction over the Subordinate Courts*. ...
>
> 14 … What the petitioner was seeking in effect was for the High Court to exercise its power of revision *over a decision made by* ***its own court*** . From the definition of 'subordinate courts' in the

> Supreme Court of Judicature Act and the wording of s 266(1) of the CPC, *it is clear that the High Court does not have the power to exercise its powers of criminal revision over a decision of the Subordinate Court which had already been upheld on appeal by the High Court*. The petition for revision could have been dismissed on this basis alone.
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> [emphasis added in italics and bold italics]

26 Quoting *Bright Impex* (at [14]) with approval in *Tee Kok Boon v Public Prosecutor* [2006] 4 SLR(R) 398 (also in the context of criminal revision), Tay Yong Kwang J further elaborated (at [15]):

> I agree entirely with the above statement which I apply to the factual situation in the present application. Each High Court has co-ordinate jurisdiction and one High Court cannot profess to exercise revisionary or supervisory jurisdiction over another. Even the Court of Appeal does not have powers of judicial review over the High Court. ...

27 Tay J had applied the same principle in the context of setting aside summary judgment in *Poh Soon Kiat v Hotel Ramada of Nevada (trading as Tropicana Resort & Casino)* [1999] 2 SLR(R) 756 ("*Poh Soon Kiat*"). Tay J reasoned that if there were conflicting positions taken by the High Court in different cases touching on the same issue, parties would be able to use the guise of setting aside to resurrect cases and persuade a court of coordinate jurisdiction to side with one High Court's position over another. Tay J found that this would go against the need for orderly administration of justice and finality. He concluded (at [30]):

> What I have said applies with even greater force to the contention that the learned judicial commissioner might have made the wrong finding of fact due to the paucity of evidence in the O 14 proceedings. No High Court sits in an appellate, revisionary or supervisory jurisdiction over another High Court.

28 What the Applicant sought to do in the present application is similar to what the applicant in *Poh Soon Kiat* sought, *viz*, to challenge the evidence on which the High Court Judge based his decision and to introduce further evidence which had not been provided, although it could and should have been, at trial. Tay J's comments in *Poh Soon Kiat* (at [25]) on the implication of allowing such applications are apposite in this context:

> ... Disgruntled unsuccessful litigants who have lost their appeals or lost their right to appeal (or in decisions which are final and cannot be appealed against) may be encouraged to lodge back-door appeals under the guise of fresh proceedings to set aside regularly-obtained judgments on the ground of illegality by pleading some substantive provision of law which could and should have been raised as an issue in the earlier proceedings. ...

29 Given that the Supreme Court cannot exercise supervisory and revisionary jurisdiction over itself, nor a High Court review a decision of a court of coordinate jurisdiction, I found that there was no scope to judicially review Lee J's decision. The Application could have been dismissed on this basis alone.

Susceptibility to review of the subject matter

30 I further found that the substance of the Application was wholly unsuited for judicial review.

31 The *raison d'etre* of judicial review is different from that of an appeal. While an appeal relates to the merits of the decision, judicial review is an attack on the tribunal's *manner* of decision-making

(including whether there has been an abuse of discretion or breach of natural justice, irrationality, Wednesbury unreasonableness or bad faith). Put another way, an appeal asks whether a decision is correct while judicial review asks whether a decision is invalid. V K Rajah J opined in *Wong Keng Leong Rayney v Law Society of Singapore* [2006] 4 SLR(R) 934 ("*Rayney Wong*") (at [79]):

> … there is a clear distinction between the powers that a superior court exercises in judicial reviews and appeals. While judicial reviews and appeals are two avenues that an unsatisfied party in an inferior tribunal may have recourse to, they are separate and distinct in so far as they are designed to address two different *types* of wrongs that the tribunal may commit. Judicial review is almost invariably limited to examining, *inter alia*, whether the tribunal has exceeded its jurisdiction, whether there has been an abuse of discretion or a failure of natural justice, and whether the tribunal has acted irrationally, unreasonably or in bad faith. In other words, it hinges on the legality of the decision. An appeal, on the other hand has a wider scope: an appellate court may in limited circumstances evaluate the substantive merits of the decision arrived at by the tribunal ... the reviewing court cannot substitute its decision for that of the administrative body under review. [emphasis in original]

32 In other words, if the Application does not concern the manner in which the decision was made or suggest that the decision was made *ultra vires* the tribunal's powers, then it is not susceptible to judicial review.

33 The Application seeks an order "that the [district judge's] judgment in [the Suit] be affirmed in whole". This would require the court to substitute the district judge's decision for that of the appellate courts. This belongs in the domain of an appeal and not of judicial review.

34 Moreover, the grounds which are raised have to do with the substance of Lee J's decision. The Applicant's first ground for judicial review was to question the substantive conclusions which Lee J drew from the evidence before him. The Applicant's second ground for judicial review repeated the grounds of appeal raised before Lee J in the application for leave. This claim was essentially that evidence had been suppressed. This was not a complaint about Lee J's decision or even about his manner of decision-making, but was a complaint about the Respondent's conduct.

35 The Applicant cannot use judicial review to impugn the conduct of the Respondent. The Applicant was seeking to challenge the *findings* that were made by Lee J, implicitly inviting the reviewing court to perform the task of making fresh findings. In other words, the Applicant was seeking to impeach Lee J's decision because it was incorrect, *not* because it was invalid. Judicial review is a wholly inappropriate vehicle for this effort. As V K Rajah J explained in *Rayney Wong* (at [79]), "The reviewing court may declare that the task has been performed badly in law but it cannot take the further step of actually performing the task itself."

36 Accordingly, I found that the substance of the Application was not susceptible to judicial review. For this reason as well, leave should not be granted to allow the Application to proceed.

Whether there was an arguable case of reasonable suspicion

37 In view of the foregoing, there was no need to delve into the question whether there was an arguable or *prima facie* case of reasonable suspicion in favour of granting the remedy sought. Suffice it to say that, in any event, I also found that there was no arguable case of reasonable suspicion in relation to the *manner* of Lee J's decision-making.

Abuse of process

38 I should add that I found the Application to be egregious and an abuse of process. The Applicant had two and a half bites of the proverbial cherry. It brought its suit before the district judge and was heard fully on the merits. The chance to appeal was open to both the Applicant and the Respondent and heard before the High Court. The Applicant then applied to Lee J and made submissions on why it should be allowed to appeal. Its skeletal arguments, including supporting documents for the hearing on leave to appeal, ran into 185 pages. It was given the opportunity to canvass arguments before leave was refused. This was wholly unlike a situation where there was no opportunity to appeal and where judicial review may be the *only means* of supervising an inferior court or tribunal. The fact that the Applicant lost for the first time before the High Court did not alter the fact that it had had numerous opportunities to make its case known *and* to produce evidence which could properly dispose of the case.

39 Under s 34(2)(*a*) read with s 34(2B) of the SCJA, a refusal to give leave to appeal is final. This was a streamlined process intended to strain out hopeless appeals. The concern that this streamlining process was unduly restrictive had already been raised and addressed during the Parliamentary debates for the amendment of the SCJA in 2010. *The Singapore Parliamentary Debates, Official Reports* (18 October 2010) vol 87 at cols 1388–1389 on the Second Reading of the Supreme Court of Judicature (Amendment) Bill, states:

> The next concern that Ms Lim raises is the fact that now the High Court Judge becomes the final gatekeeper for all leave applications. First of all, I think it is important to put this amendment in its proper perspective and to bear in mind that the requirement to apply for leave to appeal usually applies only to the second tier of appeals, that is, the Court of Appeal. As I mentioned earlier, the majority of interlocutory applications are fixed before an Assistant Registrar and, as Mr Hri Kumar has reminded us, would enjoy one tier of appeal to the High Court Judge. Similarly, in a substantive case, cases which are commenced in the High Court can be appealed to the Court of Appeal as of right. Those that require leave to appeal to the Court of Appeal are those which commenced in the Subordinate Courts and, for these cases, they would already have enjoyed a one-tier of appeal to the High Court either as of right, if the amount is more than $50,000; or with leave of, first, the court hearing a case, say, of $40,000, whether it is Magistrates' or District Court; and if leave is turned down, a second bite of the cherry – asking the High Court for leave. I would suggest that – even though Ms Lim does speak strongly about it – the impact of the amendment may not be such a big one.

40 Parliament's intention is very clear: the High Court Judge, as the first tier of appeal, is to be the final gatekeeper for leave applications of a particular type. The Applicant's case falls within this band of cases, and Lee J's decision in the Appeal was final.

41 The Application was, in essence, a "back-door appeal". I have already noted Tay J's comments in *Poh Soon Kiat* on the need for finality and preventing such back-door appeals (see [28] above). The *dicta* of the High Court of Australia in *Burrell v The Queen* (2008) 82 ALJR 1221 (at [15]) is also useful in explaining the importance of maintaining finality:

> ... "A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances." That tenet finds reflection in rules concerning the bringing of an action to set aside a final judgment on the ground that it was procured by fraud and in doctrines of res judicata and issue estoppel. The principal qualification … is provided by the appellate system. But in courts other than the court of final resort, the tenet also finds reflection in the restrictions upon reopening of final orders after they have been formally recorded.

42 I also noted that this application was a back-door means of introducing further evidence. The Applicant had filed a new affidavit on 21 January 2013 furnishing evidence of the manufacturer's price increase. There is already a provision under the SCJA to ask for further arguments and evidence to be admitted. This would also have to go through Lee J as the High Court Judge who decided the Appeal. In either case, bringing by judicial review what should have been brought by way of appeal or an application for further arguments under s 28A of the SCJA is an abuse of process. If the motivation is to circumvent the discretion of the High Court Judge hearing the case, then this is also a clear circumvention of the purpose of the SCJA.

Conclusion

43 I found that the Application was entirely hopeless and an abuse of process. I accordingly dismissed the Application and awarded costs of $500 as sought by the Attorney-General.