Ser Kim Koi *v* GTMS Construction Pte Ltd and others
[2021] SGHC(A) 2

Case Number	: Originating Summons No 7 of 2021
Decision Date	: 26 March 2021
Tribunal/Court	: Appellate Division of the High Court
Coram	: Woo Bih Li JAD; Quentin Loh JAD
Counsel Name(s)	: Ajinderpal Singh, Kirindeep Singh, Tan Hui Min Beverly, Thng Hui Lin Melissa and Toh Wei Qing, Geraldine (Dentons Rodyk & Davidson LLP) for the applicant; Thulasidas s/o Rengasamy Suppramaniam and Yap Wei Xuan Mendel (Ling Das & Partners) for the first respondent; Thio Shen Yi SC, Monisha Cheong and Uday Duggal (TSMP Law Corporation) for the second and third respondents.
Parties	: Ser Kim Koi — GTMS Construction Pte Ltd — Chan Sau Yan (formerly trading as Chan Sau Yan Associates) — CSYA Pte Ltd

Civil Procedure – Appeals – Leave

26 March 2021

Woo Bih Li JAD (delivering the grounds of decision of the court):

Introduction

1 This is an application for leave to appeal to the Appellate Division of the High Court against a costs order made by a judge of the General Division of the High Court ("the Judge") where an appeal against his substantive decision had been filed earlier. As we will elaborate, the application would have been unnecessary but for a misunderstanding of the law by the applicant and his solicitors. Furthermore, the objection by the first respondent was misplaced because also of the same misunderstanding of the law by that respondent and its solicitors.

2 We granted leave to appeal against the costs order and directed that the appeal on costs be heard together with the substantive appeal and with further directions which we elaborate below. In view of the misunderstanding of law, we set out our reasons below.

Background

3 We first set out the parties to the dispute:

(a) Ser Kim Koi ("Ser") was the owner of a plot of land on which three Good Class Bungalows were to be built ("the Project").

(b) Ser engaged GTMS Construction Pte Ltd ("GTMS") as the main contractor for the Project.

(c) Ser engaged Chan Sau Yan (formerly trading as Chan Sau Yan Associates) ("Chan") as the architect for the Project.

(d) CSYA Pte Ltd ("CSYA") is a company incorporated by Chan to carry out his architecture business.

4 In the General Division of the High Court, the parties made various claims against each other. After a trial, the Judge delivered his substantive decision on 18 January 2021 in *GTMS Construction Pte Ltd v Ser Kim Koi (Chan Sau Yan (formerly trading as Chan Sau Yan Associates) and another, third parties)* [2021] SGHC 9 ("the Main Judgment"). In the Main Judgment, the Judge dismissed most of Ser's claims and allowed the claims of GTMS for unpaid construction costs and of Chan and CSYA for architect's fees.

5 Thereafter, after receiving submissions on costs, the Judge issued a supplemental judgment on 10 February 2021 on costs in *GTMS Construction Pte Ltd v Ser Kim Koi (Chan Sau Yan (formerly trading as Chan Sau Yan Associates) and another, third parties)* [2021] SGHC 33 ("the Costs Judgment") whereby:

(a) Ser was ordered to pay GTMS costs on a standard basis from 13 January 2014, being the date the Writ of Summons was filed, until 8 November 2018, being the date of commencement of the trial; with Ser to pay costs to GTMS on an indemnity basis thereafter (Costs Judgment at [19]); and

(b) Ser was ordered to pay Chan and CSYA costs on a standard basis from 29 January 2014, being the date of the Third Party Notice to join them as parties to the action, until 6 March 2017, being the deadline for Ser to accept an offer to settle; with Ser to pay costs to them on an indemnity basis thereafter (Costs Judgment at [24]).

6 At the hearing on 10 February 2021 when the Judge issued the Costs Judgment, counsel for Ser asked for a direction that Ser be allowed to file a single notice of appeal in respect of both the Main Judgment and the Costs Judgment. Counsel for GTMS and for Chan and CSYA agreed and the Court directed accordingly.

7 However, Ser decided to act differently from his proposed course of action. On 15 February 2021, Ser filed a Notice of Appeal against the Main Judgment ("the Main Appeal"). On 17 February 2021, Ser filed an application by way of the present Originating Summons for leave to appeal to the Appellate Division of the High Court against the Costs Judgment. Written submissions were tendered by solicitors for Ser and for GTMS who is the first respondent in the leave application. No submissions were received from the solicitors for Chan and CSYA.

The arguments and our decision

8 Ser explained that he decided to file only the Notice of Appeal for the Main Appeal because his attention was brought to paragraph 3(*f*) of the Fifth Schedule of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA"). He and his solicitors believed that that provision required him to obtain leave to appeal in respect of the Costs Judgment if the appeal against the Costs Judgment were what has been referred to as a standalone appeal. Ser's second reason for doing so was that there were procedural/logistical difficulties in the filing of a single Notice of Appeal against judgments issued on different dates. Ser was concerned about the effectiveness of the agreement on 10 February 2021, whereby parties had agreed to his filing of a single Notice of Appeal, and the Judge had directed accordingly, in the face of what he considered to be an express statutory provision to the contrary. In correspondence tendered after his written submission was filed, Ser elaborated that even if the Main Appeal were not successful, he would still contest the Costs Judgment on the basis that the Judge had erred in granting costs on an indemnity basis to GTMS, Chan and CSYA. It appeared that this was what led him and his solicitors to think that the appeal against the Costs Judgment would be a standalone appeal even though Ser was agreeable to having the appeal against the Costs Judgment consolidated with the Main Appeal.

9 GTMS and its solicitors appeared to have taken the same view, *ie*, that if Ser wished to contest the Costs Judgment even if the Main Appeal were dismissed, that would constitute a standalone appeal requiring leave to appeal, even if the costs appeal were consolidated with the Main Appeal. GTMS also argued that leave to appeal should not be granted. However, GTMS had no objection if Ser were granted leave to appeal in respect of the Costs Judgment provided that the costs appeal would proceed only if the Main Appeal were successful.

10 We address the second reason given by Ser first as that was clearly not a valid reason. Ser was concerned about the procedural/logistical difficulties of filing a single Notice of Appeal against judgments issued on different dates but he did not elaborate what the difficulties were. As far as we were aware, there was no such difficulty. Both judgments were issued in respect of the same trial. The Notice of Appeal would simply state that Ser was appealing against the whole or part of the Main Judgment and against the whole or part of the Costs Judgment. It seemed to us that the real cause for concern was the first reason which we now address.

11 We were of the view that Ser and GTMS had proceeded on the basis of their solicitors' incorrect understanding of the law as we elaborate below. The two pertinent provisions are s 29A(1)(*c*) read with para 3(*f*) of the Fifth Schedule of the SCJA ("the Fifth Schedule 3(*f*) provision"):

> **Leave required to appeal in certain cases**
>
> **29A.–**(1) In the following cases, leave is required before an appeal may be brought against a decision of the General Division made in the exercise of its original or appellate civil jurisdiction:
>
> **…**
>
> (*c*) subject to any exception specified in the Fifth Schedule, a case specified in paragraphs (3) and 4(1) of that Schedule.

The relevant portion of paragraph 3 of the Fifth Schedule reads:

> **Interlocutory decisions, etc.**
>
> 3. Subject to paragraph 4(2), the leave of the appellate court is required to appeal against a decision of the General Division in any of the following cases:
>
> …
>
> (*f*) where the ***only issue in the appeal relates to costs or fees for hearing dates*** ;
>
> …
>
> [emphasis added in bold italics]

12 It is important to bear in mind that the Costs Judgment was issued in time so that Ser could have filed a single Notice of Appeal in respect of both judgments, without even seeking an extension of time to do so. Had he done so, the Fifth Schedule SCJA 3(*f*) provision would not apply because that Notice of Appeal would relate to both the Main Judgment and the Costs Judgment so that it could not be said that the "only issue in the appeal relates to costs".

13 Ser's solicitors seemed to think that the situation was materially different since Ser was

intending to contest the Costs Judgment even if the appeal against the Main Judgment were unsuccessful. However, that is not correct.

14 If the Judge had issued his substantive decision and costs decision at the same time in a single judgment, Ser would have been entitled to file a single Notice of Appeal against both the substantive and costs decisions. He would also have been entitled to contest the costs decision even if he were unsuccessful against the substantive decision. That process does not make Ser's contest on costs a standalone appeal.

15 It made no material difference where, as in the present case, the Judge had issued his decisions on separate dates if one Notice of Appeal had been filed. The fact that Ser intended to contest the Costs Judgment even if the substantive appeal were unsuccessful would not make the contest a standalone appeal unless the substantive appeal was all along a disguise to hide the fact that the real appeal was in respect of the Costs Judgment alone. However, no one had suggested that the substantive appeal was merely a disguise. The contest against the Costs Judgment would not have been the sole issue in the single Notice of Appeal. As the Court of Appeal said at [16] in *Clearlab SG Pte Ltd v Ma Zhi and another* [2016] 3 SLR 1264 ("*Clearlab*"):

> The issue that concerned the court in [*Wheeler v Somerfield and others* [1966] 2 QB 94] ("*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.
>
> [emphasis added]

16 It seemed that the solicitors for both sides had misunderstood the decision of the Court of Appeal in *Clearlab*. It is important to bear in mind that in *Clearlab*, the appellant had filed two notices of appeal, not one. The second notice of appeal was in respect of a costs decision. The Court of Appeal was of the view that technically, a provision similar to the Fifth Schedule (3)(*f*) provision applied even though an appeal in respect of the substantive decision had been filed. The reasons why the Court of Appeal declined to grant the appellant leave to proceed with the second appeal on costs were two-fold. Firstly, the appellant took the affirmative position that it did not wish both appeals to be consolidated such that both appeals were fixed for hearing on different dates. Secondly, the application for leave was made late, *ie*, five months after the appellant had indicated it would apply for leave and just five days before the date of hearing of the costs appeal (*Clearlab* at [6]). The Court of Appeal also said that had both appeals been consolidated, this might well have led to a different outcome as a matter of practical application rather than of principle (*Clearlab* at [14]). This meant that although the appellant would still have required leave to appeal because the second Notice of Appeal was on costs alone, one would expect that leave would have been given if both appeals were consolidated. There would then be less concern about the wasting of scarce judicial resources.

17 Before us, Ser had agreed to his costs appeal to be consolidated with the Main Appeal if the leave application were granted. Notwithstanding that, GTMS still objected to leave being granted. It had conflated the Court's reasons in *Clearlab*. The wastage of judicial resources becomes more evident when the appeals are heard on separate dates but not when they are heard together.

18 In summary, Ser could have and should have proceeded to file a single Notice of Appeal in

respect of the Main Judgment and the Costs Judgment. Having failed to do so, Ser should nevertheless still be granted leave to file the costs appeal since he was agreeable to having that heard together with the Main Appeal. He agreed to have that done by way of consolidation.

19 We were of the view that while consolidation was one way of achieving the aim of having both appeals heard together, another way was for the Court to direct that both appeals be fixed for hearing together. This would avoid the incurring of further costs which would had been incurred if Ser were required to file a fresh application to consolidate the appeals.

20 Accordingly, we granted Ser's leave application and gave the following directions:

(a) Ser was to file and serve the Notice of Appeal in respect of the Costs Judgment within three days from the date of our decision. That appeal was to be fixed for hearing together with the appeal in respect of the Main Judgment. This would obviate the need for Ser to take a further step to consolidate both appeals.

(b) The parties were to proceed with the filing of any subsequent papers as though there were a single appeal.

(c) If any further directions were required, such directions might be given at a case management conference.

21 As for costs of the leave application, we took into account the following:

(a) The leave application was unnecessary in the circumstances. Ser could have and should have filed a single Notice of Appeal against both the Main Judgment and the Costs Judgment.

(b) That said, GTMS should not have opposed the leave application since it was quite clear that Ser was agreeable to having both appeals heard together. Perhaps that was why the other respondents in the Main Appeal did not resist the leave application.

22 We were therefore of the view that Ser should be liable for some of the costs of the leave application. We ordered him to pay GTMS $1,000 forthwith, inclusive of disbursements, as such costs.

23 We take this opportunity to make some further observations.

24 There is some suggestion in the decision of the Court of Appeal in *Qilin World Capital Ltd v CPIT Investments Ltd and another appeal* [2019] 1 SLR 1 ("*Qilin*") that even if no Notice of Appeal had been filed on costs, the Court of Appeal would still be entitled and empowered to deal with costs of the proceedings below. However, as mentioned by the Singapore International Commercial Court in *Beyonics Asia Pacific Ltd and others v Goh Chan Peng and another* [2020] 5 SLR 235 ("*Beyonics*"), it would be prudent for an appellant to seek leave to file a second Notice of Appeal on costs (where it would be too late to file a single Notice of Appeal) in the light of *Clearlab*. The court is likely to grant such leave where the appellant agrees that both appeals be heard together. As we mentioned at [19] above, this can be done by consolidation or a direction for both appeals to be heard together.

25 There was also a suggestion in *Qilin* at [9] and in *Beyonics* at [25] that a Notice of Appeal against a substantive decision may be amended to include an appeal on costs. We have some reservations whether that may be done where the decision on costs is given *after* the date that the substantive appeal is filed because there would then be no costs decision to appeal against as at the date of the filing of the substantive appeal. As this does not arise on the present case, we need not

say any more on this for the time being.

26 Finally, we note that after the written submissions from Ser and GTMS were filed, their solicitors proceeded to send further submissions to the court by way of correspondence. This should not have been done without leave of the court and we hope such conduct will not be repeated in future.