Kosui Singapore Pte Ltd *v* Thangavelu
[2016] SGCA 3

Case Number	: CA/Civil Appeal No 76 of 2015 (CA/Summons No 236 of 2015)
Decision Date	: 22 January 2016
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Judith Prakash J; Quentin Loh J
Counsel Name(s)	: Jonathan Yuen Djia Chiang and Doreen Chia Ming Yee (Rajah & Tann Singapore LLP) for the appellant; N Sreenivasan SC and Palaniappan Sundararaj (Straits Law Practice LLC) for the respondent.
Parties	: KOSUI SINGAPORE PTE LTD — THANGAVELU

Civil Procedure – Appeals – Leave

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2015] 5 SLR 722.]

22 January 2016

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

Introduction

1 Section 34 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the SCJA") is an important part of the procedural law of Singapore. It imposes restrictions on the ability of litigants to appeal to the Court of Appeal from decisions of the High Court. In some cases, no appeal whatsoever is allowed. In others, an appeal may only be brought with the leave of either the first instance judge or of the Court of Appeal itself. It is not surprising that there has been much litigation on the meaning of the words and phrases used in this section and on their exact scope.

2 This matter turned on the scope 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:
>
> (*b*) where the only issue in the appeal relates to costs or fees for hearing dates.

3 The exact question for determination in this application was whether the term "costs" used in s 34(2)(*b*) only applies to an order for party-and-party costs made in the course of litigation or whether it extends to a dispute over solicitor-and-client costs. We decided that the term "costs" as used in the legislation is not restricted to party-and-party costs but covers solicitor-and- client costs as well. As a result, the omission of the appellant here to obtain leave to appeal was fatal and its appeal had to be struck out as this court did not have jurisdiction to hear the same.

4 At the conclusion of the hearing, Sundaresh Menon CJ delivered brief oral grounds as follows:

> The application was brought before the judge to seek leave to tax the solicitor's bill of costs. That application was refused and the present appeal was brought against that refusal. Section 34(2)(*b*) of the Supreme Court of Judicature Act (Cap 322) states that there is no right of appeal

to the Court of Appeal on matters that involve only costs. The judge has ruled that he did not give leave to tax the costs of this solicitor, and we are satisfied that leave was required to pursue the appeal. As none was obtained, there was a jurisdictional deficit. We are also satisfied that there is no basis to waive that jurisdictional deficit. We therefore grant the application to strike out the Notice of Appeal.

5 We now give our full reasons for the decision.

Background

6 In 2010, the present appellant, Kosui Singapore Pte Ltd, commenced a law suit (Suit No 312 of 2010 ("the Suit")) against two defendants to recover about $3.3m arising out of a construction claim. In the Suit the appellant was represented by the respondent, Mr Thangavelu, as well as by Mr Raymond Wong ("Mr Wong"), who acted as counsel, and was from a different law firm. At the conclusion of the trial of the Suit, the appellant was awarded its claim, interest and costs. An appeal against this decision was unsuccessful and the defendants subsequently paid the appellant all sums awarded including costs.

7 For the legal services rendered to the appellant, the respondent issued a number of bills and, in particular, eight bills between December 2010 and July 2011. These bills were for work done collectively by the respondent and Mr Wong and disbursements. The bills did not disclose how the fees were divided between Mr Wong and the respondent. The appellant paid all the bills without question. The total amount paid was $715,580; about $400,000 of this went to Mr Wong's firm which meant that the respondent's fees as instructing solicitor totalled more than $300,000.

8 More than a year later, the appellant asked to see the invoices issued by Mr Wong to the respondent. The respondent sent it the invoices and upon examining them, the appellant formed the opinion that the respondent had been overpaid and Mr Wong had been underpaid. The appellant took the view that the respondent's fees were excessive in proportion to the amount of work that the respondent had done. In its view, Mr Wong had done most of the work and should have received all the fees except for a sum of $50,000 which could have been paid to the respondent.

9 The appellant conveyed its views to the respondent. The respondent did not accept the criticism but subsequently, to settle the dispute, the respondent offered to reimburse $129,000 to the appellant. The appellant rejected this offer. Further discussions took place. No resolution of the dispute was achieved, however, and the appellant informed the respondent that it would be seeking assistance from the Law Society of Singapore ("Law Society"). In October 2012, the respondent presented three options to the appellant in an attempt to resolve the dispute. These options were:

(a) to have the respondent's bill taxed in the High Court;

(b) to have the fee dispute mediated and arbitrated under the Law Society's costs dispute resolution procedure; or

(c) to jointly appoint a mediator to mediate the dispute.

10 The appellant did not accept any of the options. Instead, it lodged a complaint against the respondent with the Law Society under s 85(1) of the Legal Profession Act (Cap 161, 2009 Rev Ed) ("the LPA"). On 20 November 2012, the Law Society responded to the appellant's complaint by advising it that as the complaint filed was one of overcharging, the appellant was required to first seek a determination by the court through taxation of the bills rendered by the respondent. Once

taxation had been completed, the appellant could decide whether to proceed with the overcharging complaint. The appellant replied that it had considered the advice of the Law Society but did not want to proceed with taxation or mediation. Instead, it wanted to push ahead with its complaint on the basis of dishonesty instead of overcharging.

11 The Law Society then considered the matter. The appellant and the respondent furnished the Law Society with further documents and submissions. On 15 November 2013, the Law Society dismissed the appellant's complaint of dishonest conduct on the part of the respondent. Thereafter, the Law Society informed the appellant that if it still wanted to pursue its complaint on the basis that the respondent had breached the standards of adequate professional service, it had to provide further particulars. The appellant submitted further documents in response to this request but, on 17 February 2014, the appellant was informed that, having considered the complaint under s 75B of the LPA, the Council of the Law Society had determined that there were no grounds to substantiate a finding that the respondent had been guilty of providing inadequate professional services.

12 The appellant was not satisfied with this outcome. It had, however, exhausted its attempts to obtain satisfaction through the Law Society's complaints procedure. It therefore decided that it should apply to court for taxation of the respondent's bills. The appellant filed Originating Summons No 745 of 2014 in August 2014 for leave to tax the eight bills under s 122 of the LPA. Leave of court was required as more than 12 months had expired since the bills were issued; indeed, more than three years had passed since the appellant had paid the bills.

13 The application for leave was heard on 18 March 2015 by Vinodh Coomaraswamy J ("the Judge"). The Judge rejected the application on the basis that the appellant had failed to establish, as required by s 122 of the LPA, that special circumstances existed justifying the order for taxation, notwithstanding that more than 12 months had passed since the date(s) of presentation of the bills. The Judge noted that the appellant had accepted that the fees as a whole were reasonable. The appellant's "real and only objection" was that the respondent had allocated to himself too much out of the $715,580 in fees and too little to Mr Wong. The Judge was of the view that taxation proceedings would not address the issue of whether the fees were reasonably apportioned between the respondent, as the instructing solicitor, and Mr Wong, as the instructed counsel. The issue addressed by taxation would be only whether the overall amount billed was reasonable. There was thus no reason to order taxation of the bills. Further, the Judge rejected the appellant's argument that the delay in applying to court was due to prolonged negotiations between the respondent and the appellant over the fees. He held that the prolonged disposal of the complaint to the Law Society was not akin to negotiations over a fee dispute and such a complaint was not an alternative to taxation. Once the complaint procedure was disregarded, it was clear that the application for taxation had been taken out two years after the negotiations between the parties had broken down. Further, the appellant had been urged more than once by the Law Society to refer the bills for taxation but it did not heed this advice.

14 The Judge also made a finding that the appellant was not seeking to refer the bills for taxation for a proper purpose. In this respect, it was observed that in seeking to refer the bills for taxation, the appellant was simply seeking to pursue the subject matter of its complaints to the Law Society by other means. The Judge concluded by observing that it could be said that the appellant was seeking to pursue taxation for a collateral purpose and was therefore abusing the process of the court.

The appeal and the striking out application

15 On 15 April 2015, the appellant filed its Notice of Appeal against the Judge's decision in OS 745/2014. The respondent filed the present application (Summons No 236 of 2015) seeking to

strike out the Notice of Appeal on 23 April 2015. The grounds of the application were that the appellant had failed to obtain leave to appeal pursuant to s 34(2)(*b*) of the SCJA and that the Notice of Appeal was frivolous, vexatious and/or an abuse of the process of the court. As we decided the application on the basis of the first ground, we will deal with that alone in this judgment.

The respondent's submissions

16 The respondent submitted that the only issue in the appeal related to costs and was therefore squarely covered by the wording of s 34(2)(*b*). The appellant's original application was to obtain taxation of the bills. Taxation is the process of assessing the appropriate costs of the individual items listed in a bill of costs. In so far as the very purpose of taxation is to obtain a certificate as to the reasonable quantum of fees payable to the solicitor, there could be no question that the original application and the appeal related only to costs. The respondent also submitted that the appellant's failure to obtain leave to appeal effectively resulted in this Court not having the jurisdiction to hear the substantive appeal.

17 The respondent noted that prior to 1993 the relevant section in the SCJA dealing with appeals on the question of costs was s 34(1)(*d*) which required prospective appellants to obtain leave of court to appeal "where the judgment or order relates to costs only, *which by law are left to the discretion of the court*" (emphasis added). The phrase in italics was capable of suggesting that the costs concerned would only be those awarded by the court. The rewording of the provision by the omission of this italicised phrase effected by the Supreme Court of Judicature (Amendment) Act 1993 (No 16 of 1993), indicated, the respondent submitted, that the definition of "costs" in the section would be enlarged. The taxation of a solicitor-and-client bill of costs would therefore fall within the scope of the provision as currently worded.

18 The respondent also referred to O 59 r 28 of the Rules of Court (Cap 322, R5, 2014 Rev Ed) ("the ROC") which states that the rules pertaining to taxation in O 59 also apply to "every taxation of a solicitor's bill of costs to his own client". In this regard, the respondent argued that "costs" in s 34(2)(*b*) of the SCJA applies to solicitor-client costs as much as to party-and-party costs.

19 Finally, the respondent also referred to a number of Canadian decisions for the Court of Appeal of Alberta's interpretation of a provision that was worded similarly to s 34(2)(*b*) of the SCJA. In these decisions, the Canadian court arrived at the conclusion that leave was required to appeal against a decision in respect of the taxation of solicitor-client costs.

The appellant's submissions

20 The appellant contended that the respondent's interpretation of s 34(2)(*b*) effectively gave rise to the anomalous result of "substantive cases being denied even one tier of appeal as of right" and also ran contrary to the legislative intent behind s 34 of the SCJA.

21 The appellant relied on the parliamentary debate concerning the amendments made to s 34 of the SCJA in 2010, where it had been stated that the right of appeal for substantive matters heard at first instance by the High Court remained unchanged and that, in such cases, there was a *right* of appeal to the Court of Appeal. The appellant also referred to a number of recent pronouncements of the Court of Appeal on the scope of s 34 in the context of interlocutory applications. In particular, the appellant relied on *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 ("*Dorsey*") and *OpenNet Pte Ltd v Info-communications Development Authority of Singapore* [2013] 2 SLR 880 ("*OpenNet*"). On the facts of the present case, the appellant submitted that the Judge had disposed of its substantive right to seek leave for taxation, and that it should therefore be accorded

one tier of appeal *as of right*.

22 The appellant also took the position that the word "costs" in s 34(2)(*b*) of the SCJA is confined to costs orders made in relation to proceedings in court, which are discretionary in nature. The appellant relied on the Court of Appeal of Alberta decision of *MacKimmie Mathews v Hector* [1998] ABCA 278 ("*MacKimmie*"), where it was held (at [10]) that an order regarding liability for a solicitor's account is not a discretionary order relating to "costs only" in so far as it requires the trial of an issue of fact to establish the nature of the contractual relationship between the parties. The appellant submitted that where solicitor-client costs are in issue in the substantive claim, these issues concern the *private law rights* of the parties.

23 In the appellant's view, while its application was about costs, the issue was not as to quantum but whether there were special circumstances justifying the grant of leave to tax the bills out of time. This being the main issue, the case did not fall within a plain reading of s 34(2)(*b*).

24 As regards the respondent's reliance on the ROC, the appellant argued that this was entirely misconceived in so far as subsidiary legislation cannot be used to arrive at an interpretation of the primary legislation that would not promote its object and purpose. To this end, the appellant also argued that the respondent's reliance on the Canadian decisions was inappropriate as the statutory framework there was "very different" from that of the SCJA.

Our Analysis

25 The context in which the issue before us arose for decision has been explained in previous cases. In *Dorsey*, for instance, this Court emphasised (at [10]) that it is a creature of statute (to wit, the SCJA) and therefore is only seised of the jurisdiction conferred upon it by the statute that creates it. The Court added (at [11]), that under s 29A(1) of the SCJA any judgment or order of the High Court is ordinarily appealable as of right. This right however, is subject to any contrary provisions in the SCJA itself or in any other written law. After all, what the statute gives, the statute can also take away. It is a matter of purpose and language. The appellant, however, appeared to believe that the right was an absolute one and that this belief was substantiated by case authority.

26 The appellant cited *Dorsey* as authority for the proposition that Parliament had intended that an appeal to the Court of Appeal remained available as of right where a final order which disposes of the substantive rights of the parties is made by a High Court Judge, even if this is done at the hearing of an interlocutory application. This proposition was made to support the appellant's stand that where substantive rights of parties are concerned, an appeal must lie *as of right*. With respect, the appellant misunderstood the case and the law.

27 *Dorsey*, like the *OpenNet* decision which it followed, was concerned with the proper application of s 34(2)(*d*) of the SCJA and the Schedules to the SCJA introduced by the 2010 amendments to that Act. These Schedules set out various situations in which appeals against interlocutory decisions of the High Court are either not possible at all or possible only with leave of court. The issue before the court in *Dorsey* was whether the decision appealed against, being an order for pre-action interrogatories, fell within the Fourth Schedule which provides, *inter alia*, that no appeal can be brought to the Court of Appeal where a Judge has made an order giving or refusing interrogatories. It was decided, after a consideration of the amendments, their purpose and language, and the parliamentary explanation for them, that the proper interpretation of that provision was that it referred to an order giving or refusing interrogatories that was made at the hearing of an interlocutory application for interrogatories (at [54]). It was further decided that an application to administer pre-action interrogatories was purely for the discovery of information and could not be treated as an

interlocutory step in any proceedings that might subsequently be commenced on the basis of the information obtained (at [72]). Thus, the right of appeal in *Dorsey* was not curbed by the Fourth Schedule. Contrary to the appellant's contention, the decision in *Dorsey* was predicated on the purpose of the Fourth Schedule which was held to be concerned with appeals against decisions made in interlocutory applications rather than on the fact that substantive rights of the parties were affected by the decision. The Court was not called upon in that case to decide, nor did it decide, that whenever substantive rights are involved an appeal lies *as of right*.

28 Indeed, as the Bench pointed out to the appellant here in the course of oral argument, s 34(2) has expressly set out situations where even though the High Court's decision has clearly determined substantive rights, there is no appeal as of right for the losing party. It is not correct to contend that under s 34(2), across the board, the right to appeal cannot be excluded if the matter pertains to a substantive right. Such a contention is plainly contradicted, for instance, by s 34(2)(*c*) under which a summary decision on an interpleader summons where the facts are agreed cannot be appealed without leave notwithstanding that interpleader decisions invariably involve substantive rights. This restriction is a subject-matter restriction. In our judgment, s 34(2)(*b*) is also a subject-matter restriction. The legislature has enacted that appeals on questions of costs or hearing fees may only be made with leave. It is irrelevant for this purpose that the decisions affect substantive rights.

29 The appellant attempted to argue that the legislative intent was that matters involving substantive rights should be appealable as of right. The appellant was not able, however, to point to any specific statements in Parliament on s 34(2)(*b*). The parliamentary references the appellant relied on related to s 34(2)(*d*) and were considered in *Dorsey* for the purpose of interpreting that sub-section and the Fourth Schedule. Those debates did not deal with the distinct limitations found in ss 34(2)(*a*), 2(*b*) and 2(*c*). This is not surprising as the 2010 amendments did not affect those sub-sections. The only amendments then to s 34(2) were in relation to the framework for *interlocutory* applications, specifically the introduction of the schedules to regulate and streamline appeals to the Court of Appeal. It was in this context that the Senior Minister of State of Law observed in Parliament that "the right of appeal for substantive matters heard at first instance by the High Court *remains unchanged*" [emphasis added] (*Singapore Parliamentary Debates, Official Report* (18 October 2010) vol 87 at col 1384 (Assoc Prof Ho Peng Kee, Senior Minister of State for Law). The honourable minister was not commenting on substantive rights dealt with by other parts of s 34.

30 Thus, we come to the nub of the case: how the word "costs" in s 34(2)(*b*) is to be interpreted. In this connection, we must first consider the appellant's argument that an application under s 122 of the LPA is distinct from the issue of costs. The appellant argued that in deciding this application the main issue considered by the Judge was whether special circumstances existed so as to justify granting the appellant leave to have the bills taxed. The Judge was not concerned with the quantum payable to the respondent as such; he had to decide if the facts of the case were such that it would be right for the remedy of taxation to be made available. The appellant argued that this issue involved multiple factual disputes such as the number of times the Law Society had written to the appellant and the content of the exchanges that had taken place between the parties. The Judge had to determine those factual disputes in order to assess whether the special circumstances required existed. He was not called on to consider quantum in any way.

31 We did not agree. To accept the appellant's argument meant that we would be restricting the meaning of the term "only issue … relates to costs" in s 34(2)(*b*) to the issue of quantum of costs. There is no reason why that term should be limited in this way. When one is considering an issue relating to costs, one can be considering a whole host of matters. For example, whether or not costs should be awarded at all or whether parties should be allowed to argue about costs in a taxation (per s 122 of the LPA) or whether costs should be fixed or whether separate costs orders should be made

in respect of separate issues. There are many aspects that may need a court's attention when it has to decide issues which relate to costs, whether at first instance or on appeal. Further, the application under s 122 of the LPA relates to costs in a fundamental way: unless it is allowed the client will have no way in which to contest the costs levied by his erstwhile solicitor and will be liable for the full amount of the same.

32 We could see no unfairness in applying s 34(2)(*b*) to an application made under s 122 of the LPA. It must be recognised that any client who is dissatisfied with his solicitor's bill has an absolute right to have the bill taxed as long as he asks for taxation within one year of delivery of the bill. If for some reason the client does not make this request within the required period, he may bring an application under s 122 of the LPA for leave to tax on the grounds that special circumstances exist to permit taxation notwithstanding the lapse of the relevant period. This is the client's second chance to tax. If he is unable to convince the court that the delay in taxation was due to special circumstances which invoke the court's sympathy rather than to some neglect or omission for which he is culpable, then the policy behind s 34(2)(*b*) is to restrict access to the Court of Appeal by requiring him to convince either the judge or the Court of Appeal itself that leave to appeal against that finding should be granted. There is no absolute bar to an appeal: in a proper case the appellant would be able to satisfy the requirements for leave and obtain a hearing before the Court of Appeal. The policy of restricting access to the Court of Appeal where the only issue involved relates to costs, except in proper cases, will be served by extending the scope of s 34(2)(*b*) to applications made under s 122 of the LPA.

33 The appellant's other argument on the meaning of "costs" was that it should be understood as referring to party-and-party costs only and not to solicitor-and-client costs as well. The appellant said that the word "costs" in the sub-section must be read as referring only to costs orders made in relation to proceedings in court. As stated above, in making this argument the appellant cited the Canadian case of *MacKimmie*. The appellant found *MacKimmie* to be instructive on two points. First, the court there stated (at [9]) that because of the discretionary nature of the order of party-and-party costs, the order should be and is only subject to appeal in limited circumstances, with leave, and not as of right. The basis of the rule in the view of the Canadian court was to bring finality to litigation and to conserve the appellate court's time by screening appeals on issues of costs alone (at [6]). We had no quarrel with this reason for the rule in relation to discretionary costs but did not see how such a justification meant that non-discretionary costs could not be subject to a similar rule for a similar reason. It would be recalled that in 1993, the language in s 34(2)(*b*) (which was previously s 34(1)(*d*)) that limited the operation of the section to discretionary costs was deliberately altered so that the word "costs" is not now qualified in any way. Although the 1993 Hansard does not contain any specific discussion of this amendment, bearing in mind that Parliament's intention in this legislation as a whole has always been to assist the efficient working of the Court of Appeal by allowing the screening of certain categories of appeals, it would be hard to argue that Parliament did not intend to widen the scope of the word "costs" when it removed the phrase that had hitherto qualified it and limited it to costs orders made by the court.

34 The second reason for the ruling in *MacKimmie* (at [10]) was that:

> "… a ruling by a Chambers Judge respecting liability for a solicitor's account requires the trial of an issue of fact as to the identity of the party who retained the solicitor and agreed either expressly or impliedly to pay the solicitor's fees. A ruling on this issue of fact impacts not only on the issue of the payment of the solicitor's account, but also establishes the nature of the contractual relationship between the parties for other purposes, for instance, issues dealing with solicitor client confidentiality, solicitor's liability, *etc*. That is not a discretionary order nor is the ruling one which relates to "costs alone".

35 It can be seen from the second reason given above that the situation in *MacKimmie* was quite different from that which was before us. There, the issue was whether the person whom the solicitor sought to bill was indeed the solicitor's client. That was far from the issue here: the appellant accepted liability as a client but was dissatisfied with the quantum of that liability in respect of the amount that the respondent received, while not disputing the reasonableness of the total bill. The issue which the appellant sought to raise related essentially to quantum, not to liability *per se*. In our view, the appellant's grievance was an issue that was encompassed by the phrase "issue [that] relates to costs" that appears in s 34(2)(*b*).

36 The point raised by the appellant that its application related to private law rights could not be accepted by us. If the argument was that the client was suing the solicitor for breach of contract or if the client was contending that a solicitor was negligent, that would be a completely different subject matter from what was before the court in this case. Taxation is a specific remedy for fixing the quantum of costs that are payable by a litigant/client whether on a party-and-party basis or to his own solicitor. The statutory regime of taxation in the LPA and the ROC has been instituted to create a process to enable a party to get the court to fix a reasonable quantum of costs. That process has nothing to do with private law rights in tort or contract.

Conclusion

37 We were satisfied that s 34(2)(*b*) of the SCJA applied to the situation of the appellant in that the only issue that it wanted to bring before the Court of Appeal was an issue that related to costs. Accordingly, it required leave of court before filing its appeal. Without such leave, the purported appeal had to be struck out.