

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 7

Civil Appeal No 62 of 2021 (Summons No 92 of 2021)

Between

Dongah Geological
Engineering Co Ltd

... Applicant

And

Jungwoo E&C Pte Ltd

... Respondent

In the matter of Originating Summons No 831 of 2021

Between

Dongah Geological
Engineering Co Ltd

... Plaintiff

And

Jungwoo E&C Pte Ltd

... Defendant

EX TEMPORE JUDGMENT

[Courts And Jurisdiction] — [Judges] — [Striking out notice of appeal]
[Civil Procedure] — [Costs] — [Personal liability of solicitor for costs]

TABLE OF CONTENTS

BACKGROUND TO THE APPLICATION	1
OUR DECISION	4
CONCLUSION.....	9

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Dongah Geological Engineering Co Ltd

v

Jungwoo E&C Pte Ltd

[2022] SGCA 7

Court of Appeal — Civil Appeal No 62 of 2021 (Summons No 92 of 2021)
Sundares Menon CJ, Steven Chong JCA and Quentin Loh JAD
21 January 2022

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Steven Chong JCA (delivering the judgment of the court *ex tempore*):

1 This is the application of Dongah Geological Engineering Co Ltd (“Dongah”) to strike out Civil Appeal No 62 of 2021 (“CA/CA 62/2021”), an appeal filed to the Court of Appeal by Jungwoo E&C Pte Ltd (“Jungwoo”).

Background to the application

2 In April 2021, a dispute between the parties arose as a result of Dongah’s alleged failure to make progress payments to Jungwoo under a subcontract. Jungwoo served a payment claim on Dongah pursuant to the Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) (“the SOPA”), and on 15 July 2021, the adjudicator rendered his adjudication determination, holding that Dongah was liable to pay Jungwoo a sum of \$2,428,690.04 (“the Adjudicated Sum”).

3 On 16 August 2021, Dongah filed HC/OS 831/2021 to, amongst other matters, set aside the adjudication determination and seek a stay of enforcement in the alternative. The High Court Judge delivered his judgment on 22 October 2021 dismissing Dongah’s application to set aside the adjudication determination. However, he ordered a partial stay in respect of the enforcement of the adjudication determination and granted a partial release of the Adjudicated Sum to Jungwoo.

4 On 28 October 2021, Dongah filed Civil Appeal No 112 of 2021 (“AD/CA 112/2021”) before the Appellate Division of the High Court (“Appellate Division”). On the same day, Dongah filed AD/SUM 28/2021 seeking a stay of the order for the partial release of the Adjudicated Sum.

5 Even though Dongah had filed the appeal before the Appellate Division, Jungwoo filed a cross-appeal before the Court of Appeal on 2 November 2021. A case management conference was held on 10 November 2021 (“the 10 November CMC”) for the purpose of understanding Jungwoo’s reasons for doing so. There, Jungwoo’s counsel submitted that Jungwoo’s cross-appeal was properly made to the Court of Appeal because an application to set aside an adjudication determination under the SOPA is a case relating to administrative law. While Jungwoo took the position that Dongah should not have filed AD/CA 112/2021 before the Appellate Division, it declined to make an application for the transfer of AD/CA 112/2021 to the Court of Appeal. Following the 10 November CMC, Jungwoo’s filing was accepted, and its cross-appeal assigned as CA/CA 62/2021.

6 On 15 November 2021, the parties were informed by the court that pursuant to s 29E of the Supreme Court of Judicature Act 1969 (2020 Rev Ed)

(“SCJA”), CA/CA 62/2021 had been identified for possible transfer from the Court of Appeal to the Appellate Division on the ground that it was not made in accordance with s 29C read with the Sixth Schedule of the SCJA.

7 On 22 November 2021, Jungwoo filed another cross-appeal to the Appellate Division which was *identical* to its cross-appeal in CA/CA 62/2021. By a letter to court dated 24 November 2021, Jungwoo’s counsel explained that Jungwoo had raised a “jurisdictional” objection in AD/SUM 28/2021 on the ground that the proper forum for the appeal should be the Court of Appeal and not the Appellate Division, but AD/SUM 28/2021 had yet to be determined by the court. As there was a “real dispute as to the proper forum for the appeal” and the decision of the Court of Appeal to transfer CA/CA 62/2021 might not be made on or before 22 November 2021, which was the deadline for Jungwoo to file an appeal, Jungwoo filed a second cross-appeal to the Appellate Division to “preserve [its] right [to] appeal” to the Appellate Division.

8 Due to this somewhat inexplicable turn of events, another case management conference was held on 26 November 2021 (“26 November CMC”), during which Jungwoo’s counsel persisted with this course of action despite the Assistant Registrar’s explanation that it was unnecessary for Jungwoo to file a second notice of appeal to the Appellate Division to preserve its right to appeal. Jungwoo’s filing was subsequently accepted and assigned as AD/CA 120/2021.

9 On 29 November 2021, Dongah took out the present application to strike out CA/CA 62/2021.

Our decision

10 The Court of Appeal has the inherent jurisdiction to strike out a notice of appeal where (a) the appeal is not capable of argument, or (b) the appeal is frivolous, vexatious or an abuse of the process of the court: *Riduan bin Yusof v Khng Thian Huat and another* [2005] 2 SLR(R) 188 at [17] and [20].

11 In our judgment, Jungwoo has unjustifiably subjected Dongah to two identical cross-appeals before two different appellate courts in a bid to hedge against the possibility that its initial filing before the Court of Appeal was a wrong call. It is clear, by any measure, that this is not an administrative law case and a single cross-appeal ought to have been made to the Appellate Division since there is no other justification for the Court of Appeal to hear this matter. Retaining CA/CA 62/2021 on the record would not only divert valuable resources away from more suitable cases which require the Court of Appeal's expertise, but would also unnecessarily vex Dongah with having to respond to identical and concurrent cross-appeals lodged before two different appellate courts. It is for these reasons that the notice of appeal in CA/CA 62/2021 should be struck out for abuse of process.

12 We now turn to explain why CA/CA 62/2021 is plainly not a case concerning administrative law. Administrative law is a body of principles which regulates the exercise of public power by the government (see Kevin YL Tan and Thio Li-ann, *Constitutional and Administrative Law in Singapore: Cases, Materials and Commentary* (Academy Publishing, 2021) at paras 19.001–19.002; William Wade and Christopher Forsyth, *Administrative Law* (Oxford University Press, 11th Ed, 2014)).

13 Although the adjudicator’s jurisdiction to conduct the adjudication is vested in him pursuant to his appointment by the authorised nominating body (“ANB”) under s 14(1) of the SOPA (*Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and another appeal* [2013] 1 SLR 401 at [29]–[30]) and s 16(4) of the SOPA confers certain powers on the adjudicator so that he or she can conduct the adjudication, it is beyond doubt that an adjudicator is not part of the government. The Minister only authorises the ANB to appoint adjudicators: s 28(1) of the SOPA. The ANB, upon receipt of an adjudication application, has the obligation to “refer” the adjudication application to an adjudicator who may then agree or decline to determine the adjudication application: ss 14(1) and (2) of the SOPA. That adjudicator, once appointed, has the jurisdiction and concomitant powers to conduct the adjudication, but his or her authority does not flow from the Minister.

14 Further, the adjudicator is not exercising any public power when making an adjudication determination. The adjudicator’s role is to hold parties to their private law obligations under contract and the matters that the adjudicator can have regard to do not involve wider public considerations: see ss 13(1), 17(2) and 17(3) of the SOPA.

15 We note that an appeal arising out of a case in relation to the setting aside of an adjudication determination may possibly engage principles that are similar or akin to those typically applied in administrative law, but ultimately, such a case is one that is unrelated to the regulation of the exercise of public powers by public authorities. The situation we have here is arguably the reverse of what is expressly contemplated by the Sixth Schedule to the SCJA, where it is provided that an appeal arising from a *case* relating to administrative law is

to be made to the Court of Appeal by default notwithstanding that it does not raise any *issue* relating to administrative law. As this court recently clarified in *Wei Fengpin v Raymond Low Tuck Loong and others* [2021] SGCA 115 at [32], paras 1(a) to (e) of the Sixth Schedule draw a distinction between a “case” and an “issue” and set out a default allocation of appeals based on the former instead of the latter. It follows that once the present appeal does not arise from an administrative law case, it falls outside the ambit of para 1(a) of the Sixth Schedule and ought to be made to the Appellate Division in the absence of other countervailing reasons.

16 Counsel for Jungwoo submitted that based on the decisions of the New South Wales Supreme Court in *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190 and of the High Court of Australia in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd and another* [2018] HCA 4, in reviewing the determination of a tribunal under the corresponding Australian legislation, the court is exercising the prerogative remedies of judicial review and that therefore such cases are administrative law cases. As to this we make a brief point. The first source of guidance should be pronouncements of our Court of Appeal. In *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 1 SLR 797, this court at [50] had recognised that while the court is exercising its supervisory jurisdiction when it exercises its powers of judicial review and makes prerogative orders, the powers it exercises when reviewing adjudication determinations are “*akin*” to a quashing order but are distinct and governed by an entirely separate procedure than that which applies to judicial review. The fact that both types of remedies entail the exercise of the court’s supervisory jurisdiction addresses the nature of the judicial function that is being invoked. And the fact that the nature of these powers may closely resemble judicial review powers does not make it an administrative law case. Given this material

distinction, leave of court to challenge an adjudication determination is not required unlike a typical judicial review application.

17 Needless to say, the conduct of this case by Jungwoo’s counsel leaves much to be desired. At the oral hearing, we invited Jungwoo’s counsel to submit on whether he should personally bear the costs incurred in this application pursuant to O 59 r 8(1) of the Rules of Court (2014 Rev Ed) (“ROC”) which empowers the court to order costs against solicitors personally where costs have been incurred “unreasonably or improperly” in any proceedings or have been “wasted by failure to conduct proceedings with reasonable competence and expedition”. The three-step test used in determining whether costs should be ordered against a solicitor personally is set out in the decision of the English Court of Appeal in *Ridehalgh v Horsefield* [1994] Ch 205 at 231 and was recently affirmed by this court in *Munshi Rasal v Enlighten Furniture Decoration Co Pte Ltd* [2021] 1 SLR 1277 at [17]. The three-step test provides as follows:

- (a) Has the legal representative of whom complaint is made acted improperly, unreasonably or negligently?
- (b) If so, did such conduct cause the applicant to incur unnecessary costs?
- (c) If so, is it in all the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?

18 In our view, the issue as to which court an appeal should be made to is purely a question of statutory interpretation of the SCJA. That is evidently a matter which a client would not be expected to provide any input on. In the same

vein, clients depend on their counsel to take the proper procedural steps in the event that disputes are raised, on counsel's advice, as to the appropriate appellate court to hear the relevant appeal. In our judgment, Jungwoo's counsel has failed to act properly, reasonably and competently on both these aspects.

19 A case involving the setting aside of an adjudication determination is unmistakably unrelated to administrative law. This is a basic point of law which Jungwoo's counsel ought to have appreciated but he failed to do so.

20 It is also clear to us that Jungwoo's counsel did not adopt a firm view that Dongah had wrongly filed AD/CA 112/2021 before the Appellate Division. No application was taken out to have AD/CA 112/2021 struck out or transferred to the Court of Appeal. Jungwoo's counsel also claimed in their correspondence with the court that there is a "real dispute" and "real lacuna" as to which is the proper appellate court. Instead of airing this dispute through a transfer application, Jungwoo's counsel recklessly went ahead to file a cross-appeal to the Court of Appeal in CA/CA 62/2021, thereby creating an odd situation where the appeal and the cross-appeal in respect of the same dispute are filed in two different appellate courts. To make things worse, Jungwoo's counsel unreasonably persisted on filing a *second* cross-appeal to the Appellate Division in AD/CA 120/2021 in a misguided attempt to preserve Jungwoo's right to appeal, *in spite of* the Assistant Registrar's explanation that this was wholly unnecessary.

21 It bears emphasising that all these were done at the expense of Jungwoo, when Jungwoo's counsel ought to have known better and advised Jungwoo against such a wasteful course of action. The counterparty, Dongah, which had rightly made the appeal before the Appellate Division at the outset, also had to

incur unnecessary costs to respond to the two identical appeals filed before two different appellate courts by Jungwoo’s counsel. In these circumstances, we think it is just and appropriate to exercise our powers under O 59 r 8(1) of the ROC to order costs against Jungwoo’s counsel. In fairness to counsel, when we voiced our concerns he readily accepted the point and conceded that he should bear the costs personally and not charge his client for his own time in this respect.

Conclusion

22 We therefore grant the application sought by Dongah and strike out the notice of appeal in CA/CA 62/2021 accordingly. Given that CA/CA 62/2021 should never have been filed in the first place, we direct that Jungwoo’s counsel bear *all* the costs incurred in this application personally, and further order that Jungwoo’s counsel should not charge Jungwoo any fees or disbursements in relation to this application and CA/CA 62/2021. We fix the costs payable by Jungwoo’s counsel at \$12,000 inclusive of disbursements.

Sundaresh Menon
Chief Justice

Steven Chong
Justice of the Court of Appeal

Quentin Loh
Judge of the Appellate Division

Campos Conrad Melville, Chong Jia Hao and Michelle Lim Ann Nee
(RHTLaw Asia LLP) for the applicant;
S. Magintharan and Liew Boon Kwee James (Essex LLC) for the
respondent.
