IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC(I) 20

Suit No 10 of 2018 (Summons No 56 of 2020)

Between

(1) Beyonics Asia Pacific Limited
(2) Beyonics International Limited
(3) Beyonics Technology (Senai) Sdn Bhd
(4) Beyonics Technology Electronic (Changshu) Co, Ltd
(5) Beyonics Precision (Malaysia) Sdn Bhd

… *Plaintiffs*

And

(1) Goh Chan Peng
(2) Pacific Globe Enterprises Limited

… *Defendants*

JUDGMENT

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

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Beyonics Asia Pacific Ltd and others
v
Goh Chan Peng and another

[2020] SGHC(I) 20

Singapore International Commercial Court — Suit No 10 of 2018 (Summons No 56 of 2020)
Simon Thorley IJ
13–17, 20–22, 28–31 January, 3–5 February, 20 March 2020; 28 May 2020; 22 July 2020

30 September 2020 Judgment reserved.

Simon Thorley IJ:

1 Judgment in this action was given on 28 May 2020 in *Beyonics Asia Pacific Limited and others v Goh Chan Peng and another* [2020] SGHC(I) 14 and terms not defined here shall have the same meaning as in that judgment. Two separate issues arose for consideration, the *Henderson v Henderson* Issue and the Substantive Issue. The Defendants succeeded on the *Henderson v Henderson* Issue with the result that the action was struck out for abuse of process. However, neither party had sought to have the *Henderson v Henderson* Issue tried as a preliminary point and the trial therefore also addressed the Substantive Issue and judgment was given on this as well.

2 On the Substantive Issue, had the action not been struck out, the Plaintiffs' claims for the Diversion Loss and the Total Loss would have failed

but their claims for the return of the bonus and the payments made under the Resignation Agreements would have succeeded.

3 On 29 June 2020 the Plaintiffs filed a notice of appeal against the consequential order ("the Substantive Appeal").

4 The parties were unable to agree on the appropriate order for costs and by a subsequent judgment, dated 22 July 2020, it was ordered that the Plaintiffs should pay the Defendants' costs of the *Henderson v Henderson* Issue and two thirds of their costs of the Substantive Issue ("the Trial Costs Order").

5 An issue has arisen between the parties on the question of whether leave to appeal is needed in order to appeal against the Trial Costs Order in the particular circumstances of this case. In this case, the Plaintiffs have stated that, if the Substantive Appeal is dismissed, they will not challenge the existing order for costs of the trial but would wish to do so in the event that the appeal succeeds wholly or in part.

6 The Plaintiffs submit that in those circumstances leave to appeal is not required and that the Court of Appeal, following its decision in the Substantive Appeal, has the power to make such order as to costs as it sees fit both in relation to the costs of the appeal and of the trial. It has this power without the need for a formal separate notice of appeal in relation to costs and hence without the need for leave to appeal being granted by the trial judge pursuant to s 34(2) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") and the Fifth Schedule thereto.

7 The Defendants do not agree. They contend that where an order for costs has been made which is a separate order from that on the substantive judgment

which has itself been appealed, leave to appeal is required since the costs issue does not arise under the earlier order.

8 In consequence, in order to protect themselves should the Defendants' contentions be correct, the Plaintiffs seek leave to appeal against the Trial Costs Order and, since the application was made out of time, an extension of time in which to file the notice of appeal.

9 Both parties have filed written submissions and have agreed that the matter should be decided without the need for an oral hearing.

10 Section 34(2) of the SCJA provides:

> (2) An appeal may be brought to the Court of Appeal in any of the following cases only with the leave of the High Court or the Court of Appeal unless otherwise provided in the Fifth Schedule:
>
> …
>
> (*b*) any case specified in paragraph 1 of the Fifth Schedule.

11 Paragraph 1 of the Fifth Schedule provides:

> 1. Subject to paragraphs 4 and 5, an appeal may be brought to the Court of Appeal only with the leave of the High Court or 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….

12 The Plaintiffs put their case succinctly in paragraph 2 of their written submissions:

> Where a lower Court releases its judgment on costs subsequent to the substantive judgment (i.e. after the deadline for any appeal against the substantive judgment), it can be argued that a standalone notice of appeal (and correspondingly, leave to file

> such notice) is not required to appeal against costs if an appeal has already been filed against the substantive judgment. Where the appellant does not intend to challenge the costs judgment in the event the appeal against the substantive judgment fails, it should follow that no appeal against the costs judgment is necessary; in the event the substantive judgment appeal is successful, the Court would and should still be able to make consequential cost orders, including set aside the costs judgment.

13 In support of this reliance is placed on the Court of Appeal decision in *Qilin World Capital Ltd v CPIT Investment Ltd and another appeal* [2019] 1 SLR 1 ("*Qilin*").

14 The underlying facts in *Qilin* so far as relevant were on all fours with the facts of this case. On 5 March 2018 the trial judge made his decision on the costs of the trial, well after the substantive decision had been given, as the Court of Appeal's decision on the substantive appeal was given the next day, 6 March 2018 (*Qilin World Capital Ltd v CPIT Investments Ltd and another appeal* [2018] 2 SLR 1).

15 The appeal was allowed in part and the Court of Appeal was then asked to address the question of costs both at trial and on appeal in the light of its judgment.

16 The respondent's solicitors are recorded in [7(a)] of the Court of Appeal's judgment as contending:

> (a) The direction from the Court of Appeal on 10 April 2018 was for parties to deal with the question of costs of the appeals. It did not include the costs of the proceedings below, which was not the subject of Qilin's Notice of Appeal in CA 126.

17 Paragraph 9 of *Qilin* reads as follows:

> As to point (a), the fact that the costs of the first instance proceedings were absent from Qilin's notice of appeal is not

> surprising. The notice of appeal was filed on 20 July 2017. The decision of the trial judge on costs was published on 5 March 2018. *Despite the fact that the costs of the proceedings below are not mentioned in the notice of appeal, the court is entitled and empowered to deal with the costs of the proceedings below.* Even if the notice of appeal is to be regarded as deficient in this respect, it is a deficiency which could readily be cured by amendment. In the circumstances an amendment is not necessary.
>
> [emphasis added]

18 The emphasised passage is clear and is directly on point. The Court of Appeal has control over its own proceedings and, once it has reached a conclusion different to that of the trial judge, it has the power to do that which is right in the light of its decision so far as costs are concerned wherever those costs have been incurred.

19 The Court of Appeal's judgment on costs was however reached without the benefit of full submissions from the respondent in *Qilin* as, by then, the solicitors formerly instructed by the respondent had ceased to act. The Defendants in this case submit that the passage in [9] of *Qilin*, cited above, was reached *per incuriam* as the Court of Appeal was not referred to its earlier judgment in *Clearlab SG Pte Ltd v Ma Zhi and another* [2016] 3 SLR 1264 ("*Clearlab*").

20 In that case, separate orders were made on the substantive judgment and on a subsequent determination on costs. Two notices of appeal were filed, one against the substantive order and the other against the costs order, but leave to appeal against the costs order was not sought. Further, the appellants resisted a suggestion that the two appeals should be consolidated. As a result, the appeal against the substantive order was heard first and the appeal was dismissed. Thereafter a separate hearing took place on the appeal against the costs order, the contention being that even although the substantive appeal had failed, the

trial judge's order on costs should be reconsidered and amended. The point was taken that such an appeal, separate from the appeal on the substantive order, required leave to appeal.

21 In order to put the reasoning in the Court of Appeal's decision into context it is necessary to cite from [7]–[14] of *Clearlab*:

> **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: …
> >
> > > (*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.
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> [emphasis in original omitted; emphasis added in italics]

22 *Clearlab* was thus a very different case to *Qilin* and the present case in two principle respects. First the costs appeal was not consolidated with the substantive appeal and secondly the costs appeal was not only seeking a different award of costs if the appeal succeeded in whole or in part, it was inviting the Court of Appeal to alter the costs award below even if the appeal failed.

23 The costs appeal was thus a standalone appeal (see the emphasised passage in [12] of *Clearlab* set out above). As such it required a separate notice of appeal and for leave to be given. The Court of Appeal went on to consider what its attitude would have been had the appeals been consolidated and concluded that as a practical matter leave would probably have been given, but once again held that leave would have been required.

24 The first question therefore that has to be decided is whether in the present case, where the appellant seeks the Court of Appeal to review the order for costs below if, but only if, the appeal succeeds in whole or in part, a separate notice of appeal is required. If so, then it must follow that leave to appeal is required also. To my mind this is a question that did arise for decision in *Qilin*

and was not canvassed in *Clearlab*. Accordingly, I hold that this court is bound by the reasoning in *Qilin* which was not reached *per incuriam*.

25 *Qilin* is authority for the proposition that where there is a substantive appeal and a notice of appeal is filed before a costs order is made in respect of the trial costs, if the appellant wishes only to challenge the costs order should the appeal succeed in part, no separate notice of appeal is required. The most that may be required is that the notice of appeal against the substantive judgment is amended to make this clear. The Court of Appeal in *Qilin* did not expressly decide that such an amendment was necessary, contenting itself with holding that it was not necessary on the facts of that case.

26 However, the reasoning of the Court of Appeal in the passage in [9] of *Qilin*, highlighted in [17] above, suggests that it is not. If the Court of Appeal is "entitled and empowered to deal with the costs of the proceedings below" it would seem to follow that an express request that the court exercise that power is an unnecessary requirement.

27 Be that as it may, for the reasons I have given, I am satisfied that no separate notice of appeal is required but appellants would be well advised as a matter of caution to seek to amend any substantive notice of appeal until the Court of Appeal clarifies that this is unnecessary.

28 This is therefore sufficient to dispose of this application. If no notice of appeal is required, it follows that leave to appeal is not necessary either. But that leaves the Plaintiffs in a somewhat invidious position if the Court of Appeal were to consider that the reasoning in *Clearlab* mandates the filing of a separate notice of appeal for which leave has been given.

29 They should, in my judgment, not be left in the position where a successful appeal might result in the Court of Appeal holding that it does not have the power to alter the costs award in the court below even if it felt this to be just owing to a failure in serving the necessary documents.

30 I therefore propose to grant the Plaintiffs leave to appeal against the judgment on costs in so far as this may be necessary and they can then seek to have that appeal consolidated with the Substantive Appeal.

31 The Defendants contend, strongly, that this should not be done as the application for leave was made out of time and that there was no good reason for the delay. They submit that this is particularly the case where the failure relates to a notice of appeal where the interest of justice requires that there be finality. However, in this case, there is to be the Substantive Appeal and finality will only occur once judgment is given by the Court of Appeal. There is thus no reason to adopt a strict approach to the granting of an extension of time. In the circumstances where the law is said to be unclear, where the delay is a short one and the delay is not going to affect the ultimate date on which finality is reached, it is appropriate that leave should be given.

Conclusion

32 On the facts of this case I do not consider that a separate notice of appeal on costs is necessary so that leave to serve one is not required. However, in circumstances where one party contends that it is, the right course is to grant leave to appeal so that the Plaintiffs are protected should my primary conclusion be held to be wrong. I therefore grant leave to appeal out of time.

33 So far as costs are concerned, it can fairly be said that the Plaintiffs have made an unnecessary application but equally it can be said that the Defendants

have failed in opposing the application for leave to amend. In all the circumstances I consider that each party should bear its own costs of the application. There will therefore be no order as to costs.

Simon Thorley
International Judge

Chin Li Yuen Marina, Alcina Lynn Chew Aiping, Siew Guo Wei, Darren Ng Zhen Qiang, Germaine Teo and Joseph Lim (Tan Kok Quan Partnership) for the plaintiffs;
Davinder Singh s/o Amar Singh SC, Lin Xianyang Timothy, Tan Mao Lin, Gerald Paul Seah Yong Sing and Joshua Chia Sheng Rong (Davinder Singh Chambers LLC) for the defendants.