

Federal Court spells out restriction for notices of cross-appeal

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Litigation, Malaysia

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Facts

In *Kabushiki Kaisha Ngu v Leisure Farm Corporation Sdn Bhd*(**1**) the subject matter concerned was a golf course owned by the second defendant. The first defendant owned all of the shares in the second defendant.

Initially, the president of the first defendant, on behalf of the first and second defendants, negotiated the sale of the land with the plaintiff. After concluding the negotiations, the plaintiff inserted private caveats over the land in order to protect its right and interest therein.

Subsequently, the sale of the land did not materialise and the plaintiff filed suit in the high court against the first defendant for specific performance of the sale and purchase of the entirety of the shares in the second defendant issued by the first defendant to the plaintiff. Despite the pending legal suit, the second defendant granted the third defendant an option to purchase part of the land, based on which a sale and purchase agreement was entered into by the first and third defendants. As a result, the plaintiff obtained an injunction to prevent the first and second defendants from any further dealings regarding the land.

Decisions

High court

The high court found that there was a sale and purchase agreement between the plaintiff and first defendant in respect of the land, wherein the latter had agreed to sell all of its shares in the second defendant to the plaintiff. As such, the high court granted the plaintiff damages in lieu of an order for specific performance of the contract to be recovered from the first defendant.

Court of Appeal

Dissatisfied with the high court's decision regarding damages in lieu of specific performance, the plaintiff appealed to the Court of Appeal against that part of the high court's decision, contending that the high court should have granted specific performance to the plaintiff instead.

Thereafter, via its cross-appeal, the first defendant appealed against the high court's finding that there was a "concluded contract" between the plaintiff and first defendant. This was not part of the plaintiff's notice of appeal.

During the appeal, the plaintiff raised its preliminary objection against the first defendant's cross-appeal on the grounds that the cross-appeal should be restricted to the part of the order that was being appealed by the plaintiff and not to seek a reversal of any other aspects of the high court's decision. Accordingly, if the first defendant wished to do so, it should have filed a proper and separate notice of appeal and not a cross-appeal.

The Court of Appeal agreed and thus allowed the plaintiff's preliminary objection.

Federal Court

Discontented with the Court of Appeal's decision granting the plaintiff's preliminary objection, the first defendant appealed to the Federal Court.

The Federal Court concurred with the Court of Appeal's ruling, holding that the issue at hand involved the interpretation and application of Rules 5 and 8 of the Rules of the Court of Appeal 1994.

Rule 5(1) of the Rules of the Court of Appeal provides that "[a]ppeals to the Court shall be by way of re-hearing and shall be brought by giving notice of appeal", whereas Rule 8(1) provides as follows:

"It shall not be necessary for a respondent to give notice of appeal, but if a respondent intends, upon the hearing of the appeal, to contend that the decision of the High Court should be varied, he may, at any time after entry of the appeal and not more than ten days after the service on him of the record of appeal, give notice of cross-appeal specifying the grounds thereof, to the appellant and any other party who may be affected by such notice, and shall file within the like period a copy of such notice, accompanied by copies thereof for the use of each of the Judge of the Court."

Reading Rules 5 and 8 together, the Federal Court held that Rule 5 permits appeals to be lodged against all or part of any judgment or court order, and that such appeals should be considered by way of re-hearing. Further, the word 're-hearing' clearly anticipated a review before the Court of Appeal of all points and arguments heard by the lower-instance court. On the other hand, Rule 8 provides that a respondent can contend only that a high court decision should be varied. It does not state that a notice of cross-appeal "shall be by way of rehearing". A notice of cross-appeal does not provide for a complaint to be reheard. Hence, if an aggrieved party seeks to challenge a substantive finding of the court, it must file a proper notice of appeal.

For the reasons above, the first defendant's appeal was dismissed.

Comment

The Federal Court has clearly set out the circumstances under which a notice of appeal under Rule 5 of the Rules of the Court of Appeal or a notice of cross-appeal under Rule 8 of the rules can be filed. In short, where the respondent wants to reverse or set aside part of a lower-instance finding, decision or judgment which was not appealed in the appellant's notice of appeal, it is incumbent on the respondent to file an independent and separate notice of appeal, rather than a notice of cross-appeal.

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Endnotes

(1) [2016] 8 CLJ 149

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