Nomura Regionalisation Venture Fund Ltd v Ethical Investments Ltd [2000] SGHC 36

Case Number : Suit 623/1998

Decision Date : 13 March 2000

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Ang Cheng Hock and Bernice Loo (Allen & Gledhill) for the plaintiffs; Terence Teo (Chee & Teo) for the defendants

Parties : Nomura Regionalisation Venture Fund Ltd — Ethical Investments Ltd

Civil Procedure – Appeals – Notice of appeal – Extension of time for service of notice of appeal – Relevant principles governing extension of time – O 3 rr 2(5) & 4, O 56 r 1(3) Rules of Court (1997 Rev Ed)

Civil Procedure – Appeals – Notice of appeal – Extension of time for service of notice of appeal – Mistake of solicitor's employee – Serving notice of appeal on wrong party – Whether circumstances justify exercise of discretion to extend time – Whether "special circumstances" to be shown – O 3 rr 2(5) & 4, O 56 r 1(3) Rules of Court(1997 Rev Ed)

: This was an application by the defendants for an extension of time to serve the notice of appeal in RA 514/99 (the appeal) and for the late service of the notice of appeal on the plaintiffs` solicitors M/s Allen & Gledhill, to be deemed proper service. After hearing the arguments, I granted the defendants` application and adjourned the hearing of the appeal; the plaintiffs have now appealed against my decision (in CA 12/2000).

The facts

The plaintiffs are a venture company incorporated in Singapore. The defendants agreed to subscribe for 50 units of shares in the plaintiffs at US$100,000 per unit. The shares were allotted to the defendants. The defendants paid US$2.5m as the first instalment for the shares. On 30 April 1997, the plaintiffs gave written notice for the payment of the second instalment of the subscription monies in the sum of US$2.5m. After a further written demand from the plaintiffs dated 17 June 1997, the defendants made part-payment of $500,000 but not the balance of $2m.

Consequently, the plaintiffs commenced an action against the defendants claiming specific performance of the agreement and for damages. Summary judgment was granted in favour of the plaintiffs and specific performance of the agreement was ordered. However, the defendants failed to comply with the order for specific performance. On the plaintiffs` application, the order for specific performance was discharged on 12 March 1999 and the parties were ordered to proceed with the assessment of damages.

Before the damages were assessed, the plaintiffs forfeited the shares allotted to the defendants pursuant to their articles of association. The defendants then applied for relief against forfeiture and for the plaintiffs to expedite their assessment of damages; the application was dismissed on 3 December 1999 and the appeal was the defendants` against that decision.

On 13 December 1999, the defendants` previous solicitors M/s Drew & Napier filed the notice of appeal on the defendants` behalf. On 16 December 1999, the defendants` present solicitors took over the conduct of the matter. Although the notice of appeal was filed in time, it was not served on the plaintiffs` solicitors until 7 January 2000 contrary to O 56 r 1(3) read with O 3 r 2(5) of the Rules

of Court, which required the defendants to serve the notice of appeal within seven days of filing (excluding weekends and public holidays), namely, by 22 December 1999.

The solicitor in charge of the appeal (Teo Chee Seng) filed an affidavit on 10 January 2000 explaining the default. He stated that he had specifically instructed the litigation secretary of his firm to serve the notice of appeal and the notice of change of solicitors on M/s Allen & Gledhill. He assumed she had complied with his instructions; he had even telephoned her from Hong Kong to confirm that she had done so. However, on 7 January 2000, he discovered that the papers were wrongly served on M/s Drew & Napier. According to him, the litigation secretary said that the court clerk was on leave and she had told the despatch clerk to serve the papers instead. She also admitted that she had given the wrong instructions to the despatch clerk. Later that day at about 6pm, Teo Chee Seng instructed one of his staff to immediately serve the relevant papers on M/s Allen & Gledhill. Service having been effected after 4pm, it meant that it was deemed to have been served on the following day, namely, 8 January 2000 which was a Saturday.

The plaintiffs opposed the application on the ground that there were no `special circumstances` on the facts of this case which warranted the exercise of the court`s discretion to extend time. In particular, they contended that the mistake of the defendants` solicitors or their employees in not effecting proper service is not a ground for extending time. Their counsel cited the following authorities in support of their submissions: **Cheah Teong Tat v Ho Gee Seng & Ors** [1974] 1 MLJ 31 and [1975] 2 MLJ 149; **Tan Chai Heng v Yeo Seng Choon** SLR 381 ; **Re Coles and Ravenshear** [1907] 1 KB 1; **Vettath v Vettath** [1992] 1 SLR 1 ; and **Chin Hua Sawmill Co Sdn Bhd v Tuan Yusoff bin Tuan Mohamed** [1974] 1 MLJ 58 .

I overruled the plaintiffs` objections as, in my view, the cases cited by counsel were not directly in point. In ***Re Coles and Ravenshear*** , counsel for the appellant sought an extension of time to file the notice of appeal after he had taken an erroneous view that the appeal need not be brought within a certain period of time. The application was refused by the English Court of Appeal on the ground that a mistake on the part of the solicitor was not sufficient to warrant an extension of time. It is pertinent to note that the court in that case was interpreting the existing O 58 r 15 of the English rules which provided that `special leave` of the Court of Appeal was required before an appeal can be brought out of time. Similarly, the Malaysian Federal Court in ***Chin Hua Sawmill Co Sdn Bhd v Tuan Yusoff bin Tuan Mohamed*** interpreted r 13 of the Federal Court (Civil Appeals) (Transitional) Rules of 1963 which was in pari materia with the English provision.

In ***Cheah Teong Tat v Ho Gee Seng & Ors*** , Syed Agil Barakbah J held that an applicant must show `special circumstances` upon which the court can exercise its discretion for an extension of time. On the facts, he held that the mistake of the applicant in not realising the time-frame in which he must serve the notice of appeal was not sufficient. His decision was affirmed on appeal to the Federal Court. In the course of his judgment, the learned judge observed that the English position had been altered since 1909 and `special leave` was no longer required to bring an appeal out of time. He went on to hold that the pre-1909 English position as enunciated in the decision of ***Re Coles and Ravenshear*** nonetheless remained relevant because no similar amendments were made to the Rules of the Supreme Court 1950.

In contrast, the jurisdiction of our courts to extend time is found in O 3 r 4 of the Rules of Court which states that the court:

> *may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these Rules or by any judgment, order or direction, to do any act in any proceedings.*

In my view, it would appear that our courts have a wider discretion in deciding the question of extension of time. In addition, the test adopted in ***Cheah Teong Tat v Ho Gee Seng & Ors*** which required the proof of `special circumstances` before leave can be granted to extend time is not in line with the local decisions which I shall refer to later in my decision.

Such a distinction was also endorsed by the Malaysian Court of Appeal in **Soh Keng Hian v American International Assurance Co Ltd** [1996] 1 MLJ 191 where the court made the following observations (at p 194) in relation to the Rules of the Court of Appeal 1994 which also did not have a specific requirement of `special leave` to extend time:

> *Further, we are fully conscious of the difference between the language of the Federal Court (Civil Appeals) (Transitional) Rules 1963 and the Rules of the Court of Appeal 1994. The former required an appellant to obtain special leave to extend time to either file or to serve a notice of appeal. The latter has no such requirement. This difference in language has an important consequence. Whereas in an application under the former, the mistake of a solicitor or his clerk was no excuse (**Re Coles & Ravenshear** [1907] 1 KB 1), it is a factor which the court may now take into account when deciding whether to grant an extension of time under the latter (**Sinnathamby & Anor v Lee Chooi Ying** [1987] 1 MLJ 110).*

Since the amendments in 1909, it is noteworthy that the English courts had granted an extension of time, in appropriate circumstances, even though the failure to appeal in time was due to a mistake on the part of the legal adviser (see for example **Gatti v Shoosmith** [1939] 3 All ER 916).

Hence, given the important difference in the wording of the relevant provisions pertaining to extension of time, I found these cases to be of little assistance. Moreover, none of the factual matrixes in those cases resembled the facts at hand. The applicant in ***Cheah Teong Tat v Ho Gee Seng & Ors*** was ignorant of the requirement to file and serve the notice of appeal within the same period of time. In the case of ***Re Coles and Ravenshear*** , the applicant`s counsel erroneously took the view that the appeal need not be brought within 14 days from the order. In ***Chin Hua Sawmill Co Sdn Bhd v Tuan Yusoff bin Tuan Mohamed*** , the counsel for the applicant had inadvertently omitted to instruct his staff to serve the notice of appeal on the respondent or his solicitors.

The relevant considerations in the exercise of discretion to extend time to appeal has been considered in numerous cases. As a starting point, I refer to the observations of Lord Guest in the Privy Council decision of **Ratnam v Cumarasamy** [1965] 1 WLR 8 at p 12:

> *The rules of court must prima facie be obeyed, and in order to justify a court in extending time during which some step in procedure requires to be taken, there must be some material upon which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a timetable for the conduct of litigation.*

The relevant principles governing the extension of time to appeal are set out in the Court of Appeal decision of **Pearson v Chen Chien Wen Edwin** [1991] SLR 212 . In that case, there was an application to the Court of Appeal for an extension of time to appeal against a court order on ancillary

matters. The application was necessitated by a miscalculation of the time for filing of the notice of appeal. The applicant`s solicitors were under the mistaken impression that O 3 r 3 of the Rules of Supreme Court 1970, which excluded the court vacation from the time for filing and service of any pleading, also applied to a notice of appeal. The court endorsed the decision of Chan Sek Keong J (as he then was) in **Hau Khee Wee & Anor v Chua Kian Tong & Anor** [1986] SLR 484 [1987] 2 MLJ 146 and identified the following factors to be taken into account in deciding whether to grant an extension of time to file a notice of appeal:

(1) the length of the delay;

(2) the reasons for the delay;

(3) the chances of the appeal succeeding if time for appealing is extended, and

(4) the degree of prejudice to the would-be respondent if the application is granted.

In the circumstances, the applicant was unable to persuade the court to show sympathy to her and an extension of time was therefore not granted.

In my judgment, the same factors ought to be considered in deciding whether to grant an extension of time to serve the notice of appeal. Although counsel for the defendants sought to distinguish the cases cited by the plaintiffs on the ground that they concerned applications for extension of time to file notice of appeal, he had not cited any authorities to justify such a distinction. On the contrary, it has been held that an appeal only comes into being with the filing and service of a notice of appeal (***Soh Keng Hian v American International Assurance Co Ltd*** and **Tan Thye Heng v Pan Mercantile (S) Pte Ltd & Anor** [1989] SLR 973 (also [1990] 1 MLJ 208).

I understood that a similar approach was also taken by Chao Hick Tin J (as he then was) in **Stansfield Business International Pte Ltd v Vithya Sri Sumathis** [1999] 3 SLR 239 when he considered the question of whether he ought to exercise his discretion to allow an extension of time for the service of a notice of appeal against a Small Claims Tribunal decision. He held that the application for an extension of time to serve must be viewed on the same basis as an application for extension of time to file a notice of appeal.

I now turn to the remaining cases cited by counsel for the plaintiffs. In ***Tan Chai Heng v Yeo Seng Choon*** , the applicant applied for an extension of time to file a notice of appeal. The applicant`s solicitor averred in his affidavit filed in support of the application that the notice of appeal was not filed in time because the cause papers file pertaining to the matter had been misplaced. The notice of appeal was only filed after the recovery of the file, almost a month later. Choor Singh J dismissed the application. He opined that it was the duty of the solicitor to exercise reasonable diligence to ensure that the notice of appeal was filed within the time prescribed for bringing the appeal even though the file had been mislaid. In that case, the solicitor could have filed the notice of appeal even though he did not have the file with him. In his view, the facts disclosed gross negligence on the part of the solicitor and did not merit the exercise of judicial discretion in favour of the applicant.

In ***Vettath v Vettath*** , the application for an extension of time to file a notice of appeal against various orders made by the High Court in a divorce petition was refused by the Court of Appeal. The applicant had instructed solicitors to appeal against the orders. On their request, the applicant agreed to brief another solicitor as counsel for the appeal. Under O 57 r 4 of the Rules of the Supreme Court 1970, the notice of appeal would have had to be filed and served within one month from 2 May 1991. However, there was some confusion as to which solicitor should file the notice of appeal. Eventually,

the time for the filing of the notice of appeal expired. Yong Pung How CJ, delivering the judgment of the court, applied the decision in ***Pearson v Chen Chien Wen Edwin*** and held that the applicant had not established grounds sufficient to persuade the court to show sympathy to him. The applicant could have filed the notice of appeal through either one of the solicitors acting for him within the time prescribed by the Rules but he did not do so.

In my opinion, these cases do not lay down a general proposition that mistakes of the solicitor would ***never*** be sufficient to justify an extension of time. Whether it is appropriate to allow the applicant to bring an appeal out of time would depend on the circumstances of each case, having considered the relevant principles governing the exercise of the judicial discretion. In those two cases, the failure on the part of the respective solicitors in charge to file the notice of appeal was clearly inexcusable in the circumstances for the reasons stated in the judgments.

The decision

Here, the delay in service was about two and a half weeks. While the delay was not short, I did not regard it as prolonged. The defendants` solicitors did not appear to be tardy in pursuing the appeal. When the mistake was discovered, they immediately attempted to rectify it by serving the relevant papers on M/s Allen & Gledhill. But for the inadvertent mistake of the litigation secretary, the notice of appeal would have been served on the correct solicitors in time and the matter would have proceeded on appeal with no procedural objections. It was also not the contention of the plaintiffs that they had suffered such prejudice which could not be compensated by an appropriate order for costs. Moreover, I had adjourned the hearing of the appeal to a later date to obviate any prejudice that might possibly result from the late service of the notice of appeal on the plaintiffs` solicitors. In short, this was a case of wrong service, not non-service.

The last factor to be considered is the defendants` chances of succeeding in the appeal as `it would be a waste of time for all concerned if time is extended when the appeal is utterly hopeless` (per Yong Pung How CJ at p 218 of ***Pearson v Chen Chien Wen Edwin*** ). The parties did not address this issue in their submissions before me. The gist of the defendants` contention was that it was unconscionable for the plaintiffs to forfeit the shares when they had already paid US$3m towards the purchase of the shares. Having perused the affidavits filed in respect of the application for relief against forfeiture and the arguments canvassed below, I would hesitate to say that the appeal would be `utterly hopeless` without the benefit of considering the submissions from both counsel.

Conclusion

Because of the peculiar circumstances of this case, I thought it appropriate to exercise my discretion in favour of the defendants. Accordingly, I granted their application for an extension of time to serve the notice of appeal. Even so, the defendants should still be penalised in costs for their non-compliance with the Rules of Court. I therefore awarded costs of $500 to the plaintiffs.

Outcome:

Application allowed.