IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC 31

Originating Application No 831 of 2022

Between

Pharma Inc (Wordwide) Pte Ltd

… *Appellant*

And

Limb Salvage and Revision Arthroplasty Surgery Pte Ltd

… *Respondent*

GROUNDS OF DECISION

Civil Procedure — Extension of time

Pharma Inc (Wordwide) Pte Ltd
v
Limb Salvage and Revision Arthroplasty Surgery Pte Ltd

[2023] SGHC 31

General Division of the High Court — Originating Application No 831 of 2022
Hri Kumar Nair J
1 February 2023

13 February 2023

Hri Kumar Nair J:

1 This is an application for an extension of time to file a notice of appeal against the decision of the learned District Judge ("DJ"), Mr Vince Gui Chuan Cheng, made on 25 October 2022. Following a three-day trial, the learned DJ awarded judgment and costs against the applicant, which had defended the claim, and dismissed the applicant's counterclaim (Case No.: DC/DC 1144/2019).

2 It is undisputed that the time for filing the appeal expired on 8 November 2022. The applicant tried to file its notice of appeal that day, but it was rejected as the required security for the appeal was not furnished. The applicant then tried to file its notice of appeal with the requisite security on 9 November 2022, but it was again rejected as the deadline for appealing had passed. On 10

November 2022, the applicant filed an application in the State Courts for leave to appeal out of time, which was later withdrawn as the application ought to have been filed in High Court.

3 The applicant filed this application on 8 December 2022 on the basis that it had breached the deadline for filing its notice of appeal by only one day.[1]

4 It is trite that in considering whether to allow an extension of time to appeal, the following factors are taken into account (*Hau Khee Wee and another v Chua Kian Tong and another* [1985-1986] SLR(R) 1075 at [14]; *Pearson Judith Rosemary v Chen Chien Wen Edwin* [1991] 2 SLR(R) 260 at [15] and [17]):

(a) the length of the delay;

(b) the reasons for the delay;

(c) the chances of the appeal succeeding if time for appealing is extended; and

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

5 I dismissed the application for the reasons below.

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[1] Ho See Peng's affidavit filed in support of this application dated 8 December 2022 (the "Affidavit") at para 11.

No reasons were given for the delay

6 This was not a simple delay of just one day. It was compounded by the applicant's mistake of applying for an extension of time in the State Courts notwithstanding that it should have been filed in the High Court, given that the time for appeal had lapsed (O 55D r 14 of the Rules of Court (2014 Rev Ed)). This is not a new rule and the legal position is clear (*Tjo Kwe In v Chia Song Kwan* [2002] 2 SLR(R) 560 at [8]). No explanation was given as to why the application was wrongly brought. Further, although the applicant was alerted to this error at a hearing in the State Courts on 1 December 2022, this application was only filed on 8 December 2022. No explanation was offered for this delay either. As a consequence, a proper application for an extension of time to appeal was only filed one month after the deadline.

7 I also find that insufficient reasons have been given for the delay. In the Affidavit, the applicant's director and substantial shareholder, Ho See Peng ("Mr Ho") admitted that he was informed of the 14-day deadline to file the appeal and was aware that it expired on 8 November 2022.[2] He stated that his attempt to file the notice of appeal on 8 November 2022 had failed because the funds needed to provide security for the costs of appeal would only be available the next day.[3] However, Mr Ho gave no explanation for why the funds could not have been secured by 8 November 2022. Furthermore, if the applicant was aware that it would not be able to obtain funds within time, it should have filed

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2 The Affidavit at para 5.

3 The Affidavit at para 9.

an application with the State Courts for an extension of time before the deadline; this was not done and the omission was not explained. As noted above at [6], there was also no explanation for the application being brought wrongly in the State Courts.

The appeal is hopeless

8 In assessing whether to grant leave for a notice of appeal to be filed out of time, the court also considers the prospects of the applicant succeeding on appeal. The court adopts a very low threshold in this merits assessment: the test is whether the appeal is "hopeless" (*ARW v Comptroller of Income Tax and another and another appeal* [2019] 1 SLR 499 at [76]).

9 As a preliminary observation, I note that the applicant did not make any closing submissions at the trial below. It therefore offered no arguments to the learned DJ as to how the evidence, and the parties' respective claims, should be evaluated. The applicant claimed this failure was due to a disagreement with its (then) solicitors over legal fees. No particulars were proffered, and, in any event, that is not a good explanation. The applicant could have applied for time to instruct new solicitors or to prepare closing submissions on its own. In fact, the applicant did apply for and was granted an extension of time until 23 September 2022 to file its closing submissions, but eventually did not file any. For completeness, I do not agree with the learned DJ that this, by itself, means that the applicant had abandoned its defence. Nonetheless, this is a non-issue as the learned DJ ultimately decided this case on its merits.

10 In order to assess whether the appeal is a hopeless one, I first set out the facts agreed between the parties or found by the learned DJ, and a summary of

the applicant's case. This provides the background against which applicant's submissions in this application should be considered.

The trial below

11 The respondent's claim against the applicant was to recover a sum of $160,500 it had paid the applicant to purchase two Diamagnetic Device CTU-Mega 18 ("CTU-18") machines.

12 The following facts are undisputed or were found by the learned DJ:

(a) There was an agreement (the "Agreement") between the parties for the respondent to purchase two CTU-18 machines from the applicant;

(b) The applicant issued an invoice dated 26 October 2016 and the respondent paid $160,500, which was equivalent to the purchase price for one unit of the CTU-18 machine;[4]

(c) On or around 4 July 2017, the parties agreed that they would proceed with the purchase and delivery of one CTU-18 machine. The moneys paid thereby constituted the full purchase price for the one unit;

(d) The applicant did not place an order for the CTU-18 machine with the supplier, Bio-Pharmaceuticals Sdn Bhd (the

[4] Statement of Claim ("SOC") at paras 6 and 7; Defence and Counterclaim (Amendment No. 1) ("D&CC") at para 5; Court Transcript (19 July 2022) p 56 line 16.

"Malaysian supplier"), and did not pay the Malaysian supplier any moneys.[5] (An analysis of the evidence shows that the applicant failed to do so notwithstanding Mr Ho's representations to the respondent (i) that it had paid a deposit to the Malaysian supplier;[6] (ii) that it had placed an order for the CTU-18 machine with the Malaysian supplier; and (iii) that the CTU-18 machine would be delivered soon);[7]

(e) The applicant did not, in fact, have any CTU-18 machines for delivery; and

(f) On 21 August 2017, the respondent treated the applicant's conduct as a repudiatory breach and cancelled the Agreement. The respondent demanded the refund of the moneys paid, which the applicant failed to pay.[8]

13 The applicant's pleaded defence was that the Agreement was varied at a board meeting on 27 March 2017 between the parties' representatives, Mr Ho and Mr Saminathan Suresh Nathan ("Mr Nathan") of the respondent. The varied Agreement was for the applicant to supply a different model, a CTU-20 machine, to be purchased directly from TSEM Med Swiss SA, a manufacturer

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5 SOC at para 15; Court Transcript (19 July 2022) p 96 line 32.

6 Court Transcript (19 July 2022) p 71 lines 26 and 31, p 108 line 15.

7 Saminathan Suresh Nathan's affidavit of evidence-in-chief ("Nathan's AEIC") at paras 14–16; Court Transcript (22 June 2022) p 16 lines 28–31; Court Transcript (19 July 2022) p 64 line 5, p 67 lines 23, p 68 line 3; Ho See Peng's affidavit of evidence-in-chief ("Ho's AEIC") at paras 29, 33; D&CC at para 10(f).

8 SOC at paras 17 and 18; D&CC at para 22.

in Italy (the "Italian supplier"). (The CTU-20 machine is a newer model of the CTU-18 machine, and they share substantially the same functions.) This was because the applicant claimed to have discovered that the CTU-18 machines from the Malaysian distributor were defective.[9] The applicant further claimed that the delivery of the CTU-20 machines was subject to approval by the Health Sciences Authority ("HSA"),[10] which approval was only obtained on 20 March 2019.[11] Accordingly, the applicant asserts that the respondent had no basis to terminate the varied Agreement for the applicant's failure to deliver the CTU-18 machine; instead, it was the respondent which was in breach and this formed the basis of the applicant's counterclaim.

The applicant's submissions on the issue of merits

14 The Affidavit deals with the issue of merits in only two paragraphs, both of which merely outline general allegations and are woefully inadequate to explain how the learned DJ was in error. At the hearing of this application, the applicant relied, in the main, on the minutes of two meetings (the "Minutes") held on 27 March 2017 and 6 July 2027 attended by Mr Ho and Mr Nathan, arguing that these constitute evidence of the alleged variation.

15 I note that the learned DJ made no specific findings of fact as to the applicant's case on the variation of the Agreement. Nonetheless, based on the applicant's own pleadings and concessions at trial, there are substantial difficulties with its case. I explain these difficulties below: with reference first,

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9 D&CC at para 10(g).

10 D&CC at paras 4A and 11A(c).

11 D&CC at para 11A(g).

to the Minutes (since these are submitted as the primary basis for the applicant's contention that their appeal is not a hopeless one) and then, to other difficulties with the applicant's case.

16 First, the Minutes do not assist the applicant; instead, they contradict the alleged variation pleaded by the applicant.

(1) Minutes of the meeting on 27 March 2017

17 While the minutes of the meeting held on 27 March 2017 (the "March Minute") do refer to an intention to purchase one CTU-20 machine, it reflected an exploratory discussion.[12] The March Minute expressly states that the cost of the CTU-20 machines was unknown and the parties were considering a loan to purchase the same, the details of which were not confirmed.[13] While there was a reference to defects with the CTU-18 machine, this was an issue which required a "deeper look" and there was no expressed intention, much less an agreement, to abandon the purchase of the CTU-18 machines entirely.[14] The March Minute was thus not evidence of an agreement to cancel the purchase of the CTU-18 machines and/or to replace it with the CTU-20 machines.

18 On this same point, the applicant's own pleadings and subsequent events contradict the applicant's case that the Agreement had been varied on 27 March 2017.[15] The applicant's pleaded case is that notwithstanding the meeting on

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12 Court Transcript (22 June 2022) p 38 lines 5–15, p 39 line 11, p 40 lines 25 and 28, p 94 lines 25; Court Transcript (19 July 2022) p 24 lines 28–31, p 25 line 2.

13 Nathan's AEIC at paras 27 and 28.

14 Court Transcript (19 July 2022) p 25 lines 4–6, p26 lines 3 and 4.

15 The Affidavit at para 6; D&CC at para 10(g).

27 March 2017, the specific model of machines to be purchased had yet to be confirmed.[16] It also pleaded a conversation on 24 June 2017 during which Mr Ho informed Mr Nathan that obtaining a CTU-18 machine would be faster than obtaining a CTU-20 machine, and the latter would require the further signing of contracts and raising of a bankers' guarantee[17]. It is not disputed that no contracts were signed for the CTU-20 machines, nor were guarantees procured. This suggests that there was no variation to the Agreement on 27 March 2017 for the respondent to purchase two CTU-20 machines, instead of the CTU-18 machine, from the applicant.

(2) Minutes of the meeting on 6 July 2017

19 At the outset, the applicant did not expressly plead that there was a variation of the Agreement on 6 July 2017. In any event, the minutes of 6 July 2017 (the "July Minute") helps the applicant even less.

20 The July Minute makes it clear, in the first line which reads "One unit of CTU MEGA 18 Machine will be purchase [*sic*] from the Malaysian distributor", that the parties agreed to proceed with the purchase of one CTU-18 machine. This contradicts the applicant's pleaded variation. Indeed, Mr Ho and Ms Thea Gonzales Caoile ("Ms Thea"), both witnesses for the applicant, gave evidence at trial that, at this meeting, the parties had agreed that the respondent would purchase one CTU-18 machine, to be obtained from the Malaysian supplier, and that two CTU-20 machines would later be procured from the Italian supplier. The July Minute expressly states that when the CTU-

16 D&CC at para 11(h).

17 D&CC at para 11(h); Ho's AEIC at para 53(b).

20 machines have been received, the CTU-18 machine would be used for mobile road shows instead.[18]

21 Further, at the trial below, Ms Thea, who was the secretary who recorded the Minutes, testified that the discussion at this meeting was for another company, Abdiel Physio Inc Pte Ltd ("Abdiel"), not the respondent, to purchase the CTU-20 machines.[19] Mr Ho also testified that the two CTU-20 machines referred to in the July Minute were to be acquired by Abdiel.[20] This is inconsistent with the variation as pleaded and the case the applicant intends to advance on appeal.

22 Second, the applicant's pleaded variation is contradicted by Mr Ho's evidence given during cross-examination that the parties agreed on 4 July 2017 to proceed with the purchase of one CTU-18 machine.[21]

23 Further, it is common ground between the parties that Mr Ho had informed Mr Nathan on 25 July 2017 via a WhatsApp message that the CTU-18 machine had been approved by HSA and would "be here in 10-14 days max…".[22] This contradicts the applicant's alleged variation, according to which it would not by obliged to deliver a CTU-18 machine.

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18 Ho's AEIC at para 58; Thea's affidavit of evidence-in-chief ("Thea's AEIC") at para 8.

19 Court Transcript (26 July 2022) p 13 lines 14–28.

20 Court Transcript (22 June 2022) p 112 lines 12–20; p 119 lines 27–31.

21 D&CC at para 11p; Court Transcript (19 July 2022) p 92 line 5.

22 Plaintiff's Opening Statement at para 16; Nathan's AEIC at para 19p; D&CC at para 17(a)(iii); Court Transcript (19 July 2022) p 99 line 30, p 100 line 14, p 101 line 4; Plaintiff's Closing Submissions at para 41.

24 Third, other parts of the applicant's pleadings contradict its case. The applicant pleaded that on or after 24 June 2017, the parties agreed to proceed with the purchase of one CTU-18 machine from the Malaysian supplier first before obtaining a CTU-20 machine from the Italian supplier.[23] It also pleaded that when Mr Nathan asked for updates on 4 July 2017, Mr Ho said that he was waiting for HSA approval before the machine that had been ordered from the Malaysian supplier could be imported.[24] This could only be a reference to the CTU-18 machine, as the CTU-20 machine was to be purchased directly from the Italian supplier. I note parenthetically that Mr Ho's representation here was untrue as he admitted at trial that he did not have any evidence to show that he had ordered or otherwise taken steps to get a CTU-18 machine from the Malaysian supplier,[25] and did not pay them.[26]

25 Fourth, the applicant did not respond to the respondent's termination of the Agreement and demand for a refund in August 2017 with any allegation that the Agreement had been varied. This would have been the obvious response, and its absence suggests that the allegation of a variation was an afterthought.

26 For completeness, there is no issue of the applicant not being able to deliver the CTU-18 machine to the respondent because there was no HSA approval. The applicant pleaded that it was waiting for HSA approval to import CTU-20 machines and that approval was only obtained on 20 March 2019.[27] It

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23 D&CC at paras 11(i) and 11(j); Ho's AEIC at para 53(d).

24 D&CC at paras 11(m) and 17(a)(ii).

25 Court Transcript (19 July 2022) p 69 line 28, p 96 line 32.

26 Court Transcript (19 July 2022) p 67 line 12, 16 and 18, p 96 line 32, p 97 line 30, p 98 line 2, p 102–104.

27 D&CC at paras 17(b)–17(d).

is not the applicant's case that it could not deliver the CTU-18 machine because it did not have the necessary HSA approval. Indeed, as stated above, the applicant did not even place an order for the CTU-18 machine. I further note the applicant's pleading that Mr Ho had informed Mr Nathan that the CTU-18 machine had received HSA approval.[28]

27 The applicant's counsel, Mr Joseph, conceded at the hearing that the above matters demonstrated that the evidence did not support a variation of the Agreement as pleaded and that the prospect of a successful appeal was slim. In response, he pointed to various portions of the cross-examination of Mr Nathan but conceded that these did not support a variation either. Mr Joseph eventually accepted that there was no clear evidence to support that the Agreement was varied as pleaded by the applicant, and that there was instead an agreement for the respondent's purchase of at least one CTU-18 machine.

28 Finally, the trial turned on factual disputes and the learned DJ was in the best position to assess the credibility of the witnesses. The applicant was unable to show how the learned DJ was clearly wrong or mistaken in his assessment of the evidence. Indeed, for the reasons given above, the undisputed facts, pleadings, documents and evidence given at trial support the learned DJ's findings.

29 In the circumstances, even if the respondent had agreed to purchase one CTU-18 machine first and two CTU-20 machines thereafter (which is not even the applicant's case), the applicant's failure to order or deliver the CTU-18 machine was a repudiatory breach, which the respondent was entitled to rely on

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[28] D&CC at para 17(a)(iii); Court Transcript (19 July 2022) p 99 line 30.

to terminate the Agreement. There was therefore ample basis for the learned DJ to find in favour of the respondent. I find that the prospects of an appeal to be hopeless.

Prejudice to the respondent

30 It is not the respondent's position that it would suffer prejudice if the application was granted. I note that the principal sum of the judgment has been satisfied by way of the guarantee which the applicant was ordered to furnish in obtaining leave to defend. All that is outstanding is the unpaid interests and costs.

31 Nonetheless, given my findings above, the issue of prejudice, or lack thereof, is not significant. Even if the delay is considered short, the hopelessness of an appeal compels that this matter should not progress further.

Conclusion

32 I therefore dismissed the application with costs in favour of the respondent fixed at $4,300, inclusive of disbursements.

Hri Kumar Nair
Judge of the High Court

James Joseph s/o J Joseph (Prestige Legal LLP) for the appellant;
Yap Neng Boo Jimmy (Jimmy Yap & Co) for the respondent.
