Nomura Regionalisation Venture Fund Ltd v Ethical Investments Ltd [2000] SGCA 43

Case Number : CA 12/2000

Decision Date : 15 August 2000

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; L P Thean JA

Counsel Name(s) : Ang Cheng Hock and Bernice Loo (Allen & Gledhill) for the appellants; Choi Yok Hung, Lynette Chew and Teo Chee Seng (Chee & Teo) for the respondents.

Parties : Nomura Regionalisation Venture Fund Ltd — Ethical Investments Ltd

Civil Procedure – Appeals – Notice of appeal – Extension of time to serve notice of appeal to opposing solicitors – Notice served out of time due to mistake by solicitors' staff – Whether extension should be granted – Whether mistake of solicitor or solicitors' staff can be sufficient ground to grant extension – Whether appeal is hopeless – O 56 r 1(3) Rules of Court 1997

Civil Procedure – Appeals – Discretion exercised by judge – Whether an appellate court should interfere

(delivering the grounds of judgment of the court): This was an appeal against the decision of the High Court granting an extension of time to the respondents to serve a notice of appeal on the appellants` solicitors. Having heard arguments of the parties, we dismissed the appeal and now give our reasons.

The background

We shall first set out the essential facts in brief which gave rise to the action between the parties. The appellants are a venture company incorporated in Singapore. The respondent company agreed to subscribe for 50 units of shares in the appellants at US$100,000 per unit. The agreement between the parties provided that half of the amount due (half of US$5m) would be payable on application and the second half would be made on certain specified events. It also provided for the consequences of default:

> *Provided that the second instalment payment for all subscribers shall be payable at any time upon the Company giving not less than 30 days` prior written notice to each Shareholder specifying the time and place for the payment of the second instalment.*
>
> *If a Shareholder fails to pay any call or instalment of a call on its due date, the Directors may at any time thereafter,*
>
> *(a) serve a notice on him requiring him to pay the entire unpaid balance together with any interest and expenses that may have accrued. Such notice shall specify a day (not less than 14 days from the date of service of that notice) on or prior to which and the place where payment required by the notice is to be made and if such moneys are not paid on or prior to the date specified in the notice, the Shares in respect of which such notice has been given may be forfeited by a resolution of the Directors to that effect. Such forfeiture shall include all dividends declared in respect of such Shares and not actually paid before the forfeiture. Any shares so forfeited may be disposed of by the Directors as they think fit and all proceeds of disposal (if any) shall*

accrue to the Company. The proceeds of disposal in excess of the unpaid instalment, the accrued interest thereon and any such expenses will not be returned to the Shareholder; and or

(b) commence any legal proceedings or enforce payment of the said unpaid moneys.

On 12 December 1996, pursuant to the agreement, the appellants allotted shares to the respondents amounting to 50 Units. The first instalment payment of half the value of the 50 Unit, that is US$2.5m, was paid up by the respondents to the appellants upon application. On 30 April 1997, the appellants gave written notice to the respondents requiring that payment of the second instalment of US$2.5m be made by 2 June 1997. The respondents were reminded that failure to make payment might result in the respondents` shares being forfeited as provided for in the agreement. The respondents nevertheless failed to make the second instalment payment.

On 17 June 1997, a further written request was issued by the appellants to the respondents. However, the respondents only made part payment of US$500,000 in September 1997.

On 10 November 1996, the appellants` solicitors wrote to the respondents asking that the latter make payment of the remaining US$2m by 17 November 1997. Again, the respondents were informed in this letter that failure to make payment could result in the forfeiture of their shares as provided for in the agreement. However, the respondents still failed to make payment as required. On 5 December 1997, the respondents wrote to the appellants asking for more time to make payment. On 16 December 1997, the appellants` solicitors enquired when the respondents proposed to pay for the balance. To that, there was no response from the respondents.

Thus, on 27 April 1998, the appellants instituted Suit 623/98, against the respondents seeking specific performance of the agreement, or, in the alternative, damages. On 4 December 1998, on the appellants` application, the learned Deputy Registrar ruled that there was no defence on the part of the respondents and granted summary judgment to the appellants. He ordered specific performance of the agreement, and that the respondents should pay US$2m to the appellants. On 9 February 1999, the respondents` appeal against the summary judgment was dismissed by the judge-in-chambers.

Notwithstanding the summary judgment, the respondents still failed to make the payment as ordered. So on 26 February 1999, the appellants applied for an order that the summary judgment for specific performance be discharged, without prejudice to all the appellants` rights and remedies against the respondents for breach of the agreement, and for an order that damages for breach of the agreement by the respondents be assessed. On 12 March 1999, the court granted the appellants` application.

However, on 1 April 1999, before damages were assessed, the appellants changed their mind and sent a notice of intention to forfeit to the respondents, requiring that the respondents pay the balance sum of US$2m by 22 April 1999, failing which their shares would be forfeited. On 14 April 1999, the appellants sent a second letter rectifying certain errors contained in the previous notice of intention, but without changing the deadline of 22 April 1999. On 26 April 1999, the appellants` board of directors passed a resolution forfeiting the share allotted to the respondents, pursuant to powers conferred under the articles of association. On 3 May 1999, the forfeited shares were cancelled by a members` resolution, and the appellants wrote to inform the respondents accordingly.

Some six months later, on 19 October 1999, the respondents applied to the court seeking equitable

relief against forfeiture of their shares in the appellants and for the appellants to expedite their assessment of damages. On 3 December 1999, the assistant registrar dismissed the application. On 13 December 1999, the respondents` previous solicitors M/s Drew & Napier filed a notice of appeal on the respondents` behalf. Three days later their present solicitors, M/s Chee & Teo, took over the conduct of the matter. Under O 56 r 1(3) of the Rules of Court (Cap 322), the notice of appeal was required to be served on the solicitors M/s Allen & Gledhill, within seven days of filing (excluding Saturdays, Sundays and public holidays), namely, by 22 December 1999. However, it was only served on 8 January 2000.

The explanation given by the respondents` solicitor, Teo Chee Seng, as set out in an affidavit, was 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 even telephoned her from Hong Kong to confirm that she had done so. However, on 7 January 2000, he discovered that the papers had been wrongly served on M/s Drew & Napier. According to him, the litigation secretary said that the court clerk was on leave and she had asked the despatch clerk to serve the papers instead. She admitted to having given wrong instructions to the despatch clerk. Later that same day on 7 January, at about 6pm, Teo Chee Seng instructed one of his staff to immediately serve the relevant papers on M/s Allen & Gledhill. As the service was effected after 4pm, under the rules of court it was deemed to have been served on the following day, namely, 8 January 2000 (Saturday). On 10 January 2000 (Monday), the respondents` solicitors filed an application to extend time for service of the notice of appeal.

Lai Siu Chiu J granted the respondents` application for an extension of time to serve the notice of appeal on the appellants and adjourned the substantive hearing of the Registrar`s Appeal to a later date, with the express object of enabling the appellants` solicitor to prepare himself for the substantive argument. [See [2000] 2 SLR 686.] The appellants were dissatisfied with the extension of time granted by Lai Siu Chiu J and thus appealed to us.

Decision below

In coming to her decision, Lai Siu Chiu J held that the principle governing an application to extend time to serve a notice of appeal filed within time was no different from that to extend time to file a notice of appeal. This was because an appeal would only come into being where the notice was both filed and served.

The learned judge felt that there was no general rule that a mistake of the solicitor would never be sufficient to justify an extension of time. Applying the factors which this court in **Pearson v Chen Chien Wen Edwin** [1991] SLR 212 reaffirmed to be applicable, namely, the length of the delay, the reasons for the delay, the chances of succeeding on appeal and the degree of prejudice, (hereinafter referred to as `the four factors`), Lai Siu Chiu J noted that the delay in service was about two and a half weeks. It was neither short nor was it prolonged. Service was not effected because of an inadvertent mistake of the litigation secretary. No prejudice was shown to have arisen if an extension of time was granted. It was a case of `wrong service, not non-service.` While accepting that an extension of time should not be granted if the appeal was hopeless, she was not able to say that such was the position here.

Appeal

In the appeal before us, the arguments of counsel for the appellants centred on mainly two of the four factors set out in ***Pearson*** , namely, reasons for the delay and merits of the case. Counsel

contended that a mistake by a solicitor or his staff could not amount to a sufficient ground for granting an extension of time. Furthermore, there were no merits in the appeal.

Reason for the delay

As mentioned above, the reason for the delay in the service of the notice of appeal on the appellants was because of the litigation secretary`s mistake in instructing the despatch clerk to serve on the respondents` previous solicitors instead of the appellants` solicitors. So the question that arose for consideration was whether it was correct to say that a mistake by a solicitor or his staff could never be a sufficient ground for granting an extension of time for the purpose of filing/serving a notice of appeal.

The starting point for the consideration of the question must be **Re Helsby** [1894] 1 QB 742 where the Bankruptcy Rules 1886 provided that the Court of Appeal had the power to extend time to file appeal `under special circumstances`. The appeal was not filed within time due to the mistake of the solicitor`s clerk. Lord Halsbury LC held that a blunder by the solicitor`s clerk was not a sufficient ground to extend time. Lopes and Davey LJJ agreed with him.

Next is the celebrated case **Re Coles and Ravenshear** [1907] 1 KB 1 where the relevant rules provided that `no appeal to the Court of Appeal shall, except by special leave of the Court of Appeal, be brought after the expiration of fourteen days.` The notice was not filed within 14 days because of the erroneous views of the solicitors. Collins MR said that if the case were free from authority, he would have allowed the time to be extended. But in view of the decision in ***Re Helsby*** he felt bound to follow it. Cozens-Hardy and Farwell LJJ also felt that no extension should be granted. Moreover, Farwell LJ took an even stricter view stating that `a mere slip or blunder on the part of a litigant`s legal adviser cannot entitled him to anything at all` and he also endorsed the following opinion of James LJ expressed in **International Financial Society v City of Moscow Gas Co** [1877-78] 7 Ch D 241:

> *The limitation of the time to appeal is a right given to the person in whose favour a judge has decided. I think we ought not to enlarge that time unless under some very special circumstances indeed, that is to say, if there has been any misleading through any conduct of the other side ... or again where some sudden accident which could not have been foreseen - some sudden death, or something of that kind, which accounted for the delay.*

Lai Siu Chiu J and counsel for the respondents quite rightly pointed out that these cases concerned rules where `special leave` had to be obtained. Thus, in the Malaysian case **Cheah Teong Tat v Ho Gee Seng & Ors** [1970] 1 MLJ 31 and **Chin Hua Sawmill Co Sdn Bhd v Tuan Yusoff bin Tuan Mohamed** [1974] 1 MLJ 58 , where the relevant rules there also prescribed the need for `special leave`, the approach taken in ***Re Coles & Ravenshear*** was followed. In ***Cheah Teong Tat*** , Barakbah J said that `the mere fact of misunderstanding of the rule is not such a special circumstances as to induce the court to give leave to extend the limit to file notice of appeal.` Similarly, in ***Chin Hua Sawmill*** , the Federal Court refused to extend time where it was due to a mistake of the solicitors.

The English rules were amended in 1909 and no `special leave` was needed to bring an appeal out of time. The Malaysian rules also did away with `special leave` in 1980. What was thereafter required was simple leave.

The leading English case on the post-1909 position would appear to be **Gatti v Shoosmith** [1939] 3 All ER 916. There, owing to a misreading of the rule by the applicant`s solicitors, the applicant was a few days late in entering an appeal. However, the intention to appeal had been notified to the respondent`s solicitors, by letter sent within the time specified by the rule. Sir Wilfred Greene, MR, who delivered the only judgment of the English Court of Appeal, said (at p 919):

> *... in my opinion under the rule as it now stands, the fact that the omission to appeal in due time was due to a mistake on the part of a legal adviser, may be a sufficient cause to justify the court in exercising its discretion. I say `may be`, because it is not to be thought that it will necessarily be exercised in every set of facts. Under the law as it was conceived to be before the amendment, such a mistake was considered to be in no circumstances a sufficient ground. What I venture to think is the proper rule which this court must follow is : that there is nothing in the nature of such a mistake to exclude it from being a proper ground for allowing the appeal to be effective though out of time; and whether the matter shall be so treated must depend upon the facts of each individual case.*

In ***Gatti v Shoosmith*** it would appear that the court decided to grant an extension of time because of three factors. First, the delay in service was only a matter of a few days. Second, the delay was as a result of a misunderstanding of the rules which, to anyone who was reading the rules without having the authorities in mind, `might very well have arisen.` Thirdly, the appellant`s solicitors did within time, notified the respondent`s solicitors by letter of the appellant`s intention to appeal.

This more flexible approach was followed in **Palata Investments Ltd & Ors v Burt & Sinfield Ltd & Ors** [1985] 2 All ER 517 where the delay was only a matter of three days. The other party was also informed within time that an appeal would probably be entered. The delay was due to counsel`s overlooking the fact that the prescribed time period had been reduced from six weeks to four weeks. Having had counsel`s advice, the solicitors also took the trouble of verifying it with the ***Supreme Court Practice*** but unfortunately the new edition of that publication which did spell out the new rule only arrived a few weeks later. While the English Court of Appeal noted that there were essentially four matters to consider in determining whether an extension should be granted (namely the same four factors) it did not follow that in every such application for extension of time there had to be a pre-appeal hearing in order to consider what were the prospects of success. In some cases it might be material to look into the merits as it would be wrong to give leave to pursue a hopeless appeal but that was not the position in that case. The English Court of Appeal having viewed the whole matter thought that the case was an exceptional one warranting the grant of leave to appeal out of time.

The leading Malaysian case which dealt with the consequence of the change in the rules from `special leave` to just ordinary `leave` was the Supreme Court decision in **Sinnathamby & Anor v Lee Chooi Ying** [1987] 1 MLJ 110 where the court said:

> *... and because of this change in the law which requires only ordinary leave, it is argued that the mistake of a legal adviser is no longer a ground for refusing an application for extension of time to appeal. In my view, this is not so, for the effect of the change in the law merely widens the court`s unfettered discretion under r 56 ... In view of the change in the law which no longer requires `special leave`, where the mistake of a legal adviser is advanced as the reason for the delay, the court is now free to consider it on its merits in the same manner that the court would exercise its discretion in other cases. Thus, the ruling in **Re Coles & Ravenshear** [1907] 1 KB 1 as well as **Chong Kueng Ying & Ors v Lovis Lavagna** [1972] 1 MLJ 180 , which excluded the court`s discretion in*

> *cases where the delay was caused by the mistake of a legal adviser, should no longer be applicable after the coming into force of the Supreme Court Rules 1980.*

Reverting to our own Rules of Court, O 56 r 1(3) provides that the notice of appeal against a decision of an assistant registrar must be filed within 14 days and be served within seven days after filing. The powers of the court to extend or abridge time are set out in O 3 r 4(1) which reads:

> *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 ... to do any act in any proceedings.*

A provision similar to this was contained in the previous rules of the Supreme Court. The rule leaves the discretion to the court. But of course, the discretion must always be exercised judiciously, having regard to the justice of the case.

One of the earlier Singapore cases which touched on the point on how the court should exercise that discretion to extend time is **Tan Chai Heng v Yeo Seng Choon** SLR 381 [1981] 1 MLJ 271 . There the solicitors omitted to file the notice of appeal in time because the case file had been misplaced during the renovation of the firm`s premises. Applying the principles enunciated in **Ratnam v Cumarasamy** [1965] 1 MLJ 228 , namely, that rules of court must prima facie be obeyed and for the court to extend time there must be some material upon which the court can exercise its discretion, Choor Singh J did not accept that reason as a justifiable excuse.

More recently this court had the occasion to deal with the point in **Pearson v Chen Chien Wen Edwin** [1991] 1 SLR 212 . That was an application for an extension of time to appeal against a court order on ancillary matters due to a misreading of the relevant rules of court by the applicant`s solicitors. There, this court ruled that the question of extension of time was a matter of discretion and the four factors had to be considered in determining how the discretion should be exercised. The court did not think that the `misreading` arose out of any difficulty or complexity in the rules although the mistake was nonetheless bona fide. It was purely a misreading. The court also did not think that the applicant`s prospects for success in the appeal were good. Accordingly, it held that the applicant had not shown `grounds sufficient to persuade the court to show sympathy to him.`

In **Vettath v Vettath** [1992] 1 SLR 1 this court was again asked to consider a similar application. There, the husband instructed his solicitors to appeal against certain ancillary orders of the High Court made in a divorce petition. On the solicitors` suggestion, the husband agreed to brief another solicitor as counsel for the appeal. Confusion arose between the two solicitors as to who should file the notice of appeal, and the period for appeal expired without any notice being filed. The court adopted the test propounded in ***Pearson*** and held that the reason for the delay, because of the fault of either or both solicitors, was not sufficient to persuade the court to show sympathy to him.

We agreed with Lai Siu Chiu J that there is no absolute rule of law which prescribes that an error on the part of a solicitor or his staff can never, under any circumstances, be a sufficient ground to grant an extension of time to file a notice of appeal. Having said that, we do not think it is possible to lay down any hard and fast rules as to the circumstances under which a mistake or error on the part of the solicitor or his staff would be held to be sufficient to persuade the court to show sympathy to the application. It is the overall picture that emerges to the court that would be determinative. However,

a mistake, even bona fide, is only one factor in the overall consideration. Such a mistake per se may not be sufficient to enable the court to exercise its discretion in favour of an extension. As illustrations, and no more, we note that two aspects which seem to have considerable bearing in the court`s consideration in ***Gatti v Shoosmith*** and ***Palata Investment v Burt & Sinfield*** to grant extension were (i) the fact that in each of those two cases, notice within the prescribed time was given to the other side that an appeal would be taken and (ii) the mistake was understandable and not gross. But this is not to say that only where such a notice was given that a blunder by the solicitor or his staff would be viewed sympathetically. There could well be other circumstances. Thus, if there is anything in the High Court decision in **Stansfield Business International Pte Ltd v Vithya Sri Sumathis** [1999] 3 SLR 239 which could be read to suggest, although it did not expressly so state, that an error on the part of a solicitor absolutely bars any relief, it is not correct. The decision in ***Stansfield Business International*** to refuse an extension of time could well be justified as it was a case of oversight simpliciter, with no other extenuating circumstances, although the merits of the case were strong.

Merits of the appeal

Turning to the question of the merits of the appeal, the respondents had raised a number of issues to contend that relief should be granted against forfeiture. The first concerned the question of adequate notice. Under the terms of the agreement, forfeiture of shares may be effected by the appellants only if not less than 14 days notice is given. The notice of intention to forfeit was given by the appellants` letter dated 1 April 1999, requiring payment by 22 April 1999 of S$2,000,000 when the amount should have been US$2,000,000 and costs of S$4,700 when it should have been S$6,700. The appellants` solicitors sought to correct the errors by their letter dated 14 April 1999 without changing the deadline of 22 April 1999. These facts raised the issue whether a proper notice had been given to the respondents to enable the appellants to forfeit when they sought to forfeit the shares on 26 April 1999.

The second issue concerned the fact that the appellants had obtained judgment against the respondents for damages to be assessed. Having elected their remedies and obtained a judgment, with damages to be assessed, it is arguable that they cannot thereafter change course and seek forfeiture of the shares.

The third point concerned the argument that the forfeiture clause is in fact a penalty clause and is unenforceable.

At this stage of the matter there is no need for this court to go into a full-scale hearing on those issues. Neither is it necessary for us to rule that the respondents would succeed in seeking relief. The threshold is much lower: is the appeal really `hopeless`? Like Lai Siu Chiu J, we did not think so.

The modern law on relief against forfeiture was laid down in **Shiloh Spinners Ltd v Harding** [1973] AC 691 where the House of Lords held that the jurisdiction was not confined to the two traditional heads: (i) where it is possible to state that the object of the transaction and of the insertion of the right to forfeit is essentially to secure the payment of money, and (ii) when there is fraud, accident, mistake or surprise. It affirmed (at p 723):

> *... the rights of courts of equity in appropriate and limited cases or conditions where the primary object of the bargain is to secure a stated result which can effectively be attained when the matter comes before the court and where the forfeiture provision is added by way of security for the production of that result. The word `appropriate` involves consideration of the conduct of the*

> *applicant for relief, in particular, whether this default was wilful, of the gravity of the breaches, and of the disparity between the value of the property of which forfeiture is claimed as compared with the damage caused by the breach.`*

It seems to us clear that the present case falls within the first of the two traditional heads where the court would have the jurisdiction to grant relief. At this stage, we need not and should not say more.

In the present case, Lai Siu Chiu J did consider all the circumstances in the light of the four factors She noted that the delay was not prolonged. The respondents` solicitors were not tardy in pursuing the appeal. The mistake was bona fide made by the litigation secretary. There was no prejudice to the appellant. She emphasised that this was a case of `wrong service, not non-service.` Finally, she also did not think that the appeal would be `utterly hopeless`.

The judge below having judiciously exercised her discretion, it is not for an appellate court to substitute its own decision for that of the court below unless it is shown that the judge below in exercising his discretion had applied the wrong principle or that the decision has caused a miscarriage of justice in that he had taken into account matters which he ought not to have done or failed to take into account matters which he ought to have done or that the decision was plainly wrong. That is trite law. In **Ratnam v Cumarasamy & Anor** [1965] 1 MLJ 228 the Privy Council said at p 229:

> *There is a presumption that the judge has rightly exercised his discretion ... The court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice.*

In **The Abidin Daver** [1984] AC 398[1984] 1 Lloyd`s Rep 339 Lord Brandon further elucidated the principle as follows:

> *where the judge of first instance has exercised his discretion in one way or the other, the grounds on which an appellate court is entitled to interfere with the decision which he had made are of a limited character. It cannot interfere simply because its members consider that they would, if themselves sitting at first instance, have reached a different conclusion. It can only interfere in three cases: (1) where the judge has misdirected himself with regard to the principles in accordance with which his discretion had to be exercised; (2) where the judge, in exercising his discretion, has taken into account matters which he ought not to have done or failed to take into account matters which he ought to have done; or (3) where his decision is plainly wrong.*

We did not think that Lai Siu Chiu J had erred on a matter of principle and thus declined to interfere in her decision to grant an extension of time.

Judgment

For the foregoing reasons, we dismissed the appeal with costs. The security for costs, together with any accrued interest, was ordered to be paid out to the respondents to account of the latter`s costs.

Outcome:

Appeal dismissed.

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