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

[2023] SGHC(A) 5

Originating Application No 15 of 2022

Between

Newspaper Seng Logistics Pte Ltd

… *Applicant*

And

Chiap Seng Productions Pte Ltd

… *Respondent*

JUDGMENT

[Civil Procedure — Extension of time]

Newspaper Seng Logistics Pte Ltd
v
Chiap Seng Productions Pte Ltd

[2023] SGHC(A) 5

Appellate Division of the High Court — Originating Application No 15 of 2022
Belinda Ang Saw Ean JCA and Debbie Ong Siew Ling JAD

2 February 2023

Debbie Ong Siew Ling JAD (delivering the judgment of the court):

Context

1 The present Originating Application ("OA") is an application by the applicant, Newspaper Seng Logistics Pte Ltd ("D"), for an extension of time to file and serve a notice of appeal out of time against the decision of the General Division of the High Court (the "High Court") made on 22 August 2022. In *Chiap Seng Productions Pte Ltd v Newspaper Seng Logistics Pte Ltd* [2022] SGHC 202 at [169] (the "Judgment"), the Judge of the High Court (the "Judge") allowed the claim of the respondent, Chiap Seng Productions Pte Ltd ("P"), for D's intentional disposal of P's assets.

2 The date of the decision of the Judge was 22 August 2022 (see [1] above). Pursuant to O 19 r 25(1)(*a*) of the Rules of Court 2021 ("ROC 2021"), a notice of appeal to this court should be filed and served on P within 28 days

after the date of the decision. D failed to file and serve its notice of appeal within this stipulated timeframe, that is, by 19 September 2022; it attempted to file and serve a notice of appeal on 20 September 2022, which was one day after the relevant prescribed period. D's attempted filing of its notice of appeal was rejected by the Registry of the Supreme Court (the "Registry") for being out of time. On 21 September 2022, D filed the present OA to seek an order allowing it to file and serve a notice of appeal out of time.

Legal principles and discussion of parties' key arguments

3 In determining the present question of whether to grant an applicant permission to file and serve a notice of appeal out of time, the court's power to grant permission under O 19 r 25 of the ROC 2021 is discretionary; the exercise of discretion is governed by the overriding objective of finality in litigation and by the general principles underlying the appeal regime. The well-established principles pertaining to and underlying the appeal regime are set out in *Lee Hsien Loong v Singapore Democratic Party and others and another suit* [2008] 1 SLR(R) 757 ("*Lee Hsien Loong*"). In its exercise of discretion to extend time or grant permission to file a notice of appeal out of time, the court takes into consideration all the facts and circumstances of the case to achieve a just and fair outcome, bearing in mind the principle of finality in litigation. In doing so, it is guided by the following relevant factors: (a) the length of delay; (b) the reasons for the delay; (c) the applicant's chances of success on appeal; and (d) any prejudice that the respondent would suffer if the extension of time is granted (see *Lee Hsien Loong* at [18]). All four factors are equally important.

4 D's case focuses on the first and second factors. It contends that its delay of one day is the clearest example of a *de minimis* delay. It refers to the decision of the Court of Appeal in *Lee Hsien Loong* (at [21]) that a *de minimis* delay

might be excused without the need for the court to even conduct an inquiry into the reasons for that delay. In any event, D contends that the delay was attributable to a genuine mistake by its solicitor, Ms Lim Bee Li ("Ms Lim"), in assuming that the appeal against the decision of the Judge would be governed by the Rules of Court (2014 Rev Ed) ("ROC 2014") rather than the ROC *2021*. When Ms Lim discovered her error on 20 September 2022, she made a further mistake in calculating the prescribed deadline for filing and serving the notice of appeal under the ROC 2021, believing it to be 20 September 2022 instead of 19 September 2022. On 20 September 2022, the solicitors sought to file and serve D's notice of appeal; the attempted filing was rejected by the Registry on the same day. As the ROC 2021 came into effect on 1 April 2022, D asks that this court take into account the difficulties that its solicitors faced in navigating this relatively new regime.

5 On the other hand, P submits that the failure of D's solicitors to check whether the ROC 2021 applied cannot be an excuse. P also contends that allowing D's application for an extension of time to appeal would be extremely prejudicial to P as it would result in further deterioration of the assets in question (referred to in [1] above) and cause P to suffer more financial damage. Finally, P submits that there is no serious or reasonable question or issue to be brought on appeal.

Length of delay and reasons for the delay

6 The date of the decision of the Judge was 22 August 2022. Applying O 19 r 25(1)(*a*) of the ROC 2021, the last day for D to file and serve a notice of appeal was 19 September 2022. It is not disputed that D attempted to file and serve its notice of appeal on 20 September 2022. The length of delay was one day. We accept D's submission that a delay of one day in the context of a 28-

day timeline may be considered to be a very short delay. We also note that once D was apprised of its mistake, presumably when it received notice from the Registry that its notice of appeal was rejected for being out of time, the present OA was promptly filed the next day on 21 September 2022 to seek an order allowing D to file and serve the notice of appeal out of time.

7 As for the reasons for the delay, D's reason for the delay was its solicitors' mistake in assuming that the time for filing and service of a notice of appeal was one month after the date of the decision (as explained at [4] above). The time for bringing an appeal under O 19 r 25(1) of ROC 2021, however, is 28 days.

8 In *Lee Hsien Loong* (at [22], referring to the decision of the Court of Appeal in *Denko-HLB Sdn Bhd v Fagerdala Singapore Pte Ltd* [2002] 2 SLR(R) 336 at [18]), the Court of Appeal stated that a mere assertion that the delay is due to the oversight of the solicitor is obviously insufficient and indeed, can lead to an abuse of process – there must be some extenuating circumstances or explanation offered to mitigate or excuse the oversight. Here, the explanation being offered relies in part on the alleged difficulties that D's solicitors faced in navigating the relatively new regime of the ROC 2021 (see [4] above).

9 Ms Lim candidly explained in her affidavit that she "had wrongly *assumed* that an appeal [against the decision of the Judge] would also be governed by the [ROC 2014]" [emphasis added]. On this explanation, it appears to us that her mistake was not due to any real difficulty or complexity in navigating the relatively new regime of the ROC 2021, but due to her failure to consider whether it was the ROC 2014 or ROC 2021 that was applicable in the first place. Indeed, based on Ms Lim's affidavit, it seems that when she applied

her mind to that question, she realised that it was the ROC 2021 that applied and it was *not* her case that there was difficulty or complexity in the transitional provisions and application of the ROC 2021. Unfortunately for Ms Lim, when she discovered her error on 20 September 2022, an appeal to this court would have been out of time. We emphasise that solicitors ought to know the time frame for appeals for it is the solicitor's duty to ensure that the client's appeal does not become nugatory (see *Tan Hock Tee v C S Tan and Co* [1996] 2 SLR(R) 578 at [23]–[24]).

10 Ms Lim further explained her mistake in calculating the relevant prescribed deadline under the ROC 2021 (see [4] above). She explained that her confusion was due in part to the wording of O 3 r 3(3) of the ROC 2021 which stipulates that "[w]here an act is required to be done within a specified period after or from a specified date, the period begins immediately after that date". Based on her own calculations, she believed the last day for filing to be 20 September 2022 instead of 19 September 2022. We note that this provision retains the position set out in O 3 r 2(2) of the former ROC 2014 which stipulated that "[w]here the act is required to be done within a specified period after or from a specified date, the period begins immediately after that date". Under the ROC 2021, this means that if the date of the High Court's judgment is 22 August 2022, the notice of appeal must be filed within 28 days after the date of the High Court's judgment, which would be 19 September 2022. The ROC 2021 did not change the method of calculating time periods. The rules of civil procedure are sufficiently clear on the applicable time for the filing of a notice of appeal. In this regard, there is no ambiguity in how time is to be calculated under the ROC 2014 and the ROC 2021. We observe that as Ms Lim said that she *only realised on 20 September 2022* that the ROC 2021 applied,

her second mistake described here would make no difference, having already missed the deadline in any case.

11 D also submits that as the ROC 2021 came into effect on 1 April 2022, the difficulties that its solicitors faced in navigating this relatively new regime ought to be taken into account. We refer to the speech made by Chief Justice Sundaresh Menon at the Opening of the Legal Year 2022 (see Sundaresh Menon, Chief Justice, Supreme Court of Singapore, "Opening of the Legal Year 2022", speech at the Opening of the Legal Year 2022 (10 January 2022) <https://www.judiciary.gov.sg/docs/default-source/news-docs/oly-2022.pdf?sfvrsn=5cf4384b_2> (accessed 31 January 2023) at para 17) where he stated:

> In addition, there will be a transitional learning phase [for the new ROC 2021] from 1 April to 30 June 2022. During this period, the Courts will generally be more sympathetic when dealing with non-compliance occasioned by a genuine lack of familiarity with the new procedural framework, and will, in deserving cases, afford greater leeway when considering:
>
> (a) the appropriate orders to be made in the face of such non-compliance;
>
> (b) the exercise of discretion in striking out matters, or making unless orders or granting requests for refunds and waivers of filing fees; and
>
> (c) granting extensions of time to file an appeal or to apply for permission to appeal, or generally in dealing with incorrect appellate filings.

We observe that as at the date of the Judgment on 22 August 2022, the transitional learning phase had already passed. After this phase, it can be reasonably expected that solicitors would be familiar with the ROC 2021 and

the courts will not be as sympathetic towards mistakes made after the transitional phase. Where parties attribute their non-compliance with the procedural rules to a lack of familiarity with the new procedural framework, the court will consider the alleged difficulty or complexity in how the procedural rules are to apply. In the present case, as explained at [9]–[10] above, it is difficult to find that there was a real difficulty or complexity in the application of the procedural rules.

12 Timelines in court orders and procedural rules must be complied with. On the one hand, there is interest in the rules being obeyed. On the other hand, the overriding consideration is to deal justly with applications that missed the deadline, so that if fairness demands that an extension of time should be given, discretion would be exercised accordingly. Whether D attempted to file a notice of appeal one day late or 20 days late, D is still out of time. If the court does not make the order sought by D in this application, D cannot file any notice of appeal and the Judge's decision after the hearing of the trial would have been final. The Court of Appeal in *Lee Hsien Loong* has explained (at [33]):

> … [T]he courts will adopt a far stricter approach towards applications for extension of time for the filing and/or serving of a notice of appeal relative to other situations. This is not without good reason. The overriding concern in the context of *appeals* is that there be *finality*. … Underlying the concern with finality is the fundamental rationale of *justice and fairness*. The decision concerned has, *ex hypothesi*, gone against the losing party (*ie*, the would-be appellant), and the onus is therefore on it to file an appeal if it feels that the decision is wrong. Correspondingly, the other party (the would-be respondent), having had the decision handed down in its favour, should not be kept waiting – at least, not indefinitely – on tenterhooks to receive the fruits of its judgment. For better or for worse, the applicant must decide whether or not it wishes to appeal. …
>
> [emphasis in original]

Finality is an important value in our legal system. The Court of Appeal has pointed out that the would-be respondent, having had the decision handed down in its favour, should not be kept waiting beyond the time limit for appealing against its judgment.

13 The present case concerns the filing and service of a notice of appeal. This situation can be distinguished from cases where a notice of appeal has already been filed and served, and the appellant is late in submitting, say, its record of appeal. In the former situation, there is no appeal at all whereas in the latter, there are appeal proceedings. The circumstances or "material" required to support an extension of time for the former situation should thus be "weightier or more compelling than that required for other applications" (*Lee Hsien Loong* at [31], referring to the decision of the Court of Appeal in *Ong Cheng Aik v Dayco Products Singapore Pte Ltd (in liquidation)* [2005] 2 SLR(R) 561 at [14] and [16]).

D's chances of success on appeal

14 The third factor "centres on the question of whether or not the intended appeal itself is hopeless": *Lee Hsien Loong* at [62]. The delay of one day has to be balanced with the third factor whose significance is explained in *Lee Hsien Loong* at [20]:

> …. [W]here the appeal is a hopeless one … [i]n such a situation, notwithstanding even a very short delay, an extension of time will generally not be granted by the court simply because to do so would be an exercise in futility, resulting in a waste of time as well as resources for all concerned. …

15 The test is whether the appeal is hopeless, and that is a low threshold for the applicant to meet. The merits of the intended appeal are a neutral factor

unless the appeal has no prospect of success (see *Lee Hsien Loong* at [19] and *Commodities Intelligence Centre Pte Ltd v Hoi Suen Logistics (HK) Ltd* [2022] 1 SLR 845 at [28]). P submits that the relevant test is whether there is a serious or reasonable question or issue to be brought on appeal. This is not the relevant test in the context of determining the present application.

16 On the other hand, if the appeal is not hopeless, and possibly even quite meritorious, in the interest of justice and fairness, the court has the discretion to consider the facts of the case and allow the opportunity to let the appeal proceed. A good reminder on how to reach justice and fairness is in *Lee Hsien Loong* at [36], where the Court of Appeal quoted the High Court decision of *United Overseas Bank Ltd v Ng Huat Foundations Pte Ltd* [2005] 2 SLR(R) 425 at [4]–[9]:

> The quest for justice, therefore, entails a continuous need to balance the procedural with the substantive. More than that, it is a continuous attempt to ensure that both are *integrated*, as far as that is humanly possible. Both *interact* with each other. One cannot survive without the other. There must, therefore, be – as far as is possible – a fair and just procedure that leads to a fair and just result. …
>
> [emphasis in original]

17 In addressing the third factor, we first set out the facts of this case in brief. P is in the business of supplying and installing scaffolding and seats for spectator events, such as the Formula 1 night race held in Singapore. D is in the business of newspaper recycling and manufacturing (Judgment at [1]). The dispute arises out of a Service Agreement signed between P and D on 1 November 2019 (the "Service Agreement"). Under the Service Agreement, P and D agreed that P would store its assets (the "Assets") at 33 Defu Lane 6, Defu Industrial Park A, Singapore 539381 (the "Premises") for a monthly fee

payable to D. D was at the material time occupying the Premises. It had leased the Premises from the main landlord, JTC Corporation (Judgment at [2]).

18 On 24 September 2020, after P was in arrears of its monthly fees, D seized all of the Assets which were stored within the Premises. On 5 October 2020, D sold the Assets for scrap at a price of $42,800 (inclusive of Goods and Services Tax) to Yew Huat Scaffolding & Construction Pte Ltd (Judgment at [3]). P claims that as at 30 September 2020, the Assets were worth $3,153,118.64 (Judgment at [32]).

19 P claims against D for damages arising out of D's intentional disposal of the Assets which were stored at the Premises. D counterclaims against P for the sum of $6,750, this being the balance of the outstanding arrears due from P after taking into account the sale proceeds of the Assets (Judgment at [4]–[5]).

20 The Judge allowed P's claim against D for D's intentional disposal of the Assets (Judgment at [169]). He found that the Service Agreement was in substance a tenancy agreement (Judgment at [170(a)]). Having found that the Service Agreement was a tenancy agreement, the Judge considered and rejected D's argument that it was contractually entitled to dispose of the Assets. He found that D's intentional, unreasonable and high-handed disposal of the Assets was in breach of the COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020) and the Distress Act (Cap 84, 2013 Rev Ed) (Judgment at [170(b)]). As for D's counterclaim for the balance outstanding arrears, the Judge dismissed the counterclaim as D had failed to mitigate its losses (Judgment at [159] and [170(c)]).

21 D submits that a key issue in dispute was whether the agreement between the parties was a tenancy agreement or a service agreement. If it was the former, the Distress Act (Cap 84, 2013 Rev Ed) and COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020) (collectively, the "Acts") would apply such that the D's actions on 24 September 2020 would *prima facie* be unlawful. The Acts are not applicable to a service agreement. D intends to argue on appeal that the agreement between the parties was understood by both parties to be a service agreement and that D never had a proprietary interest in the Premises that would allow it to grant a lease to P; the Acts would thus not apply.

22 It is not for the court at this stage to go into a full-scale examination of the merits of the issues involved, and it is not necessary for D to show that he will succeed in the appeal. The threshold is whether the appeal is hopeless. With this threshold question in mind, we are of the view that the appeal cannot be said to be hopeless. The issue is one that involves the interpretation of the agreement in question and application of the law to the facts found. We are of the view that P has not shown that the appeal has no prospects of success.

Prejudice to P

23 The last factor for consideration is whether P will suffer any prejudice if D is allowed to file and serve its notice of appeal out of time in the present case. P submits that the extension of time would be "extremely prejudicial" to it as "the resolution of their claim is further delayed". It has been noted by the Court of Appeal in *Aberdeen Asset Management Asia Ltd and another v Fraser & Neave Ltd and others* [2001] 3 SLR(R) 355 (at [44]) that this is, in and of itself, insufficient in law to amount to prejudice for the purpose of an extension of time:

> … The 'prejudice' cannot possibly refer to the fact that the appeal would thereby be continued, if the extension is granted. Otherwise, it would mean that in every case where the court considers the question of an extension of time to file notice of appeal, there is prejudice … The 'prejudice' here must refer to some other factors, *eg* change of position on the part of the respondent pursuant to judgment.

The Court of Appeal in *AD v AE* [2004] 2 SLR(R) 505 said that "some form of irreversible or permanent change of position must have taken place to constitute prejudice" (at [14]).

24 P says that it plans to take action against the buyers of the assets sold off by D. P says it is most important that it recovers as soon as possible the assets which are the tools of its trade, and allowing D's application will cause further delay. We do not see any merit in this argument – the buyers of the assets appear to be *bona fide* purchasers. In any case, P has already been awarded damages which would have compensated him for the losses from D's act of selling the assets.

25 In our view, P has not pointed to any change of position on its part pursuant to the Judgment. We are of the view that granting an extension of time will not result in any prejudice to P that cannot be compensated by costs.

Conclusion

26 At the end of the day, the court must, after weighing all the factors and circumstances, come to the conclusion that the application deserves sympathy, if extension of time is allowed: *Lee Hsien Loong* at [31]. The Court of Appeal has reiterated in *Lee Hsien Loong* (at [28]) that:

> … [A]ll four factors are of equal importance, and must be taken into account. They are to be balanced amongst one another, having regard

> to all the facts and circumstances of the case concerned.... [I]t is important to emphasise … that the precise facts and circumstances of each case are all-important. …

On the facts of the present case, guided by the four factors, we exercise our discretion to allow D to file and serve its notice of appeal out of time. While D's solicitor fell short in applying her mind to the question of which version of the Rules of Court applies and in properly calculating the period in which the notice of appeal must be filed, the delay was very short and there was urgency exercised by D in seeking to rectify the mistake. We also note that P's solicitors had received notice of the filing of appeal by email on the same date of the attempted filing, though this too was a day after the expiry of the relevant period. Allowing this application should not give anyone the impression that the courts will be more sympathetic when dealing with non-compliance even months after the new ROC 2021 has been in force. Our decision is made upon considering all four factors as applied to the facts and circumstances of the case. Indeed, for future cases, we think that by the time of this judgement, the ROC 2021 would have been in force for about ten months, and the reason of the lack of familiarity with the new procedural framework in itself should no longer draw sympathy from the court. Of course, each case must be decided by its own facts. We have explained above that the appeal is not hopeless and there is no prejudice to P that cannot be compensated by costs should the application be allowed. We grant leave for D to file and serve its notice of appeal within 3 days from the date of this judgment.

Costs

27 As D is seeking the court's permission to allow it to file and serve a notice of appeal out of time, notwithstanding the fact that P opposes it and has failed in contesting it, the costs of the application should go to P. It is because

of D's failure to file within the prescribed time in the first place that necessitated this OA. The next question is whether D's solicitors should be made to bear the costs of the application, pursuant to O 21 r 6(1) of the ROC 2021, which empowers the court to order the solicitor to repay to his or her client costs which the client has been ordered to pay in the proceedings if the solicitor is responsible for "incurring costs unreasonably in the proceedings". In this regard, the Court of Appeal's decision in *Dongah Geological Engineering Co Ltd v Jungwoo E&C Pte Ltd* [2022] 1 SLR 1134 is instructive. There, the court affirmed the three-step test set out in the decision of the English Court of Appeal in *Ridehalgh v Horsefield* [1994] Ch 205 at 231 as the applicable test for determining whether costs should be ordered against a solicitor personally. The three-step test provides as follows:

(a) Has the legal representative of whom complaint is made acted improperly, unreasonably or negligently?

(b) If so, did such conduct cause the applicant to incur unnecessary costs?

(c) If so, is it in all the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?

28 Before any such order is made, the court is required, pursuant to O 21 r 6(2) of the ROC 2021, to give the solicitor a reasonable opportunity to be heard, either by way of an oral hearing or by written submissions. We direct D's solicitors to write in with submissions within 7 days of this order, on the question of whether they should be made to bear the costs of the application.

The submissions must not exceed 5 pages using double-spacing and font size 12 points.

Belinda Ang Saw Ean
Justice of the Court of Appeal

Debbie Ong Siew Ling
Judge of the Appellate Division

Lim Bee Li and Wong Zhen Yang (Chevalier Law LLC) for the applicant;
Loh Yik Ming Michael (Clifford Law LLP) for the respondent.