

Tjo Kwe In v Chia Song Kwan
[2002] SGHC 156

Case Number : OS 434/2002
Decision Date : 22 July 2002
Tribunal/Court : High Court
Coram : Lee Seiu Kin JC
Counsel Name(s) : Simon Tan (Chui, Sim, Goh & Lim) for the plaintiff; Vijaya (Sam & Wijaya) for the defendant
Parties : Tjo Kwe In — Chia Song Kwan

Civil Procedure – Extension of time – Application for extension of time to file and serve notice of appeal – Plaintiff's lawyer failing to act expeditiously in filing application – Whether to grant extension of time

Civil Procedure – Extension of time – O 55D r 14 Application for extension of time under Rules of Court – When such application to be made to court below – When such application to be made to High Court – O 3 r 4 & O 55D r 14 Rules of Court (1997 Ed)

summons was for a stay of execution of judgment pending appeal. Mr Tan had waited until 8 May 2002, more than five months after the original deadline for filing the notice of appeal, to withdraw that prayer. That would have obstructed or delayed enforcement action by the defendant. The defendant has obviously been prejudiced (see 16).

Case(s) referred to

Chen Chien Wen v Pearson

[1991] SLR 578 (folld)

Tan Thye Heng v Pan Mercantile

[1989] SLR 973 (dstd)

Legislation referred to

Rules of Court (Cap 322), O 3 r 4 and O 55D r 14

Judgment

GROUNDS OF DECISION

1 This is an appeal by the Plaintiff against my order of 8 May 2002 dismissing his application in OS 434 of 2002 for extension of time to file a notice of appeal against the decision of District Judge Laura Lau of 12 November 2001 in DC Suit No.784/2000.

2 The Defendant had commenced two actions in the District Court against the Plaintiffs, viz. DC Suit No.229/2000 and the aforementioned DC Suit No.784/2000. These two actions were consolidated and District Judge Laura Lau dismissed the first one and gave judgment for the Defendant (i.e. the plaintiff in the suit) in the second. The Plaintiff naturally was happy with the decision in DC Suit No.229/2000, but not so with that in DC Suit No.784/2000.

3 The last day of filing of the Notice of Appeal permitted by the rules was 26 November 2001. On 23 November, the Plaintiff instructed

his solicitors to file the appeal. He did this by telephone as he was in Japan at the time. However the appeal was not filed on time. His counsel, Mr Simon Tan, explained what had happened in an affidavit filed in this summons:

3. The [Plaintiff] instructed us to appeal against the decision of the learned District Judge... His instructions were given before the period to appeal expired on 26 November 2001.

4. However, we discovered that our client did not have the funds in our client's account to deposit the sum of S\$3,000 with the Accountant-General. As he was outstationed in Japan, he could only give us the sum of S\$3,000 upon his return from Japan which he eventually did on 7 December 2001.

5. On his assurance that he will put me in funds upon his return, I issued a .. cheque ... dated 26 November 2001 in favour of the Accountant-General but my court clerk was unable to file the application before the expiry date on 26 November 2001. ...

6. On 5 December 2001, I proceeded to apply to the Subordinate Courts for leave to file the Notice of Appeal out of time.

7. On 17 January 2002, the application was heard by ... Magistrate Mr Adam Nakhoda and I was given leave to withdraw the application on the basis that it should have been filed in the High Court pursuant to Order 55D Rule 14 of the Rules of Court.

8. On 30 January 2002, my firm re-filed the application electronically but due to inadvertence on my firm's part, it was re-fixed [for] hearing again in the Subordinate Courts despite the fact that we indicated that this application was to be heard in the High Court.

9. The application came up for hearing on 18 March 2002 and it was heard by ... District Judge Laura Lau ... whereby she gave me leave to withdraw the application again with no order as to costs.

4 It would appear from Mr Tan's affidavit, and indeed he conceded before me, that there were three mistakes made by his firm:

(i) failing to file the Notice of Appeal on 26 November 2001;

(ii) on 5 December 2001, applying for leave to appeal out of time by way of SIC in the action in the District Court instead of by Originating Summons in the High Court; and

(iii) on 30 January 2002, filing the Originating Summons in the Subordinate Courts instead of the High Court.

It was only on the fourth attempt on 28 March 2002 in the present summons that Mr Tan's firm was able to get it correct. By that time slightly over four months had elapsed since 26 November 2001, the date due to file the Notice of Appeal under the Rules of Court. In connection with these three mistakes there were three instances of unexplained delays as I shall elaborate below.

Mistake No. 1

5 In respect of the failure to file the Notice of Appeal on 26 November 2001, Mr Tan gave some explanation in Chambers about his

firm's cheque being unacceptable that I was unable to make sense of. He certainly did not elaborate in his affidavit why his court clerk was unable to file the application on that day. Neither did he back it up with any document. The long and short of it is that he had failed to file a Notice of Appeal by the date due under the Rules of Court.

Delay No. 1

6 By itself, this mistake is not necessarily fatal. Any solicitor would have taken immediate steps to rectify it by making an application to extend time. Unfortunately Mr Tan chose not to take any immediate action. Instead he waited a good eight days before filing in such an application on 5 December 2001. He gave no explanation in his affidavit for this delay.

Mistake No. 2

7 But he still was unable to get it right. Instead of making an application to the High Court, he applied to the Subordinate Courts. Order 55D of the Rules of Court provides for appeals from the Subordinate Courts to the High Court. In respect of an application for extension of time to file and service notice of appeal, O 55D r 14 provides as follows:

Without prejudice to the power of the High Court under Order 3, Rule 4, to extend the time prescribed by any provision of this Order, the period for filing and serving the notice of appeal under paragraph (1) of Rule 4 may be extended by the Court below on application made before the expiration of that period.

8 It is clear on the face of this rule that an application for extension of time may be made to the Court below only if it is made before the expiration of the period for filing and serving the notice of appeal. If that period has expired, then the application can only be made to the High Court pursuant to its general powers to extend time under O 3 r 4. If the construction of O 55D r 14 (or its predecessor) had not been clear before, any doubt would have been eradicated since the High Court decision in *Chen Chien Wen v Pearson* [1991] SLR 578. The matter there pertains to O 57 r 4 of the Rules of Supreme Court in force at the time, which is in the same terms as O 55D r 14 under consideration. Order 57 r 4 provides as follows:

Without prejudice to the power of the Court of Appeal under O 3 r 5, to extend the time prescribed by any provision of this Order, the period for serving notice of appeal under r 4 ... may be extended by the Court below on application made before the expiration of that period.

It was held that the High Court has no jurisdiction to extend time to serve the notice of appeal where the application is made after expiration of the prescribed period for service and that an extension of time in such circumstances can only be granted by the Court of Appeal.

9 Mr Tan said that he was misled by the decision in *Tan Thye Heng v Pan Mercantile* [1989] SLR 973. The appellant there filed a notice of appeal within the prescribed time but served it one day late, on the fifteenth day. The appellant applied to the High Court for extension of time for service. The respondent raised a preliminary objection on the basis that such an application should have been made to the District Court as there was no appeal yet before the High Court. This argument was accepted by the judge. However that case concerns the Subordinate Courts Rules 1986. The present case falls under the Rules of Court (1997 Ed) which is an entirely different regime as the Supreme Court and Subordinate Courts rules have become merged. Under O 3 r 4 of the Rules of Court the High Court has jurisdiction to extend any period prescribed in those rules, including the period for filing notice of appeal against the decision of a Subordinate Court. Crucially, there is no equivalent provision to O 55D r 14 in the Subordinate Courts Rules 1986. It is therefore difficult to comprehend how any solicitor can be misled by that decision.

Delay No. 2

10 When the application came up for hearing before the Registrar at the Subordinate Courts on 17 January 2002, Mr Tan withdrew it upon realising the correct legal position. But again he did not act with expedition even though by now he was already more than one and a half months out of time. He waited another twelve days before filing the OS application on 30 January 2002. No reason was given in his affidavit

for this delay.

Mistake No. 3

11 For the third time Mr Tan or his firm could not get it right. Due to "inadvertence", the application was again filed in the Subordinate Courts. He appears to suggest that it was on account of the Electronic Filing System ("EFS"). He said that this was despite the fact that they had *"indicated that this application was to be heard in the High Court"*. However he did not elaborate on this. If it was on account of unfamiliarity with the EFS system, I would say two things. Firstly, the EFS was already up and running since March 2000, almost years earlier. Secondly, it is a matter of specifying the Court concerned. Mr Tan did not deem it fit to explain how this inadvertence came about. The onus is upon him to explain it clearly and he had chosen not to.

Delay No. 3

12 Mr Tan realised the error on 18 March 2002 when he appeared before District Judge Laura Lau. For a third time, he did not act to file the present summons until 28 March 2002, a lapse of nine days. Yet again, no explanation was given for this delay. As I have pointed out earlier, by this time more than four months had passed since the original deadline for filing the notice.

Merits of the appeal

13 This action is a claim for the sum of \$122,700 in respect of a quantity of Koi fish that the Defendant claimed he had sold to the Plaintiff. In his defence, the Plaintiff denied the existence of such a transaction. The decision of the District Judge would turn substantively on questions of fact. In arriving at that decision the judge would have had the benefit of hearing the evidence of the witnesses and observing them in the course of the trial which lasted seven days. The Plaintiff would have great difficulty in appealing against findings of fact.

Conclusion

14 In relation to the three mistakes, any single one might, in the circumstances, have moved the Court to exercise its discretion to extend time. But three mistakes were made and there is no full and frank explanation as to how they came about.

15 On top of that the Plaintiff's counsel had not acted with the due expedition that the Court would expect in such matters. This happened not once but three times, resulting in a wholly unnecessary delay of 29 days. This has to be considered in the context of the 14-day period under the Rules of Court for the Plaintiff to file and serve the notice of appeal.

16 Furthermore, the entire proceedings was dragged out for four months as a result. One of the prayers in this summons is for a stay of execution of judgment pending appeal. Although Mr Tan had withdrawn that prayer at the hearing before me, that was not until 8 May 2002, more than five months after the date due for filing notice of appeal. That would have obstructed or delayed enforcement action by the Defendant. The Defendant has obviously been prejudiced by this.

17 The circumstances of this case clearly do not justify the Court exercising its discretion to extend the time to file and serve the notice of appeal. To do so would also send the wrong signal to the profession as to the standard demanded of it by the Courts and the public.

Sgd:

LEE SEIU KIN

JUDICIAL COMMISSIONER

SUPREME COURT

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