Denko-HLB Sdn Bhd v Fagerdala Singapore Pte Ltd
[2002] SGCA 31

Case Number : CA 21/2002, NM 13/2002

Decision Date : 03 July 2002

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Tan Lee Meng J; Yong Pung How CJ

Counsel Name(s) : Liaw Jin Poh (Yeo Leong & Peh) for the appellants; Siva Murugaiyan and Parveen Kaur Nagpal (Colin Ng & Partners) for the respondent

Parties : Denko-HLB Sdn Bhd — Fagerdala Singapore Pte Ltd

Civil Procedure – Appeals – Appeal against interlocutory order of judge-in-chambers – Filing of request for further arguments before judge – Object of limited time frame in filing such request – Application for extension of time to file appeal – Need for stricter approach in determining whether to grant such application – Factors to consider in determining whether to grant such application – s 34(1)(c) Supreme Court of Judicature Act (Cap 322, 1999 Ed)

Civil Procedure – Appeals – Appeal against interlocutory order of judge-in-chambers – Request for further arguments – Failure of appellants to apply to judge for further arguments within seven days of interlocutory order – Bringing motion to Court of Appeal for extension of time to request for further arguments – Whether to allow motion

Courts and Jurisdiction – Jurisdiction – Court of Appeal – Failure of appellants to apply to judge for further arguments within seven days of interlocutory order – Bringing motion to Court of Appeal for extension of time to request for further arguments – Whether court has original jurisdiction to grant extension – ss 18, 34(1)(c), 37(2) & Sch 1 para 7 Supreme Court of Judicature Act (Cap 322, 1999 Ed)

(delivering the grounds of judgment of the court): This was a motion by Denko-HLB Sdn Bhd (`Denko`), seeking the indulgence of the Court of Appeal in respect of two matters:

(1) an extension of the time prescribed in s 34(1)(c) of the Supreme Court of Judicature Act (Cap 322, 1999 Ed) (`SCJA`) for a request to be made for further arguments to the judge-in-chambers in relation to an interlocutory order made by that judge;

(2) an extension of time to file and serve a notice of appeal against the said interlocutory order.

We heard the motion on 21 May 2002 and dismissed it. We now give our reasons as some points of practical significance were in issue.

Facts

Denko was the defendant in an action, Suit 1241/2001, brought by Fagerdala Singapore Pte Ltd (`Fagerdala`) for money due on goods sold. Denko applied to have the action stayed on the ground of forum non conveniens. The senior assistant registrar (`SAR`) granted the application and ordered a stay. Fagerdala appealed against that order to the High Court. On 19 February 2002, Lai Siu Chiu J, sitting in chambers, allowed the appeal and reversed the order of the SAR. The effect of this decision was that there would be no stay of proceedings.

It was not in dispute that the decision of 19 February 2002 was an interlocutory order and that under s 34(1)(c), if Denko wished to appeal, it must first apply for further arguments to the judge within

seven days of the order. Pursuant to O 56 r 2, if the judge certified that he did not wish to hear further arguments, or if he failed to notify the party of his intention within 14 days, he would be deemed not to require further arguments and the party could proceed to file his notice of appeal. But if the judge should certify that he wished to hear further arguments then the order already made would be suspended and the judge at the further hearing could make such order as he thought fit: see **Singapore Press Holdings v Brown Noel Trading** [1994] 3 SLR 151 and **Thomson Plaza v Liquidators of Yaohan Department Store** [2001] 3 SLR 248 .

In the present case, the solicitor for Denko overlooked the requirement of s 34(1)(c) and did not apply for further arguments within the prescribed time. On 11 March 2002 his client instructed him to appeal and only then did he realise that he had failed to comply with s 34(1)(c). So on 12 March 2002, Denko`s solicitor applied for further arguments. Fagerdala objected to the application by way of a letter dated 14 March 2002. On 19 March 2002, Denko filed the notice of appeal. The next day, the Registrar of the Supreme Court notified Denko that their request for further arguments was out of time and not valid and that the notice of appeal filed by Denko the day before was also not valid.

These were the factual matrix upon which Denko moved the court for the two reliefs prayed for.

Finally, we should add that in the parties` submissions before us, besides seeking to persuade us to grant, or to refuse to grant, an extension of time, in terms of the motion, Fagerdala had also raised a jurisdictional point. However, we think it would be more expedient if we first deal with the substantive application in the motion.

Extension of time

This court has in numerous cases in the past set out the factors which should guide the court in determining whether to grant an extension of time to enable a party to file and/or to serve a notice of appeal out of time: eg **Pearson v Chen Chien Wen Edwin** [1991] SLR 212 [1991] 3 MLJ 208 ; **Nomura Regionalisation Venture Fund v Ethical Investments** [2000] 4 SLR 46 ; **Aberdeen Asset Management Asia v Fraser & Neave** [2001] 4 SLR 441 . Obviously, this application by Denko was not strictly an application to extend time to file and serve a notice of appeal. It was in relation to a step that was needed to be taken before an appeal could be lodged. So the question is: should the factors which are applicable to an extension of time to file and/or serve a notice of appeal also apply here?

In this regard, the decision of this court in **The Tokai Maru** [1998] 3 SLR 105 is germane. The dispute there concerned late filing of affidavits of evidence-in-chief. The appellants applied to obtain retrospective extension of time for the late filing. The judge below held that as there was no material before the court which satisfactorily explained the delay, he refused to give any extension and instead granted the respondent`s application to have the appellants` defence struck out. On appeal, this court ruled that a distinction should be drawn between an application for an extension of time to file a notice of appeal and an application to extend time in relation to other matters and that a less stringent approach should be adopted in relation to the latter kind of application. The court declared the applicable principles to be as follows (at [para]23):

> *(b) The rules of civil procedure guide the courts and litigants towards the just resolution of the case and should of course be adhered to. Nonetheless, a litigant should not be deprived of his opportunity to dispute the plaintiff`s claims and have a determination of the issues on the merits*

as a punishment for a breach of these rules unless the other party has been made to suffer prejudice which cannot be compensated for by an appropriate order as to costs.

(c) Save in special cases or exceptional circumstances, it can rarely be appropriate then, on an overall assessment of what justice requires, to deny a defendant an extension of time where the denial would have the effect of depriving him of his defence because of a procedural default which, even if unjustified, has caused the plaintiff no prejudice for which he cannot be compensated by an award of costs.

While Denko`s application was not an application for an extension of time to file a notice of appeal, neither was it an application to extend time in relation to a matter of the nature as in ***The Tokai Maru*** . But the objective of Denko`s application was to enable Denko to appeal against the order made on 19 February 2002. It would appear that there is no previous case which addressed this very point. As we see it, Denko`s application was more akin to an application for an extension of time to file appeal rather than to file affidavits of evidence-in-chief out of time as in ***The Tokai Maru*** . It was a necessary step to filing an appeal. Therefore, a stricter approach should be followed in determining whether an extension of time should be granted to Denko. It must be borne in mind that the very limited time frame prescribed in s 34(1)(c) is to ensure that an interlocutory order made by a judge-in-chambers will obtain finality quickly so that the trial of the action will take place soonest practicable and not be bogged down by interlocutory squabbles. The trial of the action should not be delayed.

There are four factors which this court have consistently declared to be pertinent in determining whether an extension of time should be granted to file or serve a notice of appeal: the length of the delay; the reason for the delay; the merits of the appeal; and the question of the degree of prejudice. We will consider these factors in turn.

Length of delay

The delayed application to request for further arguments was made on 12 March 2002 when Denko should have made it on 26 February 2002, a delay of some 14 days. Considering that the period allowed by s 34(1)(c) to apply for further arguments is only seven days, a delay of 14 days cannot be said to be relatively short.

Reason for delay

As for the second factor, there was only a one line cryptic explanation for the delay: `oversight on (solicitors) and there was no fault on the part of (Denko)`. We had in ***Nomura Regionalisation*** (supra) reviewed the authorities where mistake or oversight on the part of the solicitor was the cause of the delay in filing or serving the notice of appeal out of time. At the conclusion of the review, we made the following pronouncement (at [para]28):

We agreed ... 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.*

We noted that in the affidavits filed in support, Denko, other than stating that it was simply an `oversight` on the part of the solicitors, did not offer any other explanation with regard to the `oversight`. Section 34(1)(c) was enacted in 1993. It is a provision which has been in operation for some nine years and there is nothing in it which is complex or could give rise to a misunderstanding. Indeed, the substance of what is in s 34(1)(c) has been around for more than 30 years. In the 1970 Edition of Singapore Statutes, s 34(2) of the then SCJA (Cap 15) read:

> *No appeal shall lie from an interlocutory order made by a Judge in chambers unless the Judge has certified, after application, within four days after the making of such order by any party for further argument in court, that he requires no further argument, or unless leave is obtained from the Court of Appeal or from the Judge who heard the application.*

Merits of application

With regard to the third factor, the merits, it must mean, in relation to this case, the merits in Denko`s application for a stay on the ground of forum non conveniens. There was a clear connection between the judge wishing to hear further arguments and the merits of the application for a stay. The threshold to be satisfied on this factor was not high. It was not necessary for Denko to show that the application was likely to succeed. All that was necessary to be shown was that the application for a stay was not `hopeless`. We noted that before the SAR, Denko`s application for a stay was granted. It was on appeal that Lai Siu Chiu J reversed this order. We really could not say that the application for a stay was `hopeless` and thus, as far as the third factor was concerned, we would say that it was satisfied.

Question of prejudice

Turning to the fourth factor, the degree of prejudice, two points were raised by Fagerdala: (1) if an extension were granted, it would mean further delay in the substantive action coming on for hearing before the court; and (2) a director of Denko, Dato Ahmed Anuar bin Mohamed, had informed Mr Paul Yeo, the Managing Director of Fagerdala, that Denko were in the process of completing the sale of their assets and/or the business was in the process of being acquired by a third party. If this were true, the enforcement of any eventual judgment which Fagerdala would obtain against Denko would be frustrated. This allegation was, however, denied by Dato Ahmad Anuar and Fagerdala was not able to produce any concrete evidence to substantiate its assertion.

We accept that if an appeal were eventually filed it would, of course, lead to some delay. But that would be the effect of almost every appeal. Fagerdala had not shown any real prejudice which could not be compensated by costs, eg changed position pursuant to interlocutory order. Thus, it seemed to us that prejudice was not shown.

Our overall assessment

As we viewed it, the greatest obstacle in the way of Denko`s application was in relation to the first two factors. Not only was the length of the delay quite substantial (bearing in mind the prescribed period of time within which a party must apply to the judge for further arguments was only seven days), there were no extenuating circumstances offered for the `oversight` of the solicitor. Some explanation should have been offered to mitigate or excuse the oversight. If, in every case, `oversight` is per se a satisfactory ground, we run the risk of turning the rules prescribing time into dead letters. It would be observed in breach. It would be all too simple for a party to run to a judge to ask for indulgence because of oversight. The need for finality must be borne in mind.

We have earlier referred to the fact that s 34(1)(c) has been in the statute book since 1993. Furthermore, a similar, though not identical provision, was in the SCJA long before that. In all recent cases where this court exercised its discretion to extend time, there were extenuating circumstances in relation to the solicitor`s mistakes or oversight, eg ***Nomura Regionalisation*** (supra); ***Aberdeen Asset Management*** (supra); **Tan Chiang Brother`s Marble (S) v Permasteelisa Pacific Holdings** [2002] 2 SLR 225 . Two English cases, which are enlightening, had also adopted a similar approach: **Gatti v Shoosmith** [1939] 3 All ER 916 and **Palata Investments v Burt & Sinfield** [1985] 2 All ER 517.

In summary, there must be circumstances which would persuade the court to exercise its discretion in favour of the applicant. It would not be sufficient for an applicant to merely say, my solicitor forgot about the whole matter. This aspect was what was lacking in Denko`s application.

In passing, we must emphasise that the decision which Denko would like to have reversed is not one relating to the substantive claim in the action. It only decided that there would be no stay because Denko had failed to satisfy the judge that Malaysia was the more appropriate forum. All it meant was that the action proper would be heard here in Singapore.

Jurisdictional issue

We now turn to the jurisdictional point. Fagerdala contended that this court had no jurisdiction to grant an extension of time to enable Denko to request the judge-in-chambers to hear further arguments. Its reasoning ran as follows. This court is a creature of the SCJA and its jurisdiction must, of necessity, be as circumscribed in that Act. Its civil jurisdiction consists of appeals from any judgment or order of the High Court, subject to the SCJA or any other written law regulating the terms and conditions upon which the appeals may be brought. Since Denko failed to comply with s 34(1)(c), the decision of 19 February had become non-appealable.

Denko averred that this court had no jurisdiction or power to extend time to enable that decision to be rendered appealable, as no such jurisdiction or power was conferred upon this court by either s 34(1)(c) or any other provisions in the SCJA, or any other written law. By virtue of s 18 and para 7 of the First Schedule of the SCJA, the High Court is given the power to enlarge or abridge time prescribed by any written law for doing an act or taking any proceeding, whether the application is made before or after the expiration of the time prescribed. Section 37(2) of SCJA also provides that the Court of Appeal `shall have all the powers and duties ... of the High Court`. But for s 37(2) to operate there must first be a pending appeal before the Court of Appeal. And there was none here.

Analysis

We would at the outset state that the reference made by Denko to s 37(2) is erroneous. This subsection touches on the powers of the Court of Appeal at the hearing of an appeal and it specifically mentions that the Court of Appeal `shall have all the powers and duties, as to amendment or otherwise of the High Court` and it goes on to say the court has full discretionary power to receive further evidence. It does not relate to the power of the court, whether the High Court or the Court of Appeal, to grant an extension of time. If at all, it seems to us that the more appropriate provision is s 29A(3)(a), which is set out later in [para]27.

It is clear, pursuant to s 34(1)(c), that in relation to an interlocutory order made by a judge-in-chambers, unless the application for further arguments is made within seven days by the party who wishes to have the order reversed or varied, no appeal may be brought against that order. Section 18(2) provides that the High Court shall have the powers set out in the First Schedule to the SCJA and para 7 thereof reads as follows:

> *Power to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding, whether the application therefor is made before or after the expiration of the time prescribed, but this provision shall be without prejudice to any written law relating to limitation.*

By virtue of para 7 of the First Schedule, the judge making the order could have the power to grant an extension of time to enable Denko to apply for further arguments out of time. Of course, in the present case Denko did not apply to the judge for an extension of time but had instead merely requested for further arguments. This was rightly rejected by the Registrar, Supreme Court, as being a request made out of time and was invalid.

So the question is, has the Court of Appeal the jurisdiction to entertain an application in terms of the motion herein. Two provisions in the SCJA are pertinent, s 29A(1) and (3), and they read:

(1) The civil jurisdiction of the Court of Appeal shall consist of appeals from any judgment or order of the High Court in any civil cause or matter whether made in the exercise of its original or of its appellate jurisdiction ...

(3) For the purposes of and incidental to -

(a) the hearing and determination of any appeal to the Court of Appeal; and

(b) the amendment, execution and enforcement of any judgment or order made on such an appeal,

the Court of Appeal shall have all the authority and jurisdiction of the court or tribunal from which the appeal was brought.

It seems to us clear that the civil jurisdiction of the Court of Appeal is to hear appeals from the High Court. It also seems to us that the effect of s 29A(3) is that the Court of Appeal will only have the powers of the High Court, where there is in existence an appeal. It is only at the hearing of the appeal, or at the hearing of a matter incidental to the appeal, that the Court of Appeal would have the powers which are conferred upon the High Court. Denko`s application for an extension of time to apply for further arguments can, under no stretch of the imagination, be considered to be the `hearing of` of an appeal or a matter incidental to the hearing of an appeal. There was, as yet, no appeal.

If Parliament had intended that the Court of Appeal should have a separate power to extend the time prescribed in s 34(1)(c), it would have so provided as it did in relation to the criminal jurisdiction of that court: see ss 47(5) and 50.

There may be a temptation to compare this application by Denko with an application for an extension of time to file a notice of appeal, which this court often receives. Two factors differentiate the latter application from the former. First, the time limit to file a notice of appeal is not prescribed in the SCJA, but in the Rules of Court (`the Rules`). Second, the Rules specifically gives a power to the High Court as well as this court to extend the time prescribed under the Rules: O 3 r 4 and O 57 r 17. Quite apart from the question whether the Rules may modify what is laid down in s 34(1)(c), the Rules do not confer such a power or jurisdiction upon the Court of Appeal to enlarge the time prescribed by that provision.

But that is not to say that the same application may not come before the Court of Appeal by the more normal route. As we have mentioned, a dissatisfied party, who is out of time, may apply to the judge to extend time (extension application) for that party to make the request for further arguments (s 18(2) read with para 7 of the First Schedule). If the extension application is refused by the judge, that party can then appeal to the Court of Appeal. That should have been the approach which Denko should have taken. This appears to have been the approach adopted in **Seabridge Transport v Olivine Electronics** [1995] 3 SLR 545 but with one difference. Instead of making the extension application direct to the judge, the appellant made it to the assistant registrar and having failed to obtain an extension from the assistant registrar, the appellant did not pursue it further. So there was really no cause for this court in that case to consider this procedural point. Similarly, there was also no cause for this court in that case to express any view whether it had a separate jurisdiction to entertain an application to extend time prescribed in s 34(1)(c), other than by way of an appeal from a refusal to extend time by the court below.

For the reasons we have indicated, it is our opinion that this court does not have an original

jurisdiction to entertain an application to extend time prescribed in s 34(1)(c). Thus, the motion filed by Denko was not in order.

Outcome:

Motion dismissed.