

Leong Mei Chuan v David Chan Texk Hock
[2000] SGHC 150

Case Number : D 3777/1997, RAS 720013/2000, RAS 720014/2000, SIC 750847/2000
Decision Date : 25 July 2000
Tribunal/Court : High Court
Coram : Kan Ting Chiu J
Counsel Name(s) : Tan Hin Tat, V Kanyakumari & Janaine Ong (Sim Hill Tan & Wong) for the petitioner/appellant; Anamah Tan & Veronica Joseph (Ann Tan & Associates) for the respondent
Parties : Leong Mei Chuan — David Chan Texk Hock

JUDGMENT:

Grounds of Decision

1. This matter came before me as cross-appeals against a district judges orders on ancillary matters following the dissolution of a marriage.
2. In the event the merits of the appeals were not argued and determined because the wife, who I shall refer to as the appellant, applied to amend her notice of appeal before proceeding with her appeal. After hearing counsel, I dismissed her application. Her counsel gave notice that he had instructions to appeal against the dismissal. The hearing of the appeals was stayed pending the disposal of the appeal against my order.

Background

3. The husband, who I shall refer to as the respondent, is in the employ of Dell Computer Asia Ltd. Under his contract of employment, he would receive options to purchase shares in Dell Corporation. These stock options would vest in him after a period of time. After a stock option is vested in him, he may acquire stocks in the company by exercising the option and paying for the shares. If he does not wish to exercise the option he can allow it to lapse.
4. Counsel categorised the respondents share entitlement under the options into three classes -
 - (i) options which have not vested,
 - (ii) options which have vested but are not exercised, and
 - (iii) options which have vested and are exercised.
5. By Order 5 of her orders, the district judge ruled that

The Petitioner shall be entitled to 15% of the Respondents Dell stocks, namely: -

- (i) 111,100 shares purchased from the open market valued at US \$4,575,986-80;
- (ii) 10,821 shares bought under the Employee Stock Purchase Plan valued at US\$445,695-00; and
- (iii) the gains from Dell stocks **vested and exercised** by the Respondent under

the Non-Statutory Stock Option Agreement scheme amounting to US\$2,573,328-00 less tax to be paid on such gains (proof on demand of payment from IRAS).

(Emphasis added)

(The reference to "stocks vested and exercised" in (iii) above was clearly an error, and should be "stock options vested and exercised.")

6. No order was made on the stock options that have not vested and those which were vested but are not exercised.

Chronology of events

7. This is the chronology of the material events

20 January - the district judge made her orders,

1 February - the appellant filed her Notice of Appeal,

7 April - the appellant appointed her current solicitors to act for her in the appeal,

12 April - the district judge issued her Grounds of Decision,

13 April - the appeal came on for hearing for the first time, and

9 May - the appellant applied to amend her Notice of Appeal.

The Notice of Appeal

8. In her Notice of Appeal the appellant sought orders *inter alia* that

72. The Petitioner be entitled to a greater share than 15% of the Respondents Dell stocks itemised at Order 5 of the Order of Court dated 20 January 2000.

3. There be a division of Dell Stocks in the Non-Statutory Stock Option agreements which have yet to be vested in the Respondent.

9. The other heads of appeal in the Notice of Appeal were for an increase in maintenance that the respondent is to pay, and for an order that he contributes to the mortgage payments on a property in the Gold Coast, Australia.

The hearing on 13 April

10. Counsel for the appellant informed Justice Judith Prakash that the parties had received the grounds of decision the previous day, and that the appellant intended to amend her Notice of Appeal. The hearing was adjourned to give time to counsel to prepare and submit their cases.

The application to amend the Notice of Appeal

11. The application was filed to amend prayer 3 to read

There be a division of Dell stocks in the Non-Statutory Stocks Option agreements which have vested but yet to be exercised by the Respondent and which have yet to be vested in the Respondent.

(Emphasis added)

12. Three matters caught my attention on reading the application

(i) counsel took more than 3 weeks to file the application after informing Justice Prakash of the intention to amend,

(ii) the appellant was claiming a division of shares the respondent did not possess, and

(iii) the appellant was not claiming a division of the unexercised vested options or their value.

The nature of the application

13. Counsel for the appellant characterised the application as an amendment. Insofar as it sought to add a head of appeal to the notice, it can be said that it was an application to amend the notice.

14. However, it is more than an amendment. The appellant wanted to pursue in the appeal her claim for a division of the shares that the respondent would acquire if he exercised the vested options. As she had not appealed against that part of the district judges decision and the time for appealing against it had expired, she was also seeking to appeal against that part of the decision out of time.

The rules to be applied

15. What rules should apply to the application? I am of the view that the appellant must satisfy not only the rules for amendments, she must also satisfy the rules for extending time to file notices of appeal out of time.

16. The law governing applications to extend time for filing notices of appeal was set out by Chan Sek Keong JC (as he then was) in *Hau Khee Wee & Anor v Chua Kian Tong & Anor* [1986] SLR 484 @ 488 when he said

The factors to be taken into account in deciding whether to grant an extension of time to file a notice of appeal are:

(1) the length of the delay;

(2) the reasons for the delay;

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

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

17. These factors were referred to and approved by the Court of Appeal in *Pearson v Chen Chien Wen Edwin* [1991] 1 SLR 212 where Chief Justice Yong Pung How stated "(i)n particular, the chances of the appeal succeeding should be considered, as it would be a waste of time for all concerned if time is extended when the appeal is utterly hopeless".

18. The application before the Court of Appeal was for an extension of time to file an appeal against an order on the division of matrimonial assets following the dissolution of a marriage. The appellant was aggrieved that she was not awarded \$160,000 that she has received under a deed of reconciliation, but did not file her appeal in time. The Court dismissed her application for an extension of time to file it because she had repudiated the deed when the respondent applied to court in earlier proceedings for it to be approved. The Court disapproved of her inconsistency and added that when a party applies to the court for an extension of time, the application should be on grounds sufficient to persuade the court to show sympathy to him.

Consideration of the factors

19. The length of the delay

The judgment was delivered on 20 January. The appellant had 14 days to appeal, so time ran out on 3 February. She did not apply to add the new head of appeal till 9 May, more than three months later. By any standard, this was a long delay.

20. The reasons for the delay

The only reasons disclosed in the appellants affidavit in support of her application were

(iii) when the notice of appeal was filed on 1st February 2000, it

was based strictly on the orders made by the learned district judge ("LDJ"). In lodging the appeal, my previous solicitors merely based the appeal on the orders made without having the benefit of the grounds or basis upon which the LDJ gave her orders.

(iv) the actual grounds were only given one day before the first

hearing proper and it was only thereafter (i.e. way after the filing of the notice of appeal) that my present solicitors discovered the LDJ did not take into consideration at all the arguments made before her regarding the vested but unexercised stock options

21. There was little merit in these reasons. It was very clear from the district judges orders without reference to the grounds of decision that there was to be no division of shares in respect of the unexercised vested options. When the current solicitors were appointed, that should also be clear to them, and it must also be clear to them there was no appeal relating to those options in the Notice of Appeal. It is noteworthy that neither set of solicitors deposed any affidavit to explain the delay. Furthermore there was no explanation for the delay in filing the application to amend till 9 May, more than three weeks after counsel informed Justice Prakash about it.

22. The chances of the appeal succeeding

The appellant is claiming a share of Dell stocks in the vested options which have not been exercised. The basis of the claim appears to me to be flawed. Stock options are not shares. They are rights to acquire shares. Only when an option holder exercises an option and complies with the terms of the exercise will shares be issued to him. As long as an option remains unexercised, the holder does not receive any shares.

23. In the Appellants Case filed it was contended in respect of the unvested options that

33. On a proper construction of the relevant provisions of the Stock Option agreements, the options were awarded to the husband at the date of each agreement albeit they were only to vest at a future (specified) date. The husband had therefore, from the date of each agreement, the right to have the options vested in him, which right can be deemed a chose in action and therefore would comprise assets of the husband.

34. According to **Halsburys Laws (4th Ed reissue) Vol 6 paragraph 1**, the expression "*chose in action*" is "used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession."

24. It is arguable whether an unvested option is a chose in action inasmuch as the respondent may not have the right to have it vested. However, assuming that an unvested option is a chose in action, a vested option is also that - a chose in action, not shares. The appellants chances of success are low even if the amendment were allowed.

25. The degree of prejudice to the respondent

Neither the respondent nor his counsel has asserted that he would be prejudiced if the application were granted.

My decision

26. The appellants application to amend the Notice of Appeal was filed very late, without acceptable reasons for the delay. This can weigh heavily against her. In *Stansfield Business International Pte Ltd (t/a Stansfield School of Business) v Vithya Sri Sumathis* [1999] 3 SLR 239, Justice Chao Hick Tin (as he then was) found the failure of a solicitor to instruct his clerk to serve a notice of appeal immediately after it was filed, and the clerks delay in filing it were not sufficient grounds to warrant the exercise of his discretion to extend time for the service of the notice by seven days, although he was of the view that there were merits in the appeal.

27. The appellants delay is long, unmitigated, and repeated in that after being slow to realise that the Notice of Appeal needed to be amended, she was slow in making the application to amend. She also faces the difficulty of seeking a division of shares the respondent did not possess.

28. Looking at all the circumstances, I found that the appellant has not presented a sufficient case for me to exercise my discretion in her favour to allow her to amend the Notice of Appeal.

Kan Ting Chiu

Judge

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