

Ong Wui Swoon v Ong Wui Teck and another matter
[2014] SGHC 157

Case Number : Suit No 385 of 2011 (Registrar's Appeal No 54 of 2014) and Originating Summons No 1187 of 2013 (Registrar's Appeal No 72 of 2014)
Decision Date : 07 August 2014
Tribunal/Court : High Court
Coram : Woo Bih Li J
Counsel Name(s) : Carolyn Tan (Tan & Au LLP) for Ong Wui Swoon; Ong Wui Teck in person.
Parties : Ong Wui Swoon — Ong Wui Teck

Civil Procedure – Extension of time

Civil Procedure – Costs

7 August 2014

Woo Bih Li J:

Background

1 Ong Wui Swoon (“the Sister”) and Ong Wui Teck (“the Brother”) are two out of six siblings. The Sister had alleged that the Brother had failed in his duty as an administrator of their late father Ong Thiat Gan’s estate (“the Estate”) to render an accurate account of its assets. She therefore sued the Brother in Suit No 385 of 2011 asking him to render a proper account of all the Estate’s assets, and also to pay damages for his alleged breach of duty. The Sister also asserted a beneficial interest in the sale proceeds of a private property, which she claimed the Brother held on trust for their father.

2 On 30 October 2012, I delivered my written judgment (which was reported in *Ong Wui Swoon v Ong Wui Teck* [2013] 1 SLR 733 (“the Main Judgment”). I decided that the Brother had failed to give a proper account of the assets of the Estate. I ordered the Registrar of the Supreme Court (“the Registrar”) to conduct an inquiry to determine various matters as set out at [143] of the Main Judgment. For completeness, I would mention that I dismissed the Sister’s claim for a beneficial interest in the sale proceeds of the private property mentioned above.

3 The inquiry was conducted before Assistant Registrar Shaun Leong (“AR Leong”) in TA 13 of 2013. On 24 September 2014, AR Leong decided that the Estate was in fact positive in the sum of \$15,756.47. He ordered the Brother to pay the Sister \$1,313 as her one-twelfth share of the Estate.

4 AR Leong also ordered that costs in TA 13 of 2013, *ie*, the costs of the inquiry, be agreed or taxed. This order on costs was made by consent.

5 Subsequently, a dispute arose as to who was liable for the costs of the inquiry. The Sister’s solicitors, Tan & Au LLP (“Tan & Au”) took the position that the Brother was liable. However, the Brother took the position that AR Leong’s costs order did not specify who was to pay the costs of the inquiry. AR Leong’s costs order merely stated that such costs were to be agreed or taxed.

6 On 4 December 2013, AR Leong clarified explicitly that his costs order meant that the Brother

was liable to pay such costs to the Sister.

7 Subsequently, the Brother filed Originating Summons No 1187 of 2013 ("OS 1187/2013") on 12 December 2013 to seek an extension of time to appeal against the decision of AR Leong.

8 On 24 February 2014, Assistant Registrar Una Khng ("AR Khng") granted the Brother's application for an extension of time to appeal. Thereafter, the Brother filed Registrar's Appeal No 54 of 2014 ("RA 54/2014") in Suit No 385 of 2011 on 25 February 2014 to appeal against both the substantive decision of AR Leong and his costs order.

9 The Sister then filed an appeal on 5 March 2014 against AR Khng's decision to grant the Brother's application for an extension of time to appeal. This was Registrar's Appeal No 72 of 2014 ("RA 72/2014").

10 Both RA 54/2014 and RA 72/2014 came up for hearing before me on 19 May 2014. I heard RA 72/2014 first. If that appeal was allowed in its entirety, then no extension of time would be granted to the Brother and his own appeal would fail.

11 After hearing arguments, I allowed the Sister's appeal (in RA 72/2014) partially as I elaborate below.

12 There were two aspects to AR Khng's decision. In allowing the Brother an extension of time to appeal against AR Leong's decision, AR Khng had allowed the Brother an extension of time to appeal against both the substantive decision of AR Leong and his decision on costs. I set aside AR Khng's decision to allow the Brother an extension of time to appeal against AR Leong's substantive decision. However, I allowed the extension of time to appeal against AR Leong's costs order to remain.

13 Thereafter, I proceeded to hear RA 54/2014 in respect of AR Leong's costs order only. After hearing arguments on the quantum of costs of the inquiry, I set aside AR Leong's costs order in that such costs were not to be taxed although the Brother was still liable to pay the costs. Since the parties obviously could not agree on the quantum of such costs, I decided to fix the quantum of the costs. I fixed it at \$400 to be paid by the Brother to the Sister.

14 The Brother has filed two appeals against my decisions to the Court of Appeal, *ie*, Civil Appeal No 95 and No 96 of 2014 ("CA 95/2014 and CA 96/2014") respectively.

15 The notice of appeal for CA 95/2014 states that it is against the whole of my decision (in OS 1187 of 2013) given on 19 May 2014. This is very wide and incorrect. Presumably the Brother is appealing against part of my decision only, *ie*, that part in which I did not allow him an extension of time to appeal against the substantive decision of AR Leong. He cannot be appealing against the other part of my decision in which I allowed the extension of time to appeal against AR Leong's costs order to remain.

16 The notice of appeal for CA 96/2014 states that it is against the whole of my decision (in Suit 385 of 2011) given on 19 May 2014. Again this is very wide. Presumably the Brother wants to proceed with his appeal against the substantive decision of AR Leong since that appeal had failed because I did not allow him an extension of time to appeal against that substantive decision. It is less clear whether CA 96/2014 is also an appeal against my decision that he is still liable for the costs of the inquiry and/or the quantum of \$400 I had fixed as the costs of the inquiry.

17 For completeness, I would mention that I ordered that each party was to bear his/her own

costs of RA 72/2014 and RA 54/2014.

18 I set out my reasons below for my decisions.

Issue

19 As is evident from the above background, the issue before me for RA 72/2014 was whether the Brother should have been granted an extension of time to appeal against the two decisions of AR Leong in the inquiry. As I had not allowed him an extension of time to appeal against AR Leong's substantive decision, that is the subject of CA 95/2014 and I will focus on that herein.

20 If CA 95/2014 is successful, it is up to the Court of Appeal to decide whether to remit RA 54/2014 back to me to hear the Brother's appeal against AR Leong's substantive decision. If CA 95/2014 is not successful, then AR Leong's substantive decision stands.

21 As for CA 96/2014, two other possible issues are mentioned in [16] above. I will deal with them also in these grounds of decision.

The court's reasons

22 The court should consider four main factors in an application for an extension of time to appeal. These are:

- (a) the length of the delay;
- (b) the reasons for the delay;
- (c) the merits of the appeal;
- (d) the degree of prejudice to the other side if the extension of time is granted.

23 In *Anwar Siraj and another v Ting Kang Chung John* [2010] 1 SLR 1026 ("*Anwar Siraj*"), the Court of Appeal (at [30]) mentioned that while these are the four relevant factors, two other considerations should not be disregarded. The first is that the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("ROC") must *prima facie* be obeyed with reasonable diligence being exercised. The second is that the need for finality was a paramount consideration. The precise facts and circumstances of each case are also important, see [28] of *Lee Hsien Loong v Singapore Democratic Party and others and another suit* [2008] 1 SLR(R) 757.

24 On the length of the delay, AR Leong's decisions were given on 24 September 2013. OS 1187/2013 was filed on 12 December 2013. This is more than two and a half months from 24 September 2013. However, under O 56 r 1(3) of the ROC, the Brother had 14 days to appeal against that decision. The 14 days would expire on 8 October 2013. Therefore, the actual delay was more than two months which is more than four times the period prescribed under the ROC.

25 As for the reasons for the delay, I should first set out in more detail the background and chronology leading to the Brother's application in OS 1187/2013.

26 According to the notes of arguments recorded by AR Leong at the hearing on 24 September 2013, Tan & Au had asked for costs to be agreed or taxed and the Brother had agreed that costs can be agreed or taxed. Thereafter, AR Leong ordered that, "By consent, costs in TA 13 of 2013 shall be agreed or taxed".

27 In such circumstances, the Brother said he did not understand AR Leong's costs order to mean that he was liable to pay the costs of the inquiry. It was not clear from the Brother's arguments as to whether he thought that AR Leong's costs order meant that the Sister was to pay the costs of the inquiry or the question as to who would be liable for costs would be dealt with later. He had emphasized merely that AR Leong's costs order did not state that he was to be liable for such costs.

28 On 1 October 2013, the Brother wrote to the Registrar setting out further arguments on the substantive inquiry after AR Leong's decision was given on 24 September 2013.

29 On 2 October 2013, the Registrar replied to the Brother to state that "the Court does not require any further arguments. The Court's decision made on 24 September 2013 stands".

30 The Brother had 14 days from 24 September 2013 to appeal against any aspect of or the entire decision of AR Leong. This expired on 8 October 2013. He did not file an appeal within the deadline.

31 On 24 October 2013, he sent a letter to the Registrar to state that he would be overseas and not available from 30 October 2013 to 20 November 2013 and would be incommunicado during that period.

32 On 4 November 2013, Tan & Au wrote to the Registrar to state that the inquiry had been completed with costs of the inquiry awarded to the Sister. They asked for costs of the trial (which I had reserved) to be awarded to the Sister as well. This letter was copied to the Brother.

33 On 5 November 2013, Tan & Au wrote to the Brother to demand payment of the \$1,313 and to propose \$25,000 as the amount of costs to be paid by the Brother to the Sister. There was an additional demand for costs of \$200 arising from another hearing but that is immaterial for present purposes and I will no longer refer to it.

34 Although the Brother was supposed to be incommunicado, he sent three letters each dated 19 November 2013. The first was sent to the Registrar. He referred to Tan & Au's letter dated 4 November 2013 and referred to AR Leong's costs order. He said that there was no basis for the Sister to request that costs of the trial to be similarly awarded to her. Although the Brother's letter did not state explicitly that AR Leong's costs order was silent as to who should pay the costs of the inquiry, it appears that that was the Brother's position. He stated that he was prepared to make a written submission on costs.

35 The Brother's second letter dated 19 November 2013 was also sent to the Registrar. It reiterated AR Leong's costs order. The rest of the letter is not material for present purposes.

36 The Brother's third letter dated 19 November 2013 was sent to Tan & Au. He asserted that AR Leong did not order that he pay the costs of the inquiry. He proposed that the Sister pay him \$75,000 for costs of the inquiry.

37 By a letter dated 25 November 2013, Tan & Au forwarded a copy of the extracted order of court of 24 September 2013 to the Brother.

38 As the extracted order stated that the Brother was to pay the costs of the inquiry to the Sister, the Brother wrote again to the Registrar on 25 November 2013 to dispute that he was liable to pay such costs. He said he did not have sight of the draft of the order before it was extracted.

39 A pre-trial conference ("PTC") was fixed before AR Leong for 4 December 2013. On that day, AR Leong clarified explicitly that the Brother was liable for the costs of the inquiry. I should mention that it appears inappropriate to refer to the hearing on 4 December 2014 as a PTC but as that was the description used, I will say no more about the description.

40 On 6 December 2013, the Brother wrote to the Registrar to say that he did not agree that AR Leong's clarification on 4 December 2013 was consistent with his costs order of 24 September 2013. This letter also stated that he had mentioned at the PTC on 4 December 2013 that he would be appealing.

41 The Brother filed OS 1187/2013 on 12 December 2013 for an extension of time to appeal against the decision of AR Leong given on 24 September 2013. The application for an extension of time was to appeal against the entire decision of AR Leong. In other words, it was not confined to the costs order made by AR Leong. It appeared to also cover the substantive order that AR Leong had made (in which he had ordered the Brother to pay the Sister \$1,313 as her one-twelfth share of the Estate).

42 OS 1187/2013 was heard by AR Khng. On 24 February 2014, AR Khng granted the Brother's application for an extension of time to appeal against the entire decision of AR Leong. Thereafter, he filed RA 54/2014 in Suit 385 of 2011 on 25 February 2014.

43 For the avoidance of confusion, I should mention that in OS 1187/2013, the Brother was the plaintiff whereas he was the defendant in the main action, *ie*, Suit 385 of 2011.

44 As mentioned above, the Sister filed an appeal on 5 March 2014 against AR Khng's decision. This was RA 72/2014. I allowed the appeal partially as elaborated above.

45 I was prepared to allow AR Khng's decision on an extension of time to appeal to stand in respect of AR Leong's costs order for the reasons which I will state briefly below.

46 On the one hand, it could be said that it ought to have been obvious that the costs order was in favour of the Sister and against the Brother since he had been ordered to pay the Sister a sum of money, however small the sum, in the substantive dispute. On the other hand, the terms of the costs order did not explicitly say that the Brother was to pay the costs. In the circumstances, I decided to give the Brother the benefit of the doubt. He might have genuinely misunderstood and the mistake was not attributable to his conduct or perception alone. Furthermore, the clarification was made on 4 December 2013 only.

47 Secondly, I was of the view that there was merit in an appeal against AR Leong's costs order. While AR Leong might have been correct that the Brother should, in principle, be liable for costs of the inquiry, it appeared that AR Leong had erred in ordering the Brother to bear the entire costs of the inquiry (which took about four days) bearing in mind the small sum of \$1,313 that he was liable to pay the Sister. It also appeared that an order for taxation (in the absence of agreement on the quantum) was inappropriate. Unnecessary costs (including disbursements) would be incurred in a taxation which costs might well exceed the \$1,313. Furthermore, there was no undue prejudice to the Sister if the Brother was granted an extension of time to appeal against the costs order. Hence, I decided that the Brother should be allowed an extension of time to appeal against the costs order.

48 On hearing the substantive arguments on the costs order, I decided that the Brother should still be liable for costs of the inquiry in principle. This was because he had been ordered to pay \$1,313 to the Sister. The Sister was the successful party but the small quantum of \$1,313 should be taken into account in determining the quantum of costs of the inquiry. I decided that I should fix the quantum to

avoid the costs of taxation. As regards the quantum of the costs, I took into account the sum of \$1,313 and ordered the Brother to pay \$400 as costs of the inquiry. To me, the \$400 was a fair quantum in view of the number of days taken for the inquiry and the principle of proportionality.

49 As for AR Leong's substantive decision that the Brother was to pay \$1,313 to the Sister, there was clearly no confusion. The Brother knew that he had been ordered to pay that sum. He did not say that he was unaware of the time limit to appeal if he so wished. When he filed his first supporting affidavit for OS 1187/2013, he did not explain why he delayed filing his appeal against the substantive decision. In paras 6 and 7 of his second supporting affidavit filed on 10 January 2014, he said that as at 24 September 2013, the costs of the inquiry and its impact on the Estate had yet to be determined. He said that "this has a significant bearing on the overall outcome, and hence, a comprehensive overall appeal upon the finalisation of the action is more appropriate rather than at the juncture before such costs are determined".

50 I did not accept this explanation. First, although the Brother is a lay person he is not totally unaware of court processes and procedures. He has been engaged in litigation with the Sister for some time. Apparently, there is also litigation in respect of their mother's estate as well. At times, the Brother has been represented by solicitors but on other occasions, he represented himself. When he appeared in person before me from time to time, he was able to present arguments with the apparent benefit of legal research or legal advice.

51 Secondly, and more importantly, he had not mentioned that he would appeal against the substantive decision of AR Leong until OS 1187/2013 was filed on 12 December 2013. True, he did tender further arguments by his letter dated 1 October 2013 to the Registrar but after he was informed by the Registrar's letter dated 2 October 2013 that no further arguments were required, he said no more about the substantive decision.

52 His correspondence thereafter till 6 December 2013 was only on the costs aspect.

53 Indeed, when Tan & Au demanded payment of the \$1,313 in their letter dated 5 November 2013 and suggested \$25,000 as costs of the inquiry to be paid by him, his response dated 19 November 2013 was in respect of the costs issue but not the \$1,313. He conveniently omitted mentioning the \$1,313 in his response. If he had intended at that time to appeal against the substantive decision and was refraining from filing a notice of appeal pending the resolution of the costs issue, he would have stated so in his reply. He did not even though he is quite a prolific letter writer.

54 The PTC on 4 December 2013 was only in respect of the costs issue. It is telling that in the Brother's letter to the Registrar dated 6 December 2013, *ie*, two days later, he was complaining only about the point that he was liable to pay the costs. Although his letter dated 6 December 2013 did say that he had informed AR Leong on 4 December 2013 that he would be appealing, it is not disputed that this was a reference to the costs issue only. The PTC that day was only in respect of that issue.

55 Therefore, I was of the view that the Brother was using the alleged confusion over the costs order to justify the late filing of an appeal on the substantive decision. In my view, the explanation in paras 6 and 7 of his second affidavit was not genuine.

56 Even if the Brother had genuinely thought that it was preferable to file one appeal to cover both the substantive decision and the costs, that would be his own incorrect perception. In many cases, the substantive decision is given first while the question of costs is addressed later. The notice of appeal on the substantive decision must be filed in time and not await the question of costs to be resolved.

57 Furthermore, even if the Brother's incorrect perception was the result of a genuine mistake or oversight, a mistake is not in itself necessarily a sufficient reason to grant an extension of time, see [35] of *Anwar Siraj* which cites a passage from *Denko-HLB Sdn Bhd v Fagerdala Singapore Pte Ltd* [2002] 2 SLR(R) 336.

58 As for the merits of the Brother's intended appeal, I accepted that his appeal was not clearly hopeless but it was also uncertain whether the appeal would succeed.

59 The Brother had stressed during arguments before me that the Estate was actually negative to the sum of \$21,584.63 because of its debts and expenses (totalling \$107,742.39). However, that is because he attributed a value of \$3,893.75 to the shares in Oversea-Chinese Banking Corporation Limited instead of \$25,975.47 as found by AR Leong. He also omitted the \$10,073.68 being the sale proceeds from shares in Kenwell Freight Express (S) Pte Ltd and Mecman Engineering Consultants Pte Ltd and the value of the estate's shares in United Plantations Bhd ("UP") and in Malaysian Resources Corp Bhd ("MRC"). Whether the shares in UP and MRC should be given a nil value because of the cost of claiming those shares was a matter for argument.

60 Furthermore, the Estate's assets were not confined to the assets in dispute. The Estate had fixed deposits with Asia Commercial Bank Ltd and a savings account with OUB Ltd (see items (f), (g) and (h) at [65] of the Main Judgment). These assets amounted to another \$82,264.01.

61 In so far as the Brother had also mentioned that there was income tax liability of \$7,727.77, that sum was already part of the debts and expenses of the Estate referred to above.

62 In so far as the Brother had also suggested that professional costs of around \$75,000 had been incurred by him for the inquiry and should be part of the expenses of the Estate, he was in error. AR Leong did not order that the Estate indemnify him for the costs he had incurred for the inquiry. Therefore, he had to personally bear the costs he incurred for the inquiry. The inquiry was necessary because I had previously concluded, after the trial, that he had failed to give proper accounts of the Estate. That is why he was subsequently ordered to pay some costs of the trial fixed at \$10,000. Since the inquiry was the result of his failure to give proper accounts, it is not surprising that AR Leong did not order the Estate to indemnify him for the alleged professional costs subsequently incurred by him.

63 Aside from the merits of the Brother's intended appeal, I also noted that the \$1,313 which the Brother was to pay under the substantive decision of AR Leong was a small sum and I was of the view that there should be finality on the substantive dispute.

64 Therefore, while I accepted that there was no undue prejudice to the Sister if an extension of time was granted to the Brother to appeal against the substantive decision, I was of the view that such an extension should not be granted in view of the length of the delay, the absence of good reasons for the delay, the small sum involved and the need for finality.

65 As mentioned above, I ordered each party to bear his/her own costs of both appeals. The Sister was only partially successful in her appeal. As for the remaining part of the Brother's appeal on the costs issue, the Brother failed because he was still liable to pay costs of the inquiry but he was, in a sense, successful on the quantum which I fixed at \$400.