

Kian Wah Hung (Private) Limited v William Interior Design
[2001] SGHC 332

Case Number : DCA 600007/2001, SIC 601839/2001
Decision Date : 05 November 2001
Tribunal/Court : High Court
Coram : Woo Bih Li JC
Counsel Name(s) : Patrick Chin (Chin Patrick, Dennis Loh) for the appellant/defendant; Gordon Oh (Ari, Goh & Partners) for the respondent/plaintiff
Parties : Kian Wah Hung (Private) Limited — William Interior Design

Judgment

GROUND OF DECISION

BACKGROUND

1. This action was commenced in the District Court by William Interior Design ('WID') against Kian Wah Hung (Private) Limited ('Kian Wah').
2. The trial was concluded on 13 February 2001.
3. Kian Wah filed a Notice of Appeal on 24 February 2001.
4. The Counsel acting for Kian Wah, Mr Patrick Chin, when he was in Patrick Chin, Syn & Co and then in Tan Loh & Wong, carried on his practice under the name of Chin Patrick, Dennis Loh & Co with effect from 1 July 2001.
5. By a notice dated 11 July 2001, Kian Wah's solicitors were notified by the Registrar of the Subordinate Courts ('the Registrar') that the Record of Proceedings had been compiled and were available for collection.
6. The notice was received by Kian Wah's solicitors on 13 July 2001.
7. Under O 55C r 6(1) of the Rules of Court, Kian Wah was required to file two copies of the Record of Appeal and two copies of the Appellant's Case within one month after service of the notice from the Registrar. Therefore this was to be done by 13 August 2001.
8. On 10 August 2001, Mr Chin filed an application for leave for Kian Wah to file the Record of Appeal and Appellant's Case out of time.
9. The application came on for hearing before me on 24 August 2001. It was adjourned for one week to allow Mr Chin to do further research on the law.
10. On 31 August 2001, Mr Chin was not present. Accordingly, I adjourned the application to a date to be fixed.
11. The application was then fixed for hearing on 12 September 2001. After hearing arguments, I dismissed the application with costs.
12. Kian Wah has appealed against my decision.

REASONS FOR APPLICATION

13. In his supporting affidavit, Mr Chin said:

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6. The last day for filing and lodging the same I believe is today [i.e 10 August 2001].

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12. I did just on the 1st July 2001 commence practise under the style and name of Chin Patrick, Dennis Loh & Co. There were various administrative upheavals which had been going on in my offices. I have as such been quite tied down with both legal and administrative matters.

13. As such in all of this I had mistakenly believed at all times that the date of the last letter from the Registry was dated 22nd July 2001 instead of the actual date of 11th July 2001.

14. This omission in (*sic*) due wholly to my mistake for which I most humbly and profusely apologise to this honourable Court.

15. I believe that there are grounds in law and fact, which may be raised in the appeal of this matter.

16. I also believe that the matters raised will have significant bearing in the area of the law of sale of goods.

17. I most respectfully wish to say that the Appellants/Defendants should not be penalized for my mistake for which I once again apologise unreservedly.

18. The Appellants/Defendants have properly lodged their Notice of Appeal and are intent in proceeding with their appeal. Security for costs of the appeal have also been lodged with the Accountant General.

19.

20. I shall endeavour to be more careful and less remiss in future.

21. I undertake to pay the costs of this application. I therefore humbly ask for an order in terms of the Appellants/Defendants application.'

The Law

14. In *Hau Khee Wee & anor v Chua Kian Tong & anor* [1986] SLR 484 the appellants had filed the Notice of Appeal in time but not the Record of Appeal.

15. Chan Sek Keong JC (as he then was) said that the factors to be taken into account in an application for 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.

16. I would emphasize that although these factors were stated in relation to the question of extending time to file a Notice of Appeal, the facts in that case were that the Notice of Appeal had been filed on time and it was the Record of Appeal that had not been filed on time.

17. Accordingly, these factors would also apply to a situation where the Notice of Appeal was filed on time but not the Record of Appeal, as was the case before me.

18. In *Pearson v Chen Chien Wen Edwin* [1999] 1 SLR 212, the Notice of Appeal was not filed on time due to a bona fide mistake made by the appellant's solicitors in the computation of time.

19. Chief Justice Yong Pung How, delivering the judgment of the Court of Appeal, adopted the factors stated in *Hau Khee Wee's* case as a framework in the exercise of the court's discretion to extend time.

20. Chief Justice Yong also said that when an application is made for an extension of time (to appeal out of time) the application should be on grounds sufficient to persuade the court to show sympathy and on the facts in that case, no such grounds had been shown.

21. In *Vettath v Vettath* [1992] 1 SLR 1, an application was made to file a Notice of Appeal out of time. It was not filed on time due to some confusion which arose as to which solicitor for the appellant, should file the Notice of Appeal. Chief Justice Yong reiterated what he had said in *Pearson's* case about sufficient grounds having to be shown to persuade the court to show sympathy to the applicant.

22. In *Bank of India v Rai Bahadur Singh & Anor* [1993] 2 SLR 592, the Record of Appeal had been filed on time but this had not been served on time due to an inadvertent oversight on the part of a clerk of the appellant's solicitors.

23. Judith Prakash JC (as she then was) noted that the grounds for an extension of time must be sufficient to persuade the court to show sympathy to the applicant, citing *Pearson's* case.

24. As for the four factors laid down in *Hau Khee Wee's* case, she said, at p 597F to 598A:

'The respondents submitted that in exercising my discretion I should take into account the factors laid down by Chan Sek Keong JC (as he then was) in *Hau Khee Wee & Anor v Chua Kiang Tong & Anor*. These factors are:

- (1) length of delay;
- (2) reasons for delay;
- (3) 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.

As is evident from the third factor expounded above, these factors are factors to be considered when an applicant wants leave to appeal after the time limited for appealing has expired. That is a different and more complex situation than the one I was faced with. In that situation the judgment would have become final in favour of the successful party and he would, in a sense, have had an accrued right which he would be deprived of if the application were allowed.

In the present case, the appellants had exercised their rights of appeal within time. No right had accrued to the respondents in the sense used above. Accordingly I did not consider it appropriate for me to look into the chances of the appeal succeeding. In my view, the relevant factors for my consideration were the length of the delay, the reasons for the delay and the prejudice, if any, which granting the application would cause the respondents.'

25. The facts in the *Bank of India* case were not identical to those before me. In that case, the Record of Appeal was filed on time but was not served on time. However, I would add that there should be no difference in the factors applicable between the late filing and the late service of the Record of Appeal.

26. In the case before me, the Record of Appeal (and the Appellant's Case) had not been filed on time. As I have said, the facts before me are similar to those in *Hau Khee Wee's* case. The decision in the *Bank of India* case appears inconsistent with that in *Hau Khee Wee's* case.

27. I was of the view that I should not adopt the approach in the *Bank of India* case.

28. Where a Notice of Appeal is filed and served on time but the Record of Appeal is not filed or served on time, the appeal will be deemed to be withdrawn under O 55D r 6(5) unless extension of time is granted.

29. Accordingly the judgment in favour of the respondent would likewise have become final as though the Notice of Appeal had not been filed or served on time. The respondent would have an accrued right which he would be deprived of if the application for extension of time were to be allowed.

30. Therefore, I see no valid reason to have different applicable factors for the late filing or service of the Notice of Appeal and the late filing or service of the Record of Appeal.

31. In *Nomura Regionalisation Venture Fund Ltd v Ethical Investments Ltd* [2000] 2 SLR 686, the Notice of Appeal was filed on time but due to a mistake by a staff, it was served on the previous solicitors for the appellant rather than on the solicitors for the respondent.

32. Lai Siu Chiu J decided that the factors, as enunciated in *Hau Khee Wee's* case, equally applied to an application to extend time to serve a notice of appeal filed within time. This was because an appeal only comes into being where the Notice of Appeal was both filed and served.

33. In the Court of Appeal [2000] 4 SLR 46, these same factors were upheld. In other words, there is no distinction between the filing and the service of a Notice of Appeal.

34. As for a mistake by a solicitor or his staff, Chao Hick Tin JA, delivering the judgment of the Court of Appeal said, at para 28:

'28 We agreed with Lai Siu Chiu J 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. Thus, if there is anything in the High Court decision in *Stansfield Business International Pte Ltd v Vithya Sri Sumathis* [1999] 3 SLR 239 which could be read to suggest, although it did not expressly so state, that an error on the part of a solicitor absolutely bars any relief, it is not correct. The decision in *Stansfield Business International* to refuse an extension of time could well be justified as it was a case of oversight simpliciter, with no other extenuating circumstances, although the merits of the case were strong.'

35. In the case before me, the respondent was aware that an appeal would be taken as the Notice of Appeal was filed and served on time. This, however, is only one of the circumstances to be considered and the decision of the Court of Appeal in the *Nomura* case does not mean that an extension of time will invariably be granted just because the respondent is aware that an appeal would be taken.

36. I will now come to the four factors.

The length of the delay

37. Although the application was filed before the expiry of the dead-line to file and serve the Record of Appeal and the Appellant's Case ('the Documents'), the application did not state how long Mr Chin would require to file and serve the Documents.

38. His supporting affidavit also did not disclose this.

39. In his submission, Mr Chin used the date of the hearing before me, i.e 12 September 2001 as the guide and said the length of delay was about one month. That was not correct because there was no indication that the Documents had been prepared by then. He would still need more time to prepare them but he gave no indication to me as to how much more time he needed.

40. Accordingly, the length of the delay would be more than one month.

The reasons for the delay

41. As is evident from Mr Chin's affidavit, he had mis-read the date on the Registrar's Notice and hence mis-construed the dead-line by which he was required to file and serve the Documents.

42. It was not clear to me how much the upheavals in the continuation of his practice under a new firm from 1 July 2001 had contributed to the mis-reading of the date on the Registrar's notice.

The chances of the appeal succeeding

43. Mr Chin's affidavit was sorely lacking on this point.

44. The affidavit did not disclose:

- (a) the cause of action or defence
- (b) the subject matter of the dispute
- (c) the amount or value of the subject matter in dispute
- (d) the grounds of law and fact which he said 'may be raised in the appeal'
- (e) the 'significant bearing in the area of the law of sale of goods' that he had alluded to.

45. I would add that even if the chances of the appeal succeeding should not be considered, an affidavit seeking an extension of time should disclose, at the very least, the matters I have stated in para (a) to (c) above for the court's information.

The degree of prejudice if the application is granted

46. No such prejudice was alleged by Counsel for the respondent.

Order 55D rules 5(3) and (4)

47. I should also mention a point taken by Mr Chin during submissions before me, although he did not press it very much.

48. The one month time frame to file and serve the Documents under O 55D r 6(1) runs from the date of service of the Registrar's notice referred to in r 5(3).

49. Under r 5(3), that Notice is to state that a copy of the Record of Proceedings is available, whereupon the prescribed fee (stated therein) is to be paid.

50. Under r 5(4), the Record of Proceedings shall consist of a certified copy of various documents. These are:

- (a) the judgment or grounds of judgment or order (if any), and
- (b) the notes of evidence, including the affidavits of evidence in chief ('AEICs') taken at the hearing of the case or matter.

51. Mr Chin said that the Record of Proceedings did not contain a certified copy of the AEICs and this was an irregularity. As the proper procedure under r 5(3) (read with r 5(4)) had not been complied with, the appellant should be granted the extension of time sought.

52. In my view, although r 5(4) states that the Record of Proceedings shall consist of a certified copy of the AEICs, the omission to include the same did not nullify the Registrar's Notice relating thereto, see O 2 r 1(1). Indeed, Mr Chin did not argue on the basis of nullity but irregularity.

53. The question was whether an extension of time should be granted in view of the irregularity.

54. It was not in dispute that the practice of the Registrar when giving such a Notice is not to include a certified copy of the AEICs. This is because the parties already have a copy of the AEICs. Secondly, to include a certified copy of the AEICs, which can be voluminous, may increase the fee to be paid by an appellant.

55. Furthermore, Mr Chin did not suggest that the omission had in any way prejudiced him in the preparation of the Documents. He also accepted that he did not ask for a certified copy of the AEICs from the Registrar.

56. Accordingly, the omission did not assist the applicant in seeking an extension of time.

Conclusion

57. In the circumstances, notwithstanding that the application for an extension of time was made before 13 August 2001 and notwithstanding the candour of Mr Chin in attributing the blame solely to himself, I was not persuaded to show sympathy to the applicant.

58. While it is true that the applicant will be denied the avenue of an appeal, such an argument can never be sufficient per se to persuade a court to grant sympathy, otherwise all applications for an extension of time in relation to an appeal will succeed. Besides, the applicant is not denied all avenues of recourse.

Sgd:

WOO BIH LI
JUDICIAL COMMISSIONER

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