Perdigao Agroindustrial SA v Barilla GER Fratelli-Societa Per Azioni [2009] SGHC 210

Case Number : OS 1497/2008, RA 62/2009, 63/2009

Decision Date : 18 September 2009

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Colin Phan (Gateway Law Corporation) for the plaintiff; Paul Teo (Drew & Napier LLC) for the defendant

Parties : Perdigao Agroindustrial SA — Barilla GER Fratelli-Societa Per Azioni

Civil Procedure – Extension of time

18 September 2009

Andrew Ang J:

Introduction

1 There were two appeals before me. Registrar's Appeal No 63 of 2009 was the plaintiff's appeal against the assistant registrar's ("AR") decision on 10 February 2009 dismissing the plaintiff's application for an extension of time to serve Originating Summons No 1497 of 2008 ("notice of appeal"). The said Originating Summons was itself an appeal from a decision of the Principal Assistant Registrar of Trade Mark ("PAR"). Registrar's Appeal No 62 of 2009, also by the plaintiff, was against the AR's decision on the same day allowing the defendant's application to strike out the notice of appeal.

Facts

2 The plaintiff/appellant ("Perdigao") had applied for registration of the mark "BORELLA" in Classes 29 and 30 ("the plaintiff's marks") on 16 September 2003. The defendant/respondent ("Barilla") opposed the plaintiff's marks on 23 June 2004 (in respect of Class 29) and on 4 August 2004 (in respect of Class 30) after they had been accepted for publication.

3 The oppositions were heard together at the Intellectual Property Office of Singapore on 22 July 2008. On 22 October 2008, the PAR issued her grounds of decision. She dismissed the defendant's opposition in respect of the Class 29 mark but allowed the defendant's opposition in respect of the Class 30 mark.

4 On 24 November 2008, the plaintiff applied by way of Originating Summons No 1497 of 2008 to the High Court appealing against the decision of the PAR with respect to the plaintiff's Class 30 mark. The notice of appeal was served on the defendant's solicitors on 23 December 2008.

5 The PAR's letter enclosing her grounds of decision was dated 22 October 2008 but received by the plaintiff on 28 October 2008.

6 The plaintiff filed its notice of appeal on 24 November 2008 and, on the same day, telephoned the defendant's solicitors informing them that the plaintiff had filed an appeal and that the plaintiff would be serving the same on the defendant shortly thereafter.

7 Under O 87 r 4(3) of the Rules of Court (Cap 322, R5, 2006 Rev Ed):

> Every notice of appeal must be filed with the Court within 28 days after the decision of the Registrar.

Reading this literally, the defendant contended that the 28-day period started from 22 October 2008. The plaintiff, on the other hand, relied on, *inter alia*, *Pestbusters Pte Ltd v Registrar of Companies* [1996] 2 SLR 780 where the learned judge, Kan Ting Chiu J, held that the time ran from the date the decision was given to the appealing party. The AR ruled in favour of the plaintiff and there has been no appeal by the defendant thereon. Strangely, it is noted the defendant still maintained in its written submissions (para 6) that the time for appealing the PAR's decision started running from 22 October 2008.

8 By the AR's reckoning therefore, the notice of appeal was filed within time. However, the notice of appeal was not served on the defendant until 23 December 2008, 22 days later.

9 Only after receiving a letter from the defendant's solicitors objecting to the service out of time did the plaintiff file its application for an extension of time on 19 January 2009.

10 The affidavit in support of the plaintiff's application was affirmed on 16 January 2009 by the plaintiff's solicitor, Mr Colin Phan ("Mr Phan"). In paras 7 and 8 thereof, he deposed as follows:

> However, due to a clerical oversight, and due to the fact that the conducting solicitor was called away on urgent business by another client, requiring him to travel to Tokyo, service of the Originating Summons was overlooked. Simultaneously, the Plaintiffs' solicitors were relocating from their previous premises at 152 Beach Road #37-05/06 Gateway East Singapore 189721, to the present premises, in December 2008.
>
> Upon discovering the oversight, and upon my return to Singapore on 22 December 2008, we immediately effected service of the Originating Summons on the Defendants' solicitors on 23 December 2008.

11 At the initial hearing before the AR, Mr David Lee, on 2 February 2009, the AR had agreed that the affidavit in support of the plaintiff's application for an extension of time was fairly bare. However, the AR was prepared to accept at the hearing itself the oral testimony of the plaintiff's solicitor who had supplemented his reasons for the delay in serving the notice of appeal by relying on the relocation of the plaintiff's solicitor's offices. Consequently, the AR granted the plaintiff's solicitor an opportunity to file a supplementary affidavit detailing the move. The AR therefore allowed the plaintiff's application on the basis of the move but awarded the defendant indemnity costs against the plaintiff.

12 The AR nevertheless directed that the order was not to be extracted until after the supplementary affidavit had been filed by the plaintiff's solicitor without the defendant having any objection to the same.

13 The supplementary affidavit filed by the plaintiff's solicitor on 3 February 2009 ("the plaintiff's 3rd affidavit") deposed as to particulars of the move, in particular, that preparations took place between November and December 2008 but did not explain how the office relocation was related to the oversight or the delay of 22 days for the late service of the notice of appeal. Consequently, the defendant objected to this affidavit and its solicitors wrote to the court on 4 February 2009 requesting for further arguments.

14 In their letter of 4 February 2009, the defendant's solicitors cited *Tan Chai Heng v Yeo Seng*

Choon [1980-1981] SLR 381 pointing out that in that case, even though the solicitors in question had clearly explained the reason for the delay, namely, that the file was misplaced due to renovations, the reason was still not accepted by Choor Singh J to be sufficient to merit the exercise of discretion in favour of the applicant. (As will be seen later, the defendant's reliance on that decision was misplaced.)

15 The AR heard further arguments on 10 February 2009. At that hearing, the AR asked (AR minutes at p 4):

> Are you submitting – as per the tenor of your letter – that if it is oversight, then it ought not to be excused by the Court?

The defence counsel replied:

> Yes, the cases are clear. There is still nothing in the evidence for Your Honour to exercise sympathy or your discretion towards the Plaintiff. I have nothing further.

16 Prior to that exchange, the AR had (at the hearing of further arguments) asked the plaintiff's solicitor to respond to the defence counsel's objections that the supplementary affidavit did not explain why or how the move caused the delay. The plaintiff's solicitor when asked by the AR whether the move worsened the oversight of the matter, agreed that it did.

17 Further on, the AR told the plaintiff's solicitor (at p 2):

> … I will give you a chance to explain now – tell me clearly how the move caused the delay.

It would appear that the learned AR was, even then, prepared to consider the plaintiff's solicitor's explanation how the relocation caused the delay. It would perhaps be best if I set out the AR's minutes as to what followed thereafter (at pp 2 and 3):

> PC: We were previously located in Gateway East – we were searching for main premises as the lease was coming up. We were at that point in time sharing premises with Mssrs Ella Cheong which was a patents firm. Once move was decided, as Your Honour will understand, there are a lot of files to be transported from the old office to the new office. Added to the fact that we are a small firm, we have about 4–5 lawyers and approximately equal number of staff.
>
> *During the process of the move, the packing procedure began. In November 2008. That was during the period of time where the oversight occurred. These boxes are sealed and placed together for moving* – at the same time we are attending to arrange for transfer of telephone.
>
> Court: Surely, you're not saying that all these office administration fell onto your shoulders?
>
> PC: Computers and EFS fell onto my shoulders.
>
> Court: Why was all this not in the affidavit?

PC: I was following Your Honour's directions/instructions. I may have misinterpreted it.

Court: That worsened the oversight?

PC: Combination of factors. I had these responsibilities to take care of. The moving of the boxes, packing and taking care that everything was moved over properly. Concurrently, during that period, I had addressed this – I was and am still involved in a trademark counterfeiting infringement which required me to liaise with police.

In the confusion of packing and all these numerous responsibilities, these contributed to the delay in service.

[emphasis added]

18 The AR then reluctantly recalled his earlier orders made on 2 February 2009 giving these brief grounds (at pp 5 to 7):

> At the last hearing, I had given benefit of the doubt to the Plaintiff in the hope that the Plaintiff would provide the Court with sufficient evidence to demonstrate how and why the move had caused the delay. Even leaving aside Plaintiff Counsel's misinterpretation of my directions, I entertained his further oral submissions before me as to the cause. Today, I hear for the first time that he was involved personally in the operations of the move to the extent that the technology of the firm fell on his shoulders. Be that as it may, and again after hearing further submissions from the Plaintiff as well, all the Court has before it is that the delay was caused by the oversight of the clerk which was – at best – worsened by the move of the firm.
>
> I agree with Mr Teo that both the supplementary affidavit and the oral submissions by Mr Phan before me today are – unfortunately – not sufficient for me to find that the delay was caused by the move. At best – and as Mr Phan had candidly and correctly pointed out – the move was a contributing factor to the delay.
>
> *The case law is clear. Where the delay is caused by oversight of clerk and/or solicitor, the courts are unfortunately not very forgiving in that regard – see AD v AE (CA decision by Chao JA and Tan J) and Stansfield Business International Pte Ltd (High Court decision by Chao JA) cited by the Defendant at the last hearing before me. Both decisions in terms of their guidance on the issue of delay vis-à-vis oversight by clerk and solicitors are binding on me*.
>
> *I had, at the earlier hearing, sought to give benefit of the doubt to the Plaintiff by assuming that the delay was caused – not by the oversight – but by the move*. Unfortunately and it is with much regret that even after affording one more opportunity for the Plaintiff to explain via a supplementary affidavit (and if I may add, further oral submissions before me today), counsel has not managed to do so. Quite simply, the Plaintiff has not crossed the threshold of persuading me that the move was the cause of the delay – at best it was a contributing factor.
>
> As such, it is with a heavy heart that I recall my orders made on 2 February 2009 after hearing further submissions and after reading the supplementary affidavit.
>
> [emphasis added]

19 I pause here to observe that from the AR's minutes, it would appear that he did not consider that the authorities left it open to him to allow an extension when the delay was caused by the oversight of the clerk or the solicitor. I noted that his minutes suggested that even at the first hearing, he had not given serious thought to the clerk's or solicitor's oversight as being a ground for the application. Hence, his requirement that the plaintiff file a further affidavit to show that the relocation was the cause of the delay.

20 It is also clear that the supplementary affidavit did affirm that "the preparation for the relocation of our premises mainly took place between November 2008 and December 2008". At the further hearing before the AR, the plaintiff's solicitor had also explained that it was during the process of the move, when the packing procedure began, that the oversight occurred (see [17] above). Whilst the plaintiff's solicitor failed to make the connection explicit, a fair inference, in my view, is that the preparation for the move (in the packing of the files into boxes) contributed to the oversight.

The plaintiff's arguments

21 At the hearing before me, the plaintiff's solicitor dealt with the four factors which a judge takes into account in the exercise of his discretion whether or not to grant an extension of time. He argued that although, admittedly, there had been a delay in service of the notice of appeal caused by a clerical oversight, taking into account:

(a) the fact that the defendant's solicitors had been informed of the appeal on the same day that the notice of appeal was filed;

(b) the reasons for the delay;

(c) the fact that the plaintiff had a real and substantial chance of success on the merits if the application for extension of time was granted; and

(d) that there would be no prejudice to the defendant if the extension was granted,

the delay was not so substantial as to be fatal to the plaintiff's appeal before me.

22 The plaintiff further argued that despite the defendant having had notice since 24 November 2008 that the plaintiff had filed the notice of appeal, and having belatedly been served on 23 December 2008, the defendant had nevertheless not raised objection when on 24 December 2008 the plaintiff's solicitor wrote to the Registry of the Supreme Court requesting for an adjournment of the original hearing date of 7 January 2009 to a special date. Neither did it object when, on 8 January 2009, the Registry reverted to both sets of solicitors informing them of the special date fixed for 24 February 2009. The plaintiff therefore contended that, by not raising any objection (and therefore inferentially consenting) to the adjournment, the defendant had formed an intention to defend the case on its merits at the appeal. The plaintiff's solicitor argued that by reason of O 2 r 2(1) of the Rules of Court, the defendant was to be taken as having waived the irregularity in the late service. (On this particular point, there was no authority cited to me to show that the defendant's inaction prior to 16 January 2009 (when it applied to set aside the notice of appeal) amounted to a "step" in the proceedings. For my part, I would be inclined to the view that it did not.)

The law relating to granting of extension of time

23 It is trite law that granting of an extension of time is a matter of discretion and the application for such extension should be on grounds sufficient to persuade the court to show sympathy to the applicant: *Pearson v Chen Chien Wen Edwin* [1991] SLR 212 ("*Pearson*") at [17] and [20]. In *Hau Khee Wee v Chua Kian Tong* [1986] SLR 484 ("*Hau Khee Wee*"), Chan Sek Keong JC enunciated the factors for the court's consideration in deciding whether to exercise its discretion. Chan JC held that (at 488):

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 …

24 This has since been approved and adopted by the Court of Appeal as the definitive framework for the exercise of discretion to grant extension of time: see *Pearson* at [17] ([23] *supra*); more recently in *Lai Swee Lin Linda v Attorney-General* [2006] 2 SLR 565 at [45] and *Lee Hsien Loong v Singapore Democratic Party* [2008] 1 SLR 757 ("*Lee Hsien Loong*") at [18]. Given the breadth of authorities available on the issue, I would distill the salient points derived from them.

25 First, although the emphasis, in the first instance is invariably on the first two factors, *viz*, the length of delay and the reason for the delay, all four factors are of equal importance and must be taken into account. They are to be balanced amongst one another, having regard to all the facts and circumstances of the case concerned: see *Lee Hsien Loong* at [19] and [28].

26 Second, the court looks to substance as opposed to merely form. There is no real difference in substance between an application to extend time for service of a notice of appeal filed within time and an application for leave to file a notice of appeal out of time. This is because an appeal would only come into being where the notice is both filed and served: see *Lee Hsien Loong* at [29]; and *AD v AE* [2004] 2 SLR 505 ("*AD v AE*") at [9]. Therefore, the court will take the same approach towards both applications.

27 Third, the courts adopt a more stringent approach towards applications for extension of time for the filing or serving of a notice of appeal than towards other applications for extension of time: see *The Tokai Maru* [1998] 3 SLR 105 at [20]. This is because of the need for finality. In such applications, the applicant had already been heard and the decision concerned had gone against him. Thus, the onus is therefore on the applicant to file an appeal if he feels that the decision is wrong. If no appeal is filed and served within the prescribed time, the successful party is justly entitled to assume and act as if the judgment is final. Underlying this concern with finality is the fundamental rationale of justice and fairness: see *Lee Hsien Loong* at [33] ([24] *supra*).

28 Fourth, on a more general note, the courts are sedulous to balance adherence to procedural requirements with substantive justice. On the one hand, although the courts are concerned with achieving substantively just outcomes, there must be fairness in the procedure. Procedural rules are intended to facilitate legal proceedings and procedural justice dictates that all parties involved in the proceedings abide by the same rules. On the other hand, the courts ought to be wary of a blind adherence to procedure without regard to the substantive outcomes. Where there is tension between the demands of procedural and substantive justice, the courts are required to balance the needs of both. In *United Overseas Bank Ltd v Ng Huat Foundations Pte Ltd* [2005] 2 SLR 425, Andrew Phang Boon Leong JC held (at [8]) (cited in *Lee Hsien Loong* at [36]):

> The quest for justice, therefore, entails a continuous need to balance the procedural with the substantive. More than that, it is a continuous attempt to ensure that both are *integrated*, as far as that is humanly possible. Both *interact* with each other. One cannot survive without the other. There must, therefore, be – as far as is possible – a fair and just procedure that leads to a fair and just result. This is not merely abstract theorising. It is the *very basis* of what the courts do – and ought to do. When in doubt, the courts would do well to keep these bedrock principles in mind. This is especially significant because, in many ways, this is how, I believe, laypersons perceive the administration of justice to be. The legitimacy of the law in their eyes must never be compromised. On the contrary, it should, as far as is possible, be enhanced. [emphasis in original]

29 The necessary implication of this balancing exercise is that each case must be assessed in its proper factual matrix. In the same vein, in *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR 537 ("*Lee Chee Wei*"), V K Rajah JA held (at [82]):

> … The rules of court practice and procedure exist to provide a convenient framework to facilitate dispute resolution and to serve the ultimate and overriding objective of justice. Such an objective must never be eclipsed by blind or pretended fealty to rules of procedure. On the other hand, a pragmatic approach governed by justice as its overarching aim should not be viewed as a charter to ignore procedural requirements. In the ultimate analysis, each case involving procedural lapses or mishaps must be assessed in its proper factual matrix and calibrated by reference to the paramount rationale of dispensing even handed justice.

Although Rajah JA's observations were made in the context of pleadings (in that case, the court exercised its discretion to order an assessment of damages despite the failure by the plaintiff to plead damages), the general principles of civil procedure enunciated are equally applicable to the present situation.

30 Those sagacious injunctions resonate with the timeless observations of Bowen LJ in *Cropper v Smith* (1884) 26 Ch D 700 at 710 (albeit, again in the context of amendment of pleadings):

> Now, I think it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace. …

31 We may now apply the framework for the exercise of discretion to the present case.

Length of the delay

Law

32 The length of delay is almost invariably considered together with the reason(s) for the delay. Exceptionally short delay may be excused without lengthy inquiry into the reason therefore: *Lee Hsien Loong* ([24] *supra*) at [21]. The longer the delay, the better ought the reason therefor to be. In *Denko-HLB Sdn Bhd v Fagerdala Singapore Pte Ltd* [2002] 3 SLR 357 ("*Denko*"), where there was an application to allow late filing of a request for further arguments, the Court of Appeal held that, considering that the period allowed to apply for further arguments was only seven days, a delay of 14 days was "quite substantial" (see *Denko* at [18]). The court noted (at [13]) that:

> … there was only a one line cryptic explanation for the delay: 'oversight on (solicitors) and there was no fault on the part of (Denko)'.

The court then went on to say (at [18]):

> … 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.

33 In *AD v AE* ([26] *supra*), the Court of Appeal found that the filing of the notice of appeal 49 days out of time was a substantial delay. There again the Court did not stop there. It noted that the bare reason offered for the delay, *viz*, that it was due to "inadvertence", could hardly suffice and agreed with the judge below that it was a "poor excuse". Accordingly, although the low thresholds for the third and fourth factors had been crossed, an extension of time was not granted.

34 It is therefore difficult to state conclusively when a delay would be deemed too lengthy to warrant an extension. Ultimately, "each case involving procedural lapses or mishaps must be assessed in its proper factual matrix" (see *Lee Chee Wei* ([28] *supra*) at [82]).

Facts

35 Here, the PAR's judgment was received on 28 October 2008. The notice of appeal was filed on 24 November 2008, which was within the time allowed for the filing of notice. However, the notice of appeal was served on 23 December 2008, which was 22 days out of time. Although the length of the delay was relatively long (considering the period allowed for service under O 87 r 4(5) is seven days), this was in itself inconclusive. I therefore proceeded to assess the other factors for consideration.

Reasons for the delay

36 In the court below, the AR felt bound by precedents, in particular *AD v AE* ([26] *supra*) and *Stansfield Business International Pte Ltd (trading as Stansfield School of Business) v Vithya Sri Sumathis* [1999] 3 SLR 239 ("*Stansfield*"), to hold that where the delay was caused by oversight of the solicitor (or his clerk), courts were generally unforgiving. I found that the AR had given undue weight to *Stansfield* and erred in his interpretation of *AD v AE*.

The Law

37 In *Stansfield*, Chao Hick Tin J in the High Court held that where the failure to serve the notice in time was due to the fault of the solicitor or his clerk, this would not be sufficient to warrant the exercise of the court's discretion even if there were merits in the appeal: see *Stansfield* at [33]. With respect, the authorities in support cited to the learned judge and on which he relied were mainly based on civil procedure rules different from the applicable rules in Singapore. I shall deal with each of them:

(a) In *Re Coles and Ravenshear* [1907] 1 KB 1 ("*Coles and Ravenshear*"), the solicitor failed to serve a notice of appeal in time due to a misunderstanding of the relevant rule. The court, in refusing to grant leave to appeal, held that a solicitor's mistake does not constitute special circumstances warranting an extension of time. However, this decision was revisited in *Gatti v Shoosmith* [1939] Ch 841 ("*Gatti*") where the English Court of Appeal departed from it. Sir Wilfrid Greene MR highlighted that at the time that *Coles and Ravenshear* was decided, the English rules

of procedure provided that the power of the court to extend time for appealing required some special matter because under the rules, the appeal could not be brought except by special leave of the Court of Appeal. Sir Greene MR therefore held that following the changes to the rules of procedure, the decision in *Coles and Ravenshear* was no longer good law and that a mistake on the part of a legal adviser might be sufficient to warrant the court exercising its discretion favourably. The decision in *Gatti* was not cited to the learned judge in *Stansfield*, even though, as with post-1909 English law, the civil procedure rules in Singapore do not require "special" leave to appeal.

(b) In *Chin Hua Sawmill Co Sdn Bhd v Tuan Yusoff bin Tuan Mohamed* [1974] 1 MLJ 58, the Federal Court held that a solicitor's mistake resulting in a failure to serve notice was not a ground for granting special leave. As with *Coles and Ravenshear*, the court was dealing with a rule where "special" leave was required to appeal.

(c) In *Cheah Teong Tat v Ho Gee Seng* [1974] 1 MLJ 31, the High Court held that merits alone was not sufficient by itself without special circumstances to warrant the grant of an extension of time to file appeal. However, in the case itself, the High Court, upon consideration of both *Coles and Ravenshear* and *Gatti*, applied *Coles and Ravenshear* on the grounds that the Malaysian civil procedure rules were the same as pre-1909 English law.

(d) In *Tan Chai Heng v Yeo Seng Choon* ([14] supra), Choor Singh J refused to grant an extension of time to file a notice of appeal despite the solicitor's explanation that the cause papers were misplaced when the office was undergoing renovations. Choor Singh J relied (at 382) on a "long line of cases which show further that a mistake or oversight on the part of the applicant's solicitor or on the part of the solicitor's clerk is not a sufficient ground for granting an extension of time to file a notice of appeal or a memorandum or petition of appeal". As noted above, that "long line of cases" was premised on "special leave' being required under the rules of procedure.

(e) Finally, in *Vettath v Vettath* [1992] 1 SLR 1, owing to a confusion over which of two solicitors representing the applicant should file the notice of appeal, the period for filing the notice of appeal expired without it being filed. On the facts, the Court of Appeal held that the applicant had not shown grounds sufficient to persuade the court to show sympathy to him. However, the Court did not go further to say that a solicitor's mistake would not suffice as a ground for sympathy.

38 It is significant that in *Nomura Regionalisation Venture Fund Ltd v Ethical Investments Ltd* [2000] 4 SLR 46 ("*Nomura Regionalisation*"), Chao Hick Tin JA, upon having the opportunity to consider *Gatti* ([36(a)] *supra*), re-visited his earlier decision in *Stansfield* ([36] *supra*) and held at [28]:

> ... 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. …

3 9 *Hau Khee Wee* ([23] *supra*) was precisely a case where a solicitor's error did not preclude the extension of time, Chan Sek Keong J held (at [16]) that:

> ... in spite of the fumblings of his solicitor, I do not think that the infant appellant should be denied the opportunity to have his appeal heard. …

In that case, the failure to file the record of appeal in time was a result of the desire of the appellant's solicitor to make available all the evidence before the court and his mistake in not realising that the appeal record could have been filed without certain photographs he was seeking to obtain.

40 In *AD v AE* ([26] supra), the other authority the learned AR felt constrained by, the Court of Appeal was influenced by other factors in deciding not to exercise its discretion. Significantly, despite the substantial delay, there was no reason apparent to explain the "oversight" except that it was "inadvertent": see above at [33]. Unsurprisingly, the court held that the said reason was a "poor excuse". The case was therefore not decided on the basis that a solicitor's oversight would never be a good enough reason for the court to exercise its discretion.

41 There is therefore no special rule which suggests that the courts should be less forgiving towards delays caused by the oversight of the solicitor (or for that matter, his clerk) or that a solicitor's mistake would not suffice to warrant the court exercising its discretion.

42 Returning to *Nomura Regionalisation* ([38] *supra*), it is noted in passing that Chao JA went on to observe that two aspects which seemed to have considerable bearing in the court's consideration in *Gatti* ([37(a)] *supra*) and *Palata Investments Ltd v Burt & Sinfield Ltd* [1985] 2 All ER 517 (where the delay of three days in entering an appeal was due to the counsel overlooking the fact that the prescribed time period had been reduced from six weeks to four weeks) to grant extension were:

> (a) the fact that notice within the prescribed time was given to the other side that an appeal would be taken (such indeed was the case here); and
>
> (b) the mistake was understandable and not gross.

Chao JA stated that there could be other circumstances under which a solicitor's mistake would be sufficient to persuade the court to show sympathy to the application: see *Nomura Regionalisation* at [28].

Facts

43 In the present case, although the plaintiff, in both his affidavit and supplementary affidavit, failed to satisfy the learned AR that there were sufficient reasons to warrant the court exercising its discretion favourably (the learned AR being of the view that "where the delay is caused by the oversight of [the] clerk and/or solicitor, the courts are unfortunately not very forgiving"), at the hearing before the AR, the plaintiff was given another opportunity to state his reasons. The plaintiff submitted that the delay was caused by a clerical oversight contributed to by the relocation of the plaintiff's solicitor's firm. This was unlike the cases of *AD v AE* ([26] *supra*), *Denko* ([31] *supra*) or *Stansfield* ([36] *supra*) where the plaintiff's solicitors relied on pure oversight to explain the delay (see above at [32], [33] and [38]).

44 The defendant relied entirely on the first two factors, that is, the length of delay and the reason for delay. It is noteworthy that the defendant itself conceded that the appeal was not hopeless and that no prejudice was suffered by it. Instead, the defendant submitted that the first two factors were the determining factors in this case. However, as I noted, the Court of Appeal in *Lee Hsien Loong* ([24] *supra*) held that all four factors are of equal importance and must be taken into

account. I therefore proceeded to consider the other two factors to decide if the application should be granted.

Chances of the appeal succeeding if time for appealing is extended

The Law

45 When deciding whether to exercise its discretion to extend time to file a notice of appeal, it is not for the court to go into a full-scale examination of the merits of the issues involved. The test is whether the appeal was hopeless (see *Nomura Regionalisation* ([38] *supra*) at [32]). Unless one can say that there are no prospects of the applicant succeeding on the appeal, this is a factor which ought to be considered to be neutral rather than against him: see *Aberdeen Asset Management Asia Ltd v Fraser & Neave Ltd* [2001] 4 SLR 441 ("*Aberdeen*") at [43] and *Lee Hsien Loong* ([24] *supra*) at [19].

Facts

46 Here, the defendant acknowledged that the appeal was not hopeless. Since little more is known about the strength of the plaintiff's case, all we can conclude is that the third factor does not operate against the plaintiff. However, I venture to suggest in passing that, in a case where without the court having to go into a thorough examination the prospects of the applicant succeeding in the appeal are patent, the third factor could assume greater importance. In an appropriate case, absent any prejudice to the would-be respondent, the ties of justice might militate against a denial of the application even if the length of delay might be substantial or the reason for the delay might not be entirely cogent. This harks back to the need to balance the competing demands of procedural and substantive justice summed up in the insightful remarks of Andrew Phang Boon Leong JC in *United Overseas Bank Ltd v Ng Huat Foundations Pte Ltd* ([28] *supra*) and V K Rajah JA in *Lee Chee Wei* ([29] *supra*). I hasten to add that this is not to say that the third factor will inevitably trump the first and second factors. Each case must be decided on its own facts, balancing all four factors. It is in this light that the remarks of the learned Chao Hick Tin JA in *Nomura Regionalisation* ([38] *supra*) at [28] ought to be understood where he characterised *Stansfield* as "a case of oversight simpliciter, with no other extenuating circumstances, although the merits of the case were strong".

Degree of prejudice to the would-be respondent if the application is granted

The Law

47 Prejudice here refers to the prejudice that has been or would be suffered by the would-be respondent that militates against an extension of time being granted. The Court of Appeal in *Aberdeen* ([45] *supra*) explained it thus (at [44]):

> … The 'prejudice' cannot possibly refer to the fact that the appeal would thereby be continued, if the extension is granted. Otherwise, it would mean that in every case where the court considers the question of an extension of time to file notice of appeal, there is prejudice. We endorse the views expressed in this regard by Woo Bih Li JC in *S3 Building Services v Sky Technology* (judgment of 8 May 2001 in Suit 1001/2000). The 'prejudice' here must refer to some other factors, eg change of position on the part of the respondent pursuant to judgment.

In the Court of Appeal in *Wee Soon Kim Anthony v UBS AG* [2005] SGCA 3 at [53]–[54], Woo Bih Li J put it this way in a passage cited with approval by the same Court in *Lee Hsien Loong* ([24] *supra*)

(at 24):

> 53 We would say at the outset that the prejudice referred to in the four factors is the prejudice to the would-be respondent if an extension of time were granted and not the prejudice to the would-be appellant if the extension were not granted. This is clear from *Hau Khee Wee* and *Pearson*. After all, the application for an extension of time arises out of the would-be appellant's default and not the default of the would-be respondent.
>
> 54 Furthermore, the prejudice cannot possibly refer to the fact that the would-be appellant would be deprived of his right of appeal if the extension were not granted. Otherwise, it would mean that in every case where an extension of time is sought by a would-be appellant, there would inevitably be prejudice to him.

48 In further elaboration of what "prejudice" means, the Court of Appeal in *AD v AE* ([26] *supra*) held that there must be some form of irreversible or permanent change of position. It held (at [14]):

> We recognised that because no notice of appeal was served by 18 June 2003, the husband, as well as the son, were entitled to conduct their lives as though the wife had accepted the order on the custody of the son. By extending time and allowing the proposed appeal to proceed, the husband would run the risk of the first order being overturned and their lives being upset. In the meantime, there could also be emotional turmoil. But we do not think this could be the meaning of prejudice. Some form of irreversible or permanent change of position must have taken place to constitute prejudice.

Facts

49 Here, the defendant did not contend that there would be any prejudice caused to it if an extension of time was granted. I also noted that on the day the notice of appeal was filed, the plaintiff's solicitor had also informed the defendant's solicitors that the plaintiff had filed an appeal and that the plaintiff would be serving the notice shortly after (see above at [20]). The defendant was therefore not caught unaware.

Conclusion

50 In the exercise of my discretion whether or not to grant the extension of time, I am not fettered by the decision of the AR. It is my duty to consider the matter afresh and to exercise my own discretion, of course having due regard to the decision below but being in no way inhibited by it (as held in *Evans v Bartlam* [1937] AC 473 which was approved in *Chang Ah Lek v Lim Ah Koon* [1999] 1 SLR 82 at [18]–[20]). This is in contrast to an appeal to the Court of Appeal, where the Court of Appeal will only interfere if it is satisfied that the judge below had applied the wrong principle, or that he had taken into account matters which he ought not to have done, or failed to take into account matters which he ought to have done, or that the decision is plainly wrong: see *AD v AE* ([26] *supra*) at [23]; *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR (also known as Jugoimport-SDPR)* [2009] 2 SLR 166 ("*Westacre Investments*") at [17]. The starting presumption would be that the judge had rightly exercised his discretion: see *Westacre Investments* at [18].

51 Moreover, in the present case it would appear, as I have earlier shown, that the AR had been under the misapprehension (fostered no doubt by the submissions of the defendant's solicitors) that he was bound by the authorities to disallow an extension if it was caused by the oversight of the applicant's solicitors.

52 Contrary to the holding of the AR, an oversight by the applicant's solicitor or his clerk may be a ground for the court to exercise its discretion. Furthermore, unlike the other cases where, in the absence of sufficient explanation, the court refused an application to extend time, the plaintiff's solicitor in this case was able to offer some explanation for the oversight (see [43] above). Whilst counsel for the plaintiff's presentation of the reason for the delay was not compelling, it was, to my mind, worthy of consideration.

53 Therefore, considering all the factors, I found that although the length of delay was substantial, the oversight of the plaintiff's solicitor in the total factual matrix sufficed for the court to show sympathy. The appeal was not hopeless and the defendant would not be prejudiced by the extension of time to serve notice. In fact, the defendant had been informed of the notice of appeal on the very day it was filed. I therefore came to the conclusion, balancing the four factors, that the balance came down on the other side to that chosen by the learned AR.

54 Nevertheless as, in my view, the plaintiff's application could have been better handled and the delay was through no fault of the plaintiff, I ordered costs to the defendant at the appeal and below on an indemnity basis to be borne by the plaintiff's solicitors.