Stansfield Business International Pte Ltd (trading as Stansfield School of Business) v Vithya Sri Sumathis

[1998] SGHC 423

High Court — Small Claims Tribunal Appeal No 3 of 1998
Chao Hick Tin J
4, 6, 25 November 1998

Civil Procedure *— Appeals — Notice of appeal — Discretion of court in granting extension of time to file notice of appeal — Whether court should exercise discretion to extend time*

Contract *— Remedies — Whether action for agreed sum or enforcement of penalty clause*

Facts

The respondent, Vithya Sri Sumathis, enrolled as a student in the appellant Stansfield Business International Pte Ltd. She signed an application form on enrolment which contained, *inter alia*, a contractual term requiring her to pay the full fees of $2,502.90 should she decide not to complete the course for the academic year. At the time when she left the course, the balance fee of $1,502.90 still remained outstanding. The school claimed for such balance at the Small Claims Tribunal. The referee held the term to be a penalty clause and refused the school's claim. The school appealed. It argued that it was not suing for damages but a sum which the student had contracted to pay. For the appeal, the student's counsel raised a preliminary objection: that as the notice of appeal was served out of time, there was no proper appeal.

Held, allowing the appeal if it was proper:

(1) This was a claim for the contract sum. There was no question of any breach of contract or any penalty. The respondent knew that a place was allocated to her following her enrolment and the appellant fulfilled its part of the bargain by providing the facilities and teaching staff to conduct the course. The respondent's attention was specifically drawn to the term and she had a choice whether to enrol or not to: at [18].

(2) While the notice of appeal was filed in time, the notice was served out of time by some seven days. This effectively meant that there was no appeal. An application for an extension of time to serve had to be viewed on the same basis as an application for extension of time to file a notice of appeal. On the facts, the failure to serve the notice in time was due to: (a) the solicitor's failure to instruct his clerk to serve it immediately after filing; and (b) the clerk's failure in taking his time to serve. Either ground would not be sufficient to warrant the court exercising its discretion to grant an extension of time in the appellant's favour, despite the fact that there were merits in the appeal: at [26] and [33].

Case(s) referred to

Alder v Moore [1961] 2 QB 57 (folld)

Cheah Teong Tat v Ho Gee Seng [1974] 1 MLJ 31 (folld)

Chin Hua Sawmill Co Sdn Bhd v Tuan Yusoff bin Tuan Mohamed [1974] 1 MLJ 58 (folld)

Coles and Ravenshear, In the matter of an Arbitration between [1907] 1 KB 1 (folld)

Dunlop Pneumatic Tyre Company, Limited v New Garage and Motor Company, Limited [1915] AC 79 (folld)

Hau Khee Wee v Chua Kian Tong [1985–1986] SLR(R) 1075; [1986] SLR 484 (folld)

Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] QB 433; [1988] 1 All ER 348 (refd)

Pearson Judith Rosemary v Chen Chien Wen Edwin [1991] 2 SLR(R) 260; [1991] SLR 212 (refd)

Ratnam v Cumarasamy [1965] 1 MLJ 228, [1965] 1 WLR 8 (refd)

Tan Chai Heng v Yeo Seng Choon [1979–1980] SLR(R) 658; [1980–1981] SLR 381 (folld)

Tokai Maru, The [1998] 2 SLR(R) 646; [1998] 3 SLR 105 (refd)

Vettath v Vettath [1991] 2 SLR(R) 685; [1992] 1 SLR 1 (folld)

White and Carter (Councils) Ltd v McGregor [1962] AC 413 (refd)

Willson v Love [1896] 1 QB 626 (refd)

Legislation referred to

Small Claims Tribunals Rules (Cap 308, R 1, 1998 Rev Ed) rr 21(5), 22

Yeo Soon Keong (Yeo Erunal & Partners) for the appellant;
Manimaran Arumugam (Mani & Partners) for the respondent.

25 November 1998 Judgment reserved.

Chao Hick Tin J:

1 This is an appeal against a decision of the learned referee of the Small Claims Tribunal who refused the appellant's claim in contract for a sum of $1,502.90 against the respondent. At the hearing of the appeal, counsel for the respondent raised a preliminary objection that there is no proper appeal before the High Court. I shall, however, deal first with the merits and then the preliminary objection.

2 The facts of the case are straightforward and are largely not in dispute. The appellant is a private school ("the School") providing teaching to enable students to acquire various qualifications, diplomas as well as degrees, from overseas universities and institutions. On 27 March 1997 the respondent enrolled herself as a student with the School with a view to acquiring the Diploma in Economics (External) of the University of

London. She signed an application form on enrolment where the terms of the contract were set out.

3 The provision of the contract which is germane to the present claim is cl 2 and it reads:

> Enrolment for the course, together with payment of the required deposit or first instalment of fees creates a binding agreement to follow the course and pay the full fees, even if a student subsequently decides not to complete the course for the academic year. Further, no refund can be made as a space has been committed to the student for the duration of the programme, and the school will not entertain any request for refund.

The attention of the respondent was drawn to this clause as she signed specifically against that clause. It is not the respondent's case that she was misled or did not read that clause.

4 The fees to be paid by the respondent for the course as found by the referee was the sum of $2,502.90. She paid $1,000 upon enrolment. She attended the course in the month of April 1998 but ceased to attend from May 1998. She informed the assistant director of the School, who advised her to write in formally. She did accordingly. At the time she left the course the balance fee of $1,502.90 still remained outstanding. Thus this claim by the School for the balance of the fee before the Small Claims Tribunal.

5 The referee held Condition 2 to be unconscionable, particularly in a case where the student had not attended any lessons yet, or had attended only a few lessons, at the time of the withdrawal. She queried if a student's withdrawal resulted in any loss to the School, though she recognised there could be loss of profit. She asked: "Can the court refuse to enforce the clause given its unconscionable effect?" She felt the answer should be in the affirmative provided the clause was a penalty clause. She held it to be a penalty clause because she "was not convinced that the sum to be paid represented a genuine pre-estimate of the loss to the [School] in the event that the [respondent] breached the contract by withdrawing from the course". Thus she refused to give effect to the clause.

Is it a question of penalty?

6 The point stressed before me by counsel for the School is that the School is not suing for damages on account of default. It is claiming for a sum which the respondent has contracted to pay. Consideration was given by the School for that promise to pay by setting aside a place for her to attend the course. Tuition was given. The fact that she chose, after one month, not to complete the course could in no way alter the position that the School had fulfilled its part of the bargain, namely, the provision of facilities and staff to conduct the course. The court should not go into the question of adequacy of consideration.

7 What is a penalty clause? The classic statement on this is to be found in the celebrated case *Dunlop Pneumatic Tyre Company, Limited v New Garage and Motor Company, Limited* [1915] AC 79 at 86 where Lord Dunedin stated that a clause is penal if it provides for "a payment of money stipulated as in *terrorem* of the offending party", to force him to perform the contract. And the question whether a sum stipulated is a penalty or a genuine pre-estimate of damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract judged of as at the time of the making of the contract.

8 However, a claim for the sum agreed in the contract should be differentiated from a claim in damages or for liquidated damages which is dependant upon a breach. This is put by *Treitel on Contracts* (9th Ed) at p 912 as follows:

> A contract commonly provides for the payment by one party of an agreed sum in exchange for some performance by the other. Goods are sold for a fixed price; work is done for an agreed remuneration, and so forth. An action for this price or other agreed remuneration is, in its nature, quite different from an action for damages. It is a claim for the specific enforcement of the defendant's primary obligation to perform what he has promised; though, as it is simply an action for money, it is not subject to those restrictions which equity imposes on the remedies of specific performance and injunction.

Chitty on Contracts at para 1676 states:

> An agreed sum cannot be a penalty unless payable upon breach. A sum payable upon performance of the claimant's contractual obligation cannot be a penalty; nor, at common law, can a sum which is payable upon an event other than a breach of contract be a penalty.

9 Accordingly, for a question of penalty to arise in relation to a sum payable under a contract, that payment must flow from a breach. A sum payable upon some other event is not a penalty. In *Alder v Moore* [1961] 2 QB 57, a professional footballer received £500 from an insurance company in respect of an injury which was thought to have disabled him permanently and he undertook to repay the money in the event of him again playing professional football. This was held not to be a penalty since he committed no breach when he did play again, as he had made no promise not to do so.

10 At this juncture it may be pertinent to examine briefly the case *White and Carter (Councils) Ltd v McGregor* [1962] AC 413, where the court distinguished between a claim for the contract sum and a claim for damages. There the appellants, advertising contractors, agreed with the representative of the respondent, a garage proprietor, to display advertisements for the respondent's garage for three years. The contract was headed by a warning notice that it was not to be cancelled and cl 7 provided that the contract was not subject to "countermand" on the part of

the respondent. On the same day the contract was entered into, the respondent wrote to cancel the contract on the ground that his representative misunderstood him in committing to the contract. The appellants refused and proceeded to fulfill their part of the bargain. The contract provided that:

> In the event of an instalment … being due for payment, and remaining unpaid for a period of four weeks or in the event of the advertiser being in any way in breach of the contract then the whole amount due for the 156 weeks or such part of the said 156 weeks as the advertiser shall not yet have paid shall immediately become due and payable.

The respondent refused to pay any sum. The appellants sued for the whole amount. The House of Lords by majority (3-2) held that the appellants were entitled to carry out the contract and claim the full contract price and were not obliged to accept the repudiation and sue for damages.

11 The majority seemed to think that upon repudiation the appellants could elect either to terminate the performance of the contract or to continue performance and that there was no requirement that the appellants must act reasonably in making the election. They held that the law governing mitigation of damages was not relevant to an action to recover a debt due under a contract, and the appellants, in so claiming, were doing no more than enforcing their right to recover a debt due. No question of mitigation could arise if a plaintiff was suing to recover a debt due under the contract. The minority dissented because, in their view, the appellants should have taken reasonable steps to mitigate their loss. The minority were of the view that, in the absence of a right to specific performance (and specific performance could not be invoked in that case) the appellants had no option except to claim damages from the respondent.

12 In any event, even if I were to adopt the minority view in *White and Carter* to be the correct view, it has not been satisfactorily shown by the respondent that there was any real scope to mitigate on the part of the School. Is it reasonable to expect the School to find a replacement student after the course had started for a month?

13 Counsel for the respondent relied upon *Interfoto Picture Library Ltd v Stiletto Visual Programes Ltd* [1988] 1 All ER 348 where Bingham LJ (as he then was) referred to what is known as disguised penalty as follows (at 353):

> Thus equity has intervened to strike down unconscionable bargains. Parliament has stepped in to regulate the imposition of exemption clauses and the form of certain hire-purchase agreements. The common law also has made its contribution, by holding that certain classes of contract require the utmost good faith, by treating as irrecoverable what purport to be agreed estimates of damage but are in truth a disguised penalty for breach, and in many other ways.

14 It is important to note the facts in *Interfoto Picture*. There the defendants, an advertising agency, required photographs of the 1950s for a presentation for a client. On 5 March 1984 the defendants rang the plaintiffs to inquire if the latter had such photographs for the defendants' use. The defendants and the plaintiffs had no previous dealings. On the same day the plaintiffs despatched 47 transparencies in a bag, with a delivery note, to the defendants. In the note it was stated that the transparencies were to be returned by 19 March 1984 and there were nine conditions stated in the note. Condition 2 was that: "A holding fee of £5 plus VAT per day will be charged for each transparency which is retained by [the defendants] longer than the said period of 14 days." The defendants accepted the transparencies but the court found that the defendants probably did not read any of the conditions. The defendants did not use the transparencies. They put them aside and forgot about them. The transparencies were returned only on 2 April 1984. The plaintiffs invoiced the defendants for a sum of £3,783.50, being £5 per transparency per day from 19 March to 2 April 1984. The trial judge allowed the claim. The defendants appealed. There was evidence before the court that the holding fee charged by the plaintiffs was extremely high, having regard to the fees charged by other photographic libraries, the norm being about £3.50 per week per transparency. Dillon LJ said at 352:

> Condition 2 … is in my judgment a very onerous clause. The defendants could not conceivably have known, if their attention was not drawn to the clause, that the plaintiffs were proposing to charge … at such a very high and exorbitant rate … It is in my judgment a logical development of the common law into modern conditions that it should be held, as it was in *Thornton v Shoe Lane Parking Ltd*, that, if one condition in a set of printed conditions is particularly onerous or unusual, the party seeking to enforce it must show that that particular condition was fairly brought to the attention of the other party.
>
> In the present case, nothing whatever was done by the plaintiffs to draw the defendants' attention particularly to condition 2 … Consequently, condition 2 never, in my judgment, became part of the contract between the parties.

15 Two important aspects in *Interfoto Picture* should be noted: (a) Condition 2 was out of line with the norm of the industry and was very onerous; and (b) that condition was not specifically brought to the attention of the defendants and the latter were not bound by it. However, the court found that the defendants knew the note contained conditions and should have read it and ordered the defendants to pay on a *quantum meruit* basis of £3.50 per transparency per week for retention of the transparencies beyond a reasonable period. Both members of the quorum, Dillon LJ and Bingham LJ, did not express a definite view whether Conditon 2 was a penalty clause as that question was not raised before the court, though

Dillon LJ seemed to think that the defendants would have "a strong case for saying that Condition 2 was void and unenforceable as a penalty clause".

16 I would imagine that an instance of a disguised penalty is that in *Willson v Love* [1896] 1 QB 626 where a lease of a farm provided that the lessees should not sell hay or straw off the premises during the last 12 months of the term and that they would have to pay an additional rent of £3 for every ton of either so sold. Evidence was given that the manurial value of hay was over 15 shillings per ton, but that of straw less than five shillings per ton. The court held the additional rent to be a penalty.

17 In our present case, the contract in question was essentially for the provision of facilities and qualified staff to conduct a course. By accepting the respondent as a student, the School had committed a place for her. Clause 2 expressly says that. Obviously, there would be a limit to the number of students the School could admit to a course. The School had fulfilled its part of the bargain by providing the facilities and the teaching staff to conduct the course. By withdrawing after attending one month of the course, the place reserved for her would have thereafter gone to waste, as a course is one indivisible whole. It is wholly unrealistic to expect the School to find another student who was prepared to join it midway.

18 In my opinion, this is a claim for the contract sum. There is no question of any breach of contract or any penalty. Neither is this claim a disguised penalty. The respondent knew that a place was allocated to her following her enrolment. Her attention was specifically drawn to that clause. For the reasons given in the above paragraph, I do not think it is an unconscionable provision. Neither is it unconscionable to enforce it, it being a contract freely entered into. The respondent had a choice whether to enrol or not to enrol upon seeing cl 2. If she was not satisfied with the clause, she could negotiate for a variation and if the School should refuse, she could go to another school.

19 Furthermore, even if (contrary to what I have held) cl 2 is a penalty clause and should not be enforced and that the School should only be entitled to claim for damages, it seems to me clear that the loss to the School in the present case would still be the unpaid portion of the fees. I stress again that what was offered by the School was a place for a course. The School had provided the facilities and the staff. Having started on the course for a month and then quit, the loss of that place would be for the remainder of the period of the course. As I have mentioned before, it would be unreasonable to expect the School to get someone who would be willing to sign on the course halfway and there was no evidence of any one willing to take the respondent's place. Therefore, even on the basis of damages to be assessed, I would award the same amount.

20 In the premises, I would allow the appeal if there is an appeal proper before me, to which issue I will now turn.

Service of notice of appeal out of time

21 The preliminary objection is that though the notice of appeal was filed on 11 August 1998, the appellant served it on her only on 20 August 1998 when it should have been served on 13 August 1998, as the decision of the referee was given on 13 July 1998. Until two days before the date fixed for the hearing of this appeal, the respondent was unrepresented. On the day of hearing her counsel asked for time to prepare the appeal. I gave two days' grace. On the adjourned date, counsel for the respondent submitted (besides on the merits) that as the notice of appeal was served on her out of time, there was no proper appeal.

22 Rule 22 of the Small Claims Tribunals Rules ("SCT Rules") provides that:

> Every notice of appeal shall be filed and served under rule 21(5) within one month calculated from the date on which, the order of the tribunal was given or made.

Rule 21(5) requires that the notice of appeal be served on all parties to the proceedings, who are directly affected by the appeal, at the time of filing the notice.

23 There are numerous authorities which deal with the question as to how the court should exercise its discretion in the granting of an extension of time to comply with requirements under the rules of court. First, there is the often cited decision of the Privy Council in *Ratnam v Cumarasamy* [1965] 1 MLJ 228, which concerned the filing of record of appeal out of time, and where Lord Guest observed:

> The rules of court must *prima facie* be obeyed, and in order to justify a court in extending time during which some step in procedure requires to be taken, there must be some material upon which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a timetable for the conduct of litigation

24 In *Hau Khee Wee v Chua Kian Tong* [1985–1986] SLR(R) 1075, Chan Sek Keong JC (as he then was) held that the factors to be taken into account in deciding whether to grant an extension of time to file a notice of appeal are: (a) the length of the delay; (b) the reason for the delay; (c) the chances of the appeal succeeding if time for appealing is extended; and (d) the degree of prejudice to the would-be respondent if the application is granted. The adoption of these factors as a framework for exercising the discretion whether to grant an extension of time was approved by the Court of Appeal in *Pearson Judith Rosemary v Chen Chien Wen Edwin* [1991] 2 SLR(R) 260 at [17].

25 In the recent case *The Tokai Maru* [1998] 2 SLR(R) 646, the Court of Appeal felt that the strict view in *Ratnam* should be confined to an application to appeal out of time and not to other applications for extension of time. There, it was an application to file an affidavit out of time. While the Court of Appeal held that an eight-month delay was not satisfactorily explained, it nevertheless allowed an extension of time as no prejudice had been shown.

26 In our present case, the notice of appeal was filed in time. But the notice was served out of time by some seven days. As under the SCT Rules the notice of appeal must be served within the same period as the notice of appeal must be filed, this effectively means there was no appeal. Therefore, it seems to me that such an application for an extension of time to serve must be viewed on the same basis as an application for extension of time to file a notice of appeal.

27 As this preliminary objection was only raised at the hearing proper, I directed the appellant's counsel to file an affidavit incorporating the explanation which he gave me orally. This is what he stated:

> As the respondent was in person and not represented by solicitors, the notice had to be served personally at 139 Cavenagh Road. It did not occur to me to instruct my service clerk to serve the notice immediately and conseqently my service clerk took his time and served it only on 20 August 1998.

28 In an early case, *Re Coles and Ravenshear* [1907] 1 KB 1 Farwell LJ said (at 8):

> A mere slip or blunder on the part of the litigant's legal adviser cannot, in my view, entitle him to anything at all.

29 In *Chin Hua Sawmill Co Sdn Bhd v Tuan Yusoff bin Tuan Mohamed* [1974] 1 MLJ 58 where the notice of appeal was only served almost three months late, the Federal Court held that "the failure to serve the notice was due to the solicitor's mistake … such mistake is not a ground for granting special leave".

30 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. Syed Barakbah J said that a "blunder" was not a special circumstance. To his mind special circumstances:

> … include instances where the applicant has been misled by the other side or where some mistake has been made in the registry itself and he was misled by an officer of the court or where delay in filing notice has been caused by unforeseen circumstances like sudden death or

> inevitable accident or sudden serious illness or something of that kind which reasonably account for the delay.

Syed Barokbah J's decision was upheld by the Federal Court by a majority.

31 In *Tan Chai Heng v Yeo Seng Choon* [1979–1980] SLR(R) 658 the notice of appeal should have been filed on 18 August 1980. On 29 August 1980 an application was made to the court for extension of time. In the affidavit of the solicitor it was explained (at [2]) that:

> … the notice of appeal was prepared on 18 July 1980. However, the cause paper file pertaining to this matter was misplaced in my office library which was then undergoing renovations. … It was only on 20 August 1980 in the afternoon after an exhaustive search that I discovered the file.
>
> Upon an inspection of the file I noticed that the notice of appeal was not filed in court. I immediately instructed my clerk to file the same, but the same was rejected by the registry …

Choor Singh J refused to grant an extension of time. He held that even though the file was misplaced, the solicitors could have gone to the registry, copied the heading of the case, prepared a notice of appeal and filed in the registry. He concluded (at [5]):

> There is 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.

32 Finally in *Vettath v Vettath* [1991] 2 SLR(R) 685, the applicant instructed his solicitors to appeal against certain matrimonial orders made by the High Court. On the solicitors' suggestion the applicant agreed to brief another solicitor (second solicitor) as counsel. Confusion arose as to which solicitor should file the notice of appeal and the notice of appeal was not filed when the one-month period for filing appeal expired. Some eight days after the period had expired the second solicitor filed an application to a judge in chambers for leave to file the notice of appeal out of time. The learned judge held he had no jurisdiction to hear the application. The matter came before the Court of Appeal which applied the test it propounded in *Pearson v Chen Chien Wan Edwin* ([24] *supra*): "the application should be on grounds sufficient to persuade the court to show sympathy to him." It will be seen that in this case the notice of appeal was not filed in time due to the fault of one or both solicitors.

33 Reverting to our instant case, on the basis of the affidavit filed it is clear that the failure to serve the notice in time was due to (a) the failure on the part of the solicitor in instructing his clerk to serve it on the respondent forthwith and (b) the fault of the clerk in taking his time to serve. Either ground would not, on the authorities I have cited above, be sufficient to warrant the exercise of the court's discretion in the appellant's favour. The

fact that in this case I am of the view that there are merits in the appeal would not warrant the exercise of the discretion in favour of the appellant.

34 Accordingly, I hold that there is no proper appeal before me. I would like in this regard to make one observation. Ordinarily, counsel for the respondent should have drawn the attention of the appellant to the defect as soon as he realised it. Unfortunately, the respondent was not represented until two days before the appeal. She changed her mind only at the last minute. Thus, the respondent's counsel could not have raised it earlier. So work was done on the substantive merits of the appeal and they were presented to me. Of course I recognise that this is a small claim initiated before the Small Claims Tribunal where legal representation is not allowed. Considering all the circumstances, I would award costs to the respondent only in respect of the preliminary objection and would fix costs at $1,000.

Headnoted by Agnes Tan Suan Ping.