# Soh Lup Chee and Others v Seow Boon Cheng and Another
# [2002] SGHC 64

**Case Number** : Suit 106/2001, RA 37/2002

**Decision Date** : 01 April 2002

**Tribunal/Court** : High Court

**Coram** : Choo Han Teck JC

**Counsel Name(s)** : Randolph Khoo Boo Teck and Eunice Ng (Drew & Napier LLC) for the plaintiffs; Chong Boon Leong (Rajah & Tann) for the defendants

**Parties** : Soh Lup Chee — Seow Boon Cheng; Another

*Civil Procedure – Discovery of documents – Affidavits – First defendant asserting in affidavits that all required documents provided – Material non-disclosure of source documents -Whether at interlocutory stage deponent's affidavits verifying his list of documents should be regarded as conclusive*

*Civil Procedure – Striking out – Long record of non-compliance by defendants with discovery orders – Plaintiffs applying to strike out defence – Whether defence ought to be struck out – Whether 'unless order' ought to be made*

## Judgment

### GROUNDS OF DECISION

1. The plaintiffs and the first defendant were friends and shareholders in the second defendant ("Genisys") a company incorporated to provide coordinated mechanical and electrical contracts for main contractors of building contracts. The company became a success, and like many success stories its rise also marked the falling out of its members. The plaintiffs commenced an action against the first defendant who was the majority shareholder, in Originating Summons No. 1902 of 1999, for relief against oppression of the minority shareholders. The parties, however, reached a settlement after two days' trial before Rajendran J, and consent judgment was entered on 7 July 2000. By that judgement, the first defendant agreed to purchase the plaintiffs' shares in Genisys. The price was based on an agreed formula, and fixed at 47% of the value of Genisys as at 11 August 1999. The value of the company's shares had therefore to be ascertained. The formula and way in which the shares were to be valued were also agreed under the terms of the consent judgment. By a further order of court dated 24 May 2001, Don Ho Mun Tuke was appointed as the valuer. The resulting conclusion of the valuer was that the first defendant was to pay the plaintiffs the sum of $1,694,199.60 being 47% of the value ($3,604,883.00) of Genisys as at 11 August 1999. The plaintiffs believed that the valuation was not properly carried out because the first defendant had deliberately withheld material information from the valuer and misled him with inaccurate ones.

2. Consequently, the plaintiffs commenced a fresh claim by way of a writ action against the same defendants. This time, the action was based on fraud in that they allege, broadly speaking, that the first defendant who controlled Genisys caused fraudulent information to be created and given to the valuer, or otherwise withheld material information from him, with the purpose and intention of misleading him and thereby caused him to undervalue the assets of Genisys. The plaintiffs made various interlocutory applications for discovery but were thwarted by the first defendants refusal to cooperate or obey the discovery orders in letter and spirit. At the end of their tether, the plaintiffs applied to the assistant registrar to strike out the defence on the ground that they had contumaciously and continuously failed to comply with the discovery orders of the assistant registrar made on 9 July 2001, which also aggregated previous discovery orders. The assistant registrar declined to strike out the defence and the plaintiffs appealed before me against that refusal.

3. At the heart of the dispute over discovery are documents described as Balance Budget Summaries ("BBS"). These are hard copies of documents containing budget summaries in respect of any given project of Genisys. Each BBS is a mine of information about the nature, costs, and profitability of the company in respect of the project stated in the summary. The BBS, however, are not a stack of documents kept in the cabinets or drawers of the company. The information that each BBS carries is stored in the

database of the company's computers. They are fed in, stored, edited, and retrieved as the case may be at any moment by means of a sophisticated programme known as "IMIX", the acronym for *Integrated Management Information System*. It is therefore vital to any party who wishes to ascertain the true worth of the company that the IMIX disgorges all the information from the data pool into the printed BBS. By the same token, it is naturally important to anyone who wishes to prevent that kind of information from surfacing, to manipulate IMIX so that it regurgitates only choice bits for print.

4. It will first be helpful to consider what the orders of 9 July 2001 were. For convenience I shall set out the material terms here:

> "1. The 1st Defendant shall file and serve a *comprehensive* list of documents identifying the most *comprehensive* available BBS for the following 17 UEM Genisys Sdn Bhd ("UEG") projects as at the time of the valuation and also the latest available BBS for the following 17 UEG projects as at 13 February 2001:
>
> | No. | UEG Project Name | UEG Project Code |
> |---|---|---|
> | i. | Sheraton Labuan | (4002) |
> | ii. | Sheraton Subang | (4003) |
> | iii. | Sheraton Langkawi | (4004) |
> | iv. | Sheraton Tower | (4005) |
> | v. | RSA Package C hydraulic | (4011) |
> | vi. | JB Duty Free AV | (4014) |
> | vii. | JB Duty Free Electrical | (4015) |
> | viii. | JB Duty Free BAS | (4016) |
> | ix. | Wakaf College | (4013) |
> | x. | NSC Outdoor | (5022) |
> | xi. | Telekom HQ Project | (6031) including the plumbing packages (if available) |
> | xii. | NCS Hawker Centre | (8071) |
> | xiii. | LRT System II | (LRT) |
> | xiv. | Seremban RSA Package A | (4009) |
> | xv. | Seremban RSA Package B | (4010) |
> | xvi. | Seremban RSA Package C | (4012) |
> | xvii. | Seremban RSA Plumbing | (4008) |
>
> 2. The 1st Defendant shall also file and serve an affidavit verifying such list and confirming that the Defendants have no other more comprehensive available BBS for the said 17 UEG projects.
>
> 3. The 1st Defendant shall file and serve a comprehensive list of documents and an affidavit verifying such list specifically identifying, for each entry of the BBS for the abovementioned 17 UEG projects, each available GIE form and supporting or source document in respect of the said entry.
>
> 4. The 1st Defendant shall file and serve a comprehensive list of the following documents and an affidavit verifying such list:
>
> (a) a complete copy of the January to July work in progress general ledger for 1999 for UEG;
>
> (b) an affidavit stating whether there are any supporting documents to justify the formula for a fixed percentage for the provision of costs for the projects of UEG; and
>
> (c) payment certificates for the abovementioned 17 projects

i. issued between 1 January 1999 and 20 September 2000, (both dates included); and
ii. the most recent payment certificate issued before 31 December 1998.

This order is made without prejudice to the 1st Defendant's contention that the valuation was completed on 11 August 2000.

5. Without prejudice to any dispute as to the sufficiency of compliance with the Order of Court made on 9 April 2001, the 1st Defendant shall file and serve a comprehensive list of documents and affidavit verifying such list, which specifically identifies for each entry of each BBS provided under the cover of M/s Rajah & Tann's letter dated 12 April 2001 pursuant to the Order of Court made on 9 April 2001, and each available GIE form and supporting or source document in respect of the said entry.

6. The list of documents and affidavit verifying such list of documents referred to in paragraphs 1 and 2 of this Order shall be filed and served by 4pm on 23 July 2001.

7. The list of documents and affidavit verifying such list of documents referred to in paragraphs 3, 4 and 5 of this Order shall be filed and served by 4pm on 20 August 2001.

8. Nothing in this Order shall preclude the Plaintiffs from applying for a preemptory order and/or striking out of the 1st Defendant's Defence in the event that the 1st Defendant fails to comply with paragraphs 1 to 7 of this Order of Court."

5. It can be inferred from the tone and form (from the repeated use of the word "comprehensive" in the same phrase in order 1) as well as the specificity of the rest of the above orders that the assistant registrar must have agreed with plaintiffs' vehement complaint that a previous order for discovery made on 9 April 2001 was not fully complied with. The first order of 9 April required that –

> "the first defendant provides the *complete* Balance Budget Summaries for all the three PWD projects under items B and C of paragraph 27 of the first plaintiff's 15th affidavit filed on 2 November 2000 in OS 1902 of 1999 showing the total alleged loss of S$5.7 million, *as well as the latest available updated complete BBS as at 13 February 2001*" (my emphasis).

It is also noted that the discovery orders made by the assistant registrar were in addition to orders made by Rajendran J on 13 February 2001 which were not complied with. Mr. Chong submitted on behalf of the defendants that the closest BBS to that on 13 February 2001 was 5 January 2001 for the simple reason that the data in the data pool changes all the time. The previous data merges with the new each time it is edited. Hence, if no one printed a hard copy on 13 February, as was the case alleged by the defendants, they had no hard copy of that date. In the event, the nearest hard copy was the one printed on 5 January 2001. The BBS is thus aptly described as a 'snapshot' of the current status of the project's budget at the time it was generated.

6. The first defendant asserts in his affidavits that he had provided all the documents that were required of him. In this regard, I shall be brief because I do not for the moment think it necessary to set out the numerous disputes as to what exactly it was that the first defendant actually affirmed and what he did not. The arguments concerning that aspect have been noted but should not detain us here. The plaintiffs' complaint in the appeal before me is that the first defendant had either deliberately masked, or edited out, or simply refused to produce the full and true information in the data pool from which the BBS's were produced. Secondly, they allege that it was obvious from the BBS themselves that the defendants must be or have been in possession of supporting or source documents from which the information fed into the data pool must originally have been set out. These documents (which may be referred to as either supporting or source documents) were not produced.

7. Mr. Randolf Khoo, counsel for the plaintiffs, meticulously and very patiently took me through a labyrinthine trail of documents to establish why he says that the first defendant had not complied with the orders for discovery. The first and basic

point counsel made was that it is inconceivable, taking into account the type and size of the company that Genisys is, and the nature of its work and projects that no record is kept of the supporting or source documents. I agree with this submission entirely, and in my view, there is more than a reasonable suspicion that such documents must have existed and continue to exist. In this regard, Mr. Khoo emphasized that the defendants have not deposed anywhere in their affidavits that the documents no longer exist because they have either been shredded or otherwise disposed. I am also inclined to infer on a balance of probabilities that such documents cannot be destroyed without making it impossible for the company's auditors to conduct their audit. Furthermore, it will be seen that the three major projects, which included that with the Traffic Police Department are major and complex projects that involved many different contractors and sub-contractors that it is indeed remarkable that not a single source document was produced.

8. Next, Mr. Khoo went beyond pure theory to the specifics of non-disclosure based on what is apparent from the face of the BBS that had been produced. First, he pointed out that in the BBS of 3 August 2000 at page 386 of the first plaintiff's seventh affidavit the sub-headings of variation works are captured and printed but on the 5 January 2001 copy (ordered to be produced) the variation works had obviously been edited out; but only from the heading for it did not escape the scrutiny of the plaintiffs and their counsel that a sum of $710,131 appeared in the details. Counsel also referred to the first defendant's disclosure, in purported compliance, by setting out 12 "Provisional Budgets" said to be the latest budgets; but Mr. Khoo quickly pointed out that the documents available and disclosed showed that there were at least 156 variations that were not evident from the latest budgets. I am inclined to agree that with such massive and major changes that it is impossible to have no record of the source or supporting documents. I will not retrace the steps Mr. Khoo took me through in demonstrating that such changes must and do eventually show in the BBS unless they are edited out - save to mention briefly, that one of the many examples counsel had in hand was an item entitled E4001 involving $40,072 at page 282 of the BBS exhibited in the first plaintiff's seventh affidavit. This item appears to have been overlooked by the defendants. It is a budget revision request corresponding to the item in the BBS at page 382 of the same affidavit. Its existence calls in question all other such documents which were noticeably missing. Next, Mr. Khoo drew my attention to the non-disclosure concerning the contracts of the second defendant's subsidiary in Malaysia ("UEG"). Again, Mr. Khoo laboriously demonstrated that there were material non-disclosure of source documents by the defendants in respect of the UEG records.

9. With the facts overwhelmingly against him, Mr. Chong did what a good counsel would have done in the circumstances - he mounted a formidable argument on the law. His basic position, relying on the Supreme Court Practice (1999 White Book 24/7/2 at page 471), is that at the interlocutory stage the court ought to accept a party's affidavit as final and conclusive; and if the deponent says that whatever he did not produce he did not, or no longer have, his word must not be contravened - at least until trial. One major plank of Mr. Chong's argument was that if an "unless order" for disclosure based on reasonable suspicion is made, the fundamental principle of the burden of proof based on a balance of probabilities will be plainly ignored. Counsel argued that if a defence is struck out because the defendant did not comply with the "unless order" then it would have been struck out based on just a reasonable suspicion. The reference to "reasonable suspicion" is an allusion to Cotton LJ's opinion in *Lyell v Kennedy* [1884] 27 Ch d 1, 20, that a court may order further discovery if it had a reasonable suspicion that there are further documents to be discovered. This lighter test is clearly intended for a different purpose, that is to allow further discovery. Different considerations apply when a court is minded to make an "unless order". It must be assumed that the court is fully aware that a claim or defence may be struck out if the order is not carried out - hence the title "unless order". It has nothing to do with the burden of proof in respect of the merits of the case. It is the compelling force behind a coercive order. Why and when such orders are necessary depend on the individual situation. I now revert to the issue that Mr. Chong's argument addresses, that is, whether the deponent's affidavit verifying his list of documents shall be regarded as conclusive. I must agree with counsel that generally, such affidavits cannot be contravened by other contentious affidavits and shall not be subject to cross-examination. The reasons for this, as Stuart-Smith LJ pointed out in *Fayed & Ors v Lonrho Plc* (The Times 24 June 1993), are plain. Affidavits raised in such circumstances do not address the issues for trial and whether the deponent is truthful or not in respect of the discovery of documents he might still persuade the trial judge of the merits of his case through other evidence. Stuart-Smith LJ put his view thus:

> "If I am wrong in holding that the statement in an affidavit of documents is conclusive, so that the court has no power to order cross-examination, the exercise of that power should in my judgment be reserved for those cases where the existence or non-existence of the document raises a discreet issue

which does not impinge to any serious extent on the issues in the action."

It should be noted Mr. Khoo had accepted from the outset that he was not seeking a cross-examination of the first defendant.

10. Mr. Khoo relied on two authorities for the proposition that the court may strike out a defence if it is satisfied that the defendant had failed to comply with a discovery order. The first was *British Association Of Glass Manufacturers Ltd v Nettlefold* [1912] 1 K B 369, 377. In that case, Farwell LJ answered the pertinent question as follows:

> "Is there any grounds from the contents of that document, which has thus become part of the affidavit of documents, for saying that something further is obviously omitted? In my opinion there clearly is; it was decided by this court in *Kent Coal Concessions Ltd v Duguid* [1910] 1 K B 904, which was affirmed in the House Of Lords, that it is allowable for the Court to draw inferences and say, as in that case, 'Here is a balance-sheet; a balance-sheet necessarily implies the existence of books of account from which that balance sheet was made up; those books so far as they were used to make up the balance-sheet, are relevant because the balance-sheet is admitted to be relevant, and therefore they must be produced'".

Counsel quickly pointed out that this is exactly the situation we have here. He submitted that the BBS were clearly regarded as relevant. I am in full agreement. The BBS are detailed summaries of the financial position of the company and summaries cannot exist without source documents. To bolster his argument, Mr. Khoo referred to *Manilal & Sons Pte Ltd v Bhupendra KJ Shan* [1989] SLR 1182. Before proceeding further, it should be noted that that case is unusual in that the parties there agreed to a cross-examination of the deponent, and it was the oral evidence of the deponent that exposed his concealment of relevant documents. Notwithstanding that, the principle emanating from that case is that where the court is satisfied from the documents produced that other documents must exist, the party concerned must either produce them or explain on oath what has become of them so that the contest at trial will be open and fair.

11. The two lines of cases relied upon by Mr. Khoo and Mr. Chong respectively are not difficult to reconcile. *Fayed v Lonrho* represent the general principle whereas *Nettlefold* represent the exception. It is the application to facts of individual cases, however, that tend to give rise to difficulties. For example, in the *Fayed* case the documents sought were also source documents, and in some ways similar to the applications in the present appeal. The actual issue in *Fayed* however, concerned the decision of the judge to grant an order for cross-examination of the deponents in respect their affidavits. Nonetheless, Stuart-Smith LJ further held that a claim or defence ought not to be struck out under O 24 r 16 "except on clear and uncontested evidence, either as a result of an admitted breach, or because the breach can be ascertained from the party's own documents, affidavits or pleadings". On this score, I am satisfied that the plaintiffs have amply demonstrated, through their counsel, the numerous obvious omissions of documents that must surely exist, or to be more precise, have existed. If they are no longer in the defendants' possession a reasonable explanation ought to have been given but no explanation was given by them. In my view, therefore, the plaintiffs have made out a sufficient case to strike out the defence.

12. In the circumstances, I will allow the appeal. The question is, ought I to strike out the defence? Reiterating what I had just stated above, having regard to the long record of non-compliance, the plaintiffs, are in my opinion, are entitled to strike out the defence by reason of this last round of non-compliance. The record shows that the defendants only produced a flourish of inchoate and incomplete documents each time a court order is made against them. The record also shows that the orders were made after spirited and long arguments that seem to indicate the tenacity of the defendants in preventing relevant documents from being disclosed. However, since a striking out, particularly of a defence, is a draconian measure, I shall grant the defendants a final act of kindness. I therefore hereby make an unless order in terms of prayer 2 of the plaintiffs' appeal in RA 37 of 2002 with a variation only in terms of the time for performance from seven days to 14 days. The costs here and below are to be taxed if not agreed, and paid by the defendants to the plaintiffs.

Sgd:

Choo Han Teck
Judicial Commissioner