Soh Lup Chee and Others v Seow Boon Cheng and Another
[2004] SGHC 8

Case Number : Suit 106/2001

Decision Date : 15 January 2004

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Randolph Khoo, Johnson Loo and Veronica Joseph (Drew and Napier LLC) for plaintiffs; K Shanmugam SC, Leona Yuen and Tham Wei Chern (Allen and Gledhill) for defendants

Parties : Soh Lup Chee; Tan Lee Khiang; Ang Chye Soon — Seow Boon Cheng; Genisys Intergrated Engineers Pte Ltd

Civil Procedure – Discovery of documents – Application to strike out defence for contumelious breach of discovery orders.

Companies – Shares – Sale of shares pursuant to consent judgment – Valuation of shares for purpose of sale – Whether there was fraud on valuer of shares – Whether relevant materials were suppressed and false information presented to valuer.

Evidence – Weight of evidence – Submission of no case to meet – Whether plaintiffs failed to persuade court that there was any fraud on valuer.

15 January
2004
Judgment reserved.

Choo Han Teck J:

Background and parties concerned

1 Genisys Integrated Engineers Pte Ltd ("GIE") is a company incorporated on 12 September 1988 by the plaintiffs and the first defendant. GIE provides high technology engineering services and products for use in buildings. In 1999, the plaintiffs commenced a minority oppression action against the first defendant in Originating Summons No 1902 of 1999 ("OS 1902"). That action was subsequently settled and a consent judgment was entered before S Rajendran J on 7 July 2000. This present suit arose from the settled orders of Rajendran J's judgment. Since the plaintiffs in OS 1902 are also the plaintiffs in this suit and likewise the defendant in the originating summons ("OS") is the first defendant here, I shall refer to the parties here as "the plaintiffs" collectively, or "Soh" (Soh Lup Chee), "Tan" (Tan Lee Khiang), or "Ang" (Ang Chye Soon) individually, in respect of the plaintiffs; and "Seow" (Seow Boon Cheng) for the first defendant, and "the defendants" collectively, in respect of both defendants (the second defendant is GIE itself). The plaintiffs and Seow were all shareholders and directors of GIE (Tan was an alternate director to Soh). The sale of the plaintiffs' shares in GIE to Seow was the essence of the settlement under the consent orders. It was, therefore, necessary to carry out a valuation of GIE so as to fix the value of its shares. By the time they consented to judgment before Rajendran J, the parties had already agreed, by an interlocutory order before Judith Prakash J on 24 May 2000, to appoint Don Ho Mun Tuke ("Don Ho") as the valuer because they had anticipated that whatever the outcome of the OS action, a valuation of GIE would be required. The formula which he was to use for the evaluation of the share value was also agreed upon. The terms of the consent judgment are important and I shall set them out in full for ease of reference:

AND UPON the parties having agreed terms of settlement IT IS BY CONSENT ORDERED THAT:-

1. The 1st Defendant shall purchase and the Plaintiffs shall sell all the Plaintiffs' shares in the 2nd Defendant ("GIE") upon payment by the 1st Defendant to the Plaintiffs (on terms hereafter set out) of a price, clear of all deductions, amounting to 47% of the value of GIE's shares, as at 11 August 1999 (the "Price") and as determined in paragraphs 2 to 5 below. Any personal income tax payable on the Price by the Plaintiffs shall be borne by the Plaintiffs personally.

2. The value of GIE's shares shall be derived from two valuations of GIE's shares as at 11 August 1999, with one valuation being done on a Net Tangible Asset basis ("NTA Valuation") and the other, on a fair value basis, i.e. NTA + goodwill + intangible assets, ("Fair Value Valuation") respectively. The value of GIE's shares shall be the sum of (a) the value of GIE's shares as determined by the NTA Valuation and (b) half of any excess of the Fair Value Valuation over the NTA Valuation (the "Value"). *Such valuations shall be done by Mr Don Ho Mun Tuke* ("the Valuer"), the valuer appointed pursuant to the Order of Court of 24th May 2000, on terms as set out in paragraphs 1-3, 8, 10 and 13 of the said Order.

3 . *The draft audited consolidated accounts for GIE and its subsidiary and associated companies for the year ended 31 December 1998 produced by M/s Ernst & Young (in exhibit "SLC-148" to the Affidavit of the 1st Plaintiff filed on 12 June 2000) shall be binding and conclusive as between the parties for the purposes of the said valuations*.

4. *The Plaintiffs shall be entitled to have full access to the books, accounts and records of GIE and its subsidiary and associated companies, until the Price is determined, with the 1st Defendant being required to respond to the Plaintiffs' requests in writing for all documents and information* relating to the accounts within seven (7) days of such requests. *Should there be a dispute as to the adequacy of the response from the 1st Defendant*, parties shall, together with their respective solicitors and/or their accounts, *meet at GIE within 14 days of the said request in writing to resolve the matter in good faith*. Without limiting the foregoing, and for avoidance of doubt:-

(a) the Plaintiffs shall be entitled to inspect in the presence of the 1st Defendant or his nominees, all project accounts documents and records without restrictions such as those imposed during inspection on 4 July 2000, save that no copies shall be taken by the Plaintiffs of such restricted projects accounts documents and records. The Plaintiffs however shall be provided with copies of such project accounts, documents and records within GIE's office, to be reviewed or worked on, in the presence of the 1st Defendant or his nominees. Such copies worked on by the Plaintiffs may only be submitted by the Plaintiffs to the Valuer in the presence of the 1st Defendant or his nominees;

(b) the parties shall have the right to make submissions to the Valuer in the course of the valuations as they deem fit, provided always that copies of any submissions and replies to such submissions, are provided to the other party or parties; *all documents and accounting records shown or copied to the Valuer by the Defendants shall be shown or copied to the Plaintiffs accordingly; and the parties shall be at liberty to inspect such audit working papers of Ernst & Young as are provided to the Valuer*;

(c) the Plaintiffs shall not directly or indirectly use or reveal any information or document obtained pursuant to this Order to any party other than for the purpose of the valuation; and

(d) *any disputes as to access to books, accounts and records of GIE and its subsidiary and associated companies in respect of the said valuations shall be referred to the Court*.

5 . *In the absence of fraud or collusion, the valuations done by the Valuer shall be binding on the parties for the purposes of ascertaining the value of GIE's shares. The Price shall be determined by the Valuer applying the valuations in accordance with the mathematical formula set out in paragraph 2 herein*.

6. The 1st Defendant shall pay to the Plaintiffs the sum of $1.0 million on or before 21st July 2000.

7. Two further sums of $1.0 million each shall be paid by the 1st Defendant to the Plaintiffs on or before 14th August 2000 and 14th September 2000 respectively, to account of the Price.

8. If the valuations are not completed by 14th September 2000, the 1st Defendant shall pay $750,000.00 to account of the Price on each of 14th October 2000 and 14th November 2000 and a further sum of $500,000.00 on 14th December 2000, to the Plaintiffs.

9. The 1st Defendant's obligation to pay the said sums to account of the Price set out in paragraphs 7 and 8 above, shall cease upon the valuations being completed and the Price ascertained, and thereafter, the balance of the Price shall be payable as set out in paragraph 12 below. The 1st Plaintiff shall cease as a director of UEM Genisys Sdn Bhd ("UEG"), only upon the valuations being completed and the Price being ascertained by the Valuer.

10. The 1st Defendant's obligations to make payments as set out in paragraphs 6 to 8 above shall cease if the valuation process is stopped at the instance of the Plaintiffs in writing save that the said obligations of the 1st Defendant shall continue upon the Plaintiffs requesting in writing that the valuation process continue.

11. Any payments made by the 1st Defendant in excess of the Price as decided by the Valuer shall be refunded to the 1st Defendant as follows:

(a) if the sum to be refunded is less than $1 million, then the Plaintiffs shall make such refund within 2 weeks of the Price being decided;

(b) if the sum to be refunded is equal to or more than $1 million but below $2 million, the Plaintiffs shall make such refund within 1 month of the Price being decided;

(c) if the sum to be refunded is equal to or more than $2 million but below $3 million, the Plaintiffs shall make such refund within 2 months of the Price being decided; and

(d) if the sum to be refunded is equal to or more than $3 million but below $4 million, the Plaintiffs shall make such refund within 3 months of the Price being decided.

12. The balance of the Price, less all payments to account, shall be payable, upon the valuations being completed and the Price ascertained, as follows:-

(a) if the Value is determined to be a sum less than $10.0 million, then payment of the balance of the Price (less all payments to account) shall be made 3 months from the date the valuations are completed.

(b) if the Value is determined to be a sum exceeding $10.0 million, then payment of the balance of the Price (less all payments to account) shall be made in two instalments. The first instalment of the balance of up to $4.7 million, shall be payable in 3 months from the date the valuations are completed. The final instalment, if any, shall be payable not later than 6 months after the valuations are completed.

13. Upon payment to the Plaintiffs of the sum of $1.0 million on 21st July 2000:-

(a) all the share certificates for GIE presently held by the Plaintiffs shall be delivered by the Plaintiffs to an escrow agent together with duly signed transfers by each of them, pending payment in full of the Price whereupon the 1st Defendant shall have the shares in the said certificates transferred to him. All stamp fees and costs of the transfer shall not be borne by the Plaintiffs;

(b) the 1st Defendant shall be entitled to appoint directors of GIE and any subsidiary or associated company as from this date;

(c) the 1st Defendant shall be entitled to transfer 10,000 ordinary shares in GIE to a single nominee forthwith; and

(d) the Plaintiffs shall tender letters of resignation as employees and in the case of the 1st Plaintiff, as a director, of GIE effective immediately.

14. Upon payment to the Plaintiffs of the sum of $1 million on 14th August 2000:-

(a) the 1st Defendant shall furnish evidence from banks that the guarantees signed by the 1st Plaintiff for GIE or its associated or subsidiary companies as notified by the Plaintiffs in writing to the 1st Defendant on or before 21 July 2000 (the "Notified Guarantees"), have been discharged. The 1st Defendant will indemnify the Plaintiffs against any claims or liabilities in respect of the Notified Guarantees incurred between 21 July – 14 August 2000;

(b) the 1st Defendant shall furnish evidence from banks that any further guarantees signed by the Plaintiffs for GIE or its associated or subsidiary companies which may be later identified in writing and notified by the Plaintiffs to the 1st Defendant, have been discharged within 4 weeks of such notification; and

(c) the Plaintiffs shall resign from all directorships in associated or subsidiary companies save for UEG.

15. *The terms set forth in the Order shall be in full and final settlement of all claims, matters and disputes which the Plaintiffs, 1st Defendant and 2nd Defendants have or may jointly or severally have between them and arising from or relating to this action or any matter referred to therein. Without limiting the generality of the foregoing, neither party shall hereafter raise or make any further claim against GIE or its subsidiary and associated companies or cause*

GIE, its subsidiary and associated companies to make any claim against the other in respect of all such matters compromised, which shall include any loans, advances made or monies of GIE, its subsidiary and associated companies to the Plaintiffs or the 1st Defendant. Neither party shall make or cause to be made, any complaint to any state or government authority in respect of the matters arising in this action.

16. The parties shall co-operate and take all steps necessary, including signing all resolutions and all documents, in connection with and to give effect to the terms of this Order.

17. There be no order as to costs between the parties and all orders of costs previously made are hereby rescinded.

18. There be liberty to apply.

[emphasis added]

I have added emphasis to the portions that are more significant in the present action, and, for convenience, shall refer to the consent judgment recorded by Rajendran J as "the consent judgment" or the "consent orders" where appropriate, and to the orders of court of 24 May 2000 as the "24 May orders". The major difference between the consent judgment and the 24 May orders is that under the consent judgment, the shares in GIE were to be valued as at 11 August 1999 whereas under the 24 May orders, the value of GIE was to be determined as at 11 August 1999 and 4 May 2000. The difference was not material for the purposes of this trial because the parties eventually agreed to the 11 August 1999 date (which was the date the plaintiffs formally gave notice of action against Seow).

2 Don Ho released his valuation report on 20 September 2000 stating that the NTA value of GIE on 11 August 1999 was $3,604,883 with no goodwill or intangible assets. The shares of GIE were accordingly valued at $0.7068 cents each. The plaintiffs were stunned because the NTA value of the company as at 31 December 1998 was $19.7m. The plaintiffs could not believe that this value could have plummeted to $3m in just eight months. Consequently, they commenced this action against the defendants with the view of setting aside the valuation of Don Ho. Counsel for the defendants, Mr Randolph Khoo, as well as Mr Chong Boon Leong (then of Rajah & Tann, the plaintiffs' previous solicitors), conceded that by reason of the comprehensiveness of the consent judgment, Don Ho's valuation could not be set aside except on account of fraud. The fraud that the plaintiffs alleged in this suit was based on the ground that Seow suppressed relevant materials and also presented false information to Don Ho, and thereby caused him to produce a completely erroneous valuation. The plaintiffs' theme throughout this action was, "rubbish in, rubbish out".

3 It is necessary to deal with the process concerning and leading to the valuation report of 20 September 2000. As I had mentioned, Don Ho was briefed to commence the valuation exercise as early as 24 May 2000. Furthermore, under the consent orders, the parties were entitled to address their concerns to him, which they did. Amidst a running quarrel between the parties over the adequacy of disclosure of documents, the plaintiffs submitted their written submissions with the assistance of their counsel and also their expert accountants, Ernst & Young. Likewise, Seow submitted his comments through his counsel and accountants, Arthur Anderson. The first submissions were exchanged and given to Don Ho on 22 August 2000. The parties' reply submissions were given to Don Ho on 5 September 2000. Following that, oral submissions were made on behalf of both sides on 7 September 2000 after which a third submission was put in by the plaintiffs on 13 September 2000. Seow was advised by Arthur Anderson that the value of GIE, according to their valuation, was $1,249,136.00. The plaintiffs' experts advised them that the value was closer to $23.7m, not taking into account goodwill and intangibles. The plaintiffs' case in these proceedings may be classified under

two broad headings. First, in fraud as evinced by the four "key episodes" (the fraud claim), and secondly, in the "contumelious breach" of various discovery orders (the striking out claim).

4 After Mr Khoo closed the case for the plaintiffs, Mr Shanmugam SC (counsel for the defendants) informed the court that the defendants elected not to call any evidence on the ground that the plaintiffs had not made out a case to be answered. I shall deal with the effect and consequences when a defendant elects not to call any evidence, shortly. In the meantime, it will be convenient to consider the first part of the plaintiffs' claim (the fraud claim). Counsel for both sides proceeded on the basis of the four principal instances of alleged fraud that were conveniently labelled by Mr Khoo as the "key episodes" of fraud. It is important at this juncture to indicate how I intend to deal with the issues. In a case such as this, one would have to make his way through a long and serpentine stream of words and figures were I to set out each and every issue, the evidence, as well as all the submissions that had been made, and also the court's findings and conclusions on each and every one of them. I wish to avoid that and hopefully maintain the sense and balance of the grounds upon which the court's decision was reached. The clarity and meticulousness of counsel and their teams have enabled me to recast only the principal and essential parts, referring to specific details only where required. In short, I shall focus on the foundation and the pillars of the case, and leave the less critical aspects to leisure and pleasure, or at such spaces in this judgment where I can conveniently tuck them without disturbing the superstructure or infuse tedium into what is already a long story.

Fraud: First issue – the SG debt

5 The first of the "four key episodes" of the plaintiffs' claim concerned "the SG debt issue". GIE had signed two agreements with Seow on 17 January 1997 concerning Syntech Genisys Co Ltd ("SG"), a joint-venture company in Thailand between GIE and a Thai company called Syntech Construction Ltd. The first concerned the sale by GIE to Seow of 16,000 shares in SG. The agreement contained a put option, which obliged GIE to buy back the shares at Seow's instance by 30 June 1999. The second agreement concerned the assignment by GIE to Seow of a debt of $5,100,374 owing by SG to GIE. This too had a put option that entitled Seow to re-assign the debt to GIE by 30 June 1999. The intention of the parties at that time was to do something positive about the bad debts owing by the Thai company with which the Singapore parties had fallen out. The assignment of the debts to Seow meant that GIE was more likely to recover the debts because Seow was assumed to be a more creditworthy debtor. But when Seow exercised his right of re-assignment, all these debts had to be written off, thus diminishing the value of GIE.

6 The plaintiffs' complaint in this regard was that Seow had deceived Don Ho into believing that he (Seow) had validly exercised his rights under the put options. They alleged that Don Ho was deceived into believing that Seow's right to exercise his options was extended on 28 June 1999, to expire on 30 June 2004. The plaintiffs claimed that the put options were not in fact exercised before 30 June 1999 but later. In respect of the put option concerning the 16,000 shares, Seow's case was that the extension was authorised by Tan on 16 July 1999. But the plaintiffs now say that Tan had no authority to authorise the extension since he was only an alternate director to Soh, and that at the material time Soh was in Singapore, hence, if any extension was required, he should have been the person to authorise it. So far as the put option concerning the re-assignment of debt was concerned, the plaintiffs denied that there was any extension, and maintained that the extension must have been forged by Seow. More importantly, they alleged that the agreements did not provide for any extension of the deadline for the exercise of the put option. They had repeatedly asked Seow to produce the original agreement in order to compare it with the copy produced by Seow. The original was never produced.

7 The defendants' case was that the extension was proper and that the plaintiffs had never questioned the authority of Tan to amend the agreement and extend the deadline. This particular approach normally requires evidence in support. Since the Defence offered no evidence, it must therefore persuade the court that the plaintiffs' evidence was so unreliable (or that its case cannot be maintained at law) that no rebuttal was necessary, otherwise, the defendants' election not to call evidence might adversely affect their case. Of the four "key episodes", the SG shares and debt issue was probably most daunting to the defendants in the sense that it raised a question that appeared in need of explanation, and that is: Why had Seow not produced the original agreement? Mr Shanmugam presented three arguments against the validity of this claim. First, he argued that in the original action in OS 1902, the plaintiffs recognised and acknowledged that the put options had been extended to 30 June 2004, and Soh himself swore an affidavit to this effect. Furthermore, under cross-examination in the present proceedings before me, Soh had agreed that that was so. Secondly, the plaintiffs had specifically brought these complaints to the attention of Don Ho while he was still carrying out his valuation exercise. Thirdly, in any event, order 15 of the consent judgment categorically provided that neither party (plaintiffs nor defendants) may procure GIE to sue on any debt that Soh, Tan, Ang, or Seow might owe GIE as at 11 August 1999. Apart from the uncertainty concerning the forged extension, all three arguments are factually correct. It is possible that during the action of OS 1902 the plaintiffs had assumed that the deadline was validly extended at the material time; but it is also possible that they either knew or did not care because the transfer of shares and debt of the Thai company were for cosmetic reasons only. Thus, it is in this context that the question (whether Seow's failure to produce the original agreement with the extended deadline was a fatal omission) ought to be examined. In this regard, I accept Mr Shanmugam's argument that the document, even if forged, was immaterial to the valuation. It might have been useful to Seow personally prior to the consent judgment, but had since become irrelevant because this case is not about fraud (of which forgery is a species), but fraud *on the valuer*.

Fraud: Second issue – the value of UEG

8 UEG (United Engineers Malaysia Genisys Sdn Bhd) was a joint-venture company of GIE and the Malaysian company, United Engineers Malaysia Bhd ("UEM"). The plaintiffs asserted that Seow, who had control over the books and accounts of UEG, manipulated the accounts such that GIE's investment in UEG was valued at nothing by Don Ho. They claimed that that cannot be right because as at 11 August 1999 UEG had cash assets of RM11.6m, and its net tangible asset value was RM16.72m. Their counsel submitted that Seow had induced Don Ho, by means of fraudulent misrepresentations, to misapply accounting principles and thereby took into account doubtful debts and liabilities resulting in his having to write off all the debts owing to UEG by various parties. The long list of such liabilities included the Telekom HQ plumbing project, the Johor Duty Free Complex, Wakaf College project, and debts from the Faber Group. The plaintiffs claimed that Seow had fraudulently misled Don Ho in all these projects. In the Telekom HQ project, for instance, they said that Don Ho was falsely led to believe that the project was delayed for two years, during which time it was funded by UEG, and that it would be unlikely for this debt to be recovered. They also said that Don Ho was led to believe that the Wakaf College would be constructed at UEG's own cost, and that Don Ho was not told that the debts due to UEG would be paid by UEM, thus, Don Ho wrongly wrote them off as bad debts.

9 Mr Shanmugam responded to each item of complaint in turn. In respect of the general approach, he referred to the submissions made by the plaintiffs to Don Ho where, on the advice of their expert accountant, Kon Yin Tong, they strongly suggested that Don Ho jettison the "percentage of turnover" formula in favour of "actual costs" in his evaluation. In respect of the probable value of UEG at the material time, Sulaihah, a director of UEG, under cross-examination by Mr Shanmugam, acknowledged that UEG's draft accounts as at 31 December 1999 showed a loss of RM10m – which

was more than that assessed by Don Ho (RM7.4m). The parties had agreed in the consent judgment recorded by Rajendran J that the accounts of 1998 were to be binding on them. I accept Mr Khoo's thematic point that fraud unravels everything, but in this instance, the substance of the alleged fraud was not based on freshly discovered information. They were matters that could be, and were raised, explored, and investigated before the accounts were accepted. It is more pertinent to note that in each of the alleged instances of fraud *ie* Telekom HQ, Wakaf College, and Mancon, Don Ho's attention was drawn sharply to these matters. Whether, and how much more money was likely to be collected in each instance by UEG had been clearly put to Don Ho, but Don Ho had either disagreed with the suggestions or placed little value to them (which comes to the same thing so far as his report was concerned). In some matters, it is apparent that Don Ho was quite right in not taking them into account, but some others remained matters of professional debate, for example, whether an accountant or valuation expert in those circumstances ought to have made some provision for this item or that. In other words, they were matters of professional discretion and judgment - for instance, in respect of the Telekom HQ project, the evidence showed that some RM6.8m had been due and owing to UEG for over two years. If Don Ho thought that the debts could not be recovered, it would be he, not Seow, who had to explain himself.

Fraud: Third issue – The PWD projects

10 The allegations here concerned three projects: The Traffic Police HQ project; the Cantonment Road Complex; and the Ministry of Home Affairs project. The theme in respect of these projects was that Don Ho did not take into account expected profits of GIE because of fraudulent non-disclosure by Seow. In respect of the Traffic Police HQ case, one of the quarrels concerned the valuer taking into account anticipated costs (after the provisional budget had been increased) but not anticipated profits. The plaintiffs' expert conceded that some accountants might regard this as an acceptable method of valuation while others might disagree. On another point, GIE tendered for the project at $2,682,800 at a budgeted cost of $2,359,070 that would have given it a 12% profit. The plaintiffs' evidence was contradictory. The initial budget cost was submitted to Don Ho as $2,637,529 and thus, the profit would have been 1.7% instead of 12%. This was corroborated by admission by Tan that the budget cost was prepared at a low, if not nil profit margin. It was also asserted that a sum of $318,018 was put into the budget cost on behalf of one of their sub-contractors, Wai Kee, and the amount was in fact recoverable from Wai Kee. The evidence indicated that this was a piece of dubious optimism, and even Tan himself admitted as much under cross-examination.

11 The plaintiffs alleged that the Cantonment Road Complex project was awarded at $3,386,800 with a budget cost by GIE at $3,006,000. Thus a profit at 11.2% would have been expected. The plaintiffs also complained that the balance budget summaries of GIE showed that there was a substantial increase of budget from $3,006,000 to $3,768,056. The plaintiffs maintained that the increase was unwarranted; and it was done merely to inflate the costs, and thereby reduced the profitability of GIE. The two points are connected. As Mr Khoo submitted (at para 235 of Plaintiffs' Submissions, Part B):

> If the budget was not contrived or fraudulently increased by the Defendants to $762,056, [Don Ho] would have taken the original contract sum of $3,386,800 and deducted from it the correct budgeted costs of $3,006,000. This would disclose a profit of $380,800 and not losses of $381,256."

There was no reasonable evidence that supported the plaintiffs' claim. What had been adduced proved contradictory at best. For example, the assertion that GIE would have made substantial profits (if Seow had not fraudulently increased the budgeted costs) is contrary to the plaintiffs' admission that they (both Seow and Tan) had intentionally taken the decision to tender for the job at low or no

profit. The plaintiffs explained the commercial reason for this plan. They were happy just to get the jobs if the projects were substantial because GIE's reputation and profile would increase by association or involvement with such projects. Furthermore, Tan admitted under cross-examination that all the matters complained of had been raised in their submission to Don Ho. The plaintiffs wanted to show that Don Ho's working papers would reveal that he had relied upon the "false" figures supplied by Seow. Since Don Ho was not being called as a witness, his working papers were clearly inadmissible. Except by consent, the person who scribbles such notes must present them in court himself and give an account of those notes so that he can be cross-examined on them in respect of the accuracy and reliability of the notes, as well as that of any subsequent conclusion or opinion that might have been formed in reliance on them.

12 The same pattern of allegation and rebuttal followed in respect of the Ministry of Home Affairs project, another feather in the cap for GIE at the time when they were awarded the contract. Again, they had placed a low tender price ($13,989,000) but the budget cost taken up in the valuation by Don Ho was $17,981,930. This was criticised by the plaintiffs on two grounds. First, they said that Seow had fraudulently under-priced the tender and subsequently inflated the variation costs. The result was that instead of profits, losses were shown. Secondly, that Don Ho was wrong to take into account the variation costs but not the resulting profits. This ground was traversed several times at trial, and I am satisfied that Don Ho had taken an approach that was professionally acceptable although other approaches might have been available, and even Mr Kon, the plaintiffs' expert, accepted that that was so. And as in all the previous assertions of fraud, the plaintiffs presented the complaints in respect of the Ministry of Home Affairs project to Don Ho in their submissions, both written and oral. The response by Don Ho further indicated that he had taken all these complaints into account.

Fraud: Fourth issue – the 1999 losses (TFP and EWTC claims)

13 In respect of the Traffic Police HQ project ("TFP"), the plaintiffs averred that the valuer was falsely provided with information leading to a wrongful valuation of costs anticipated for variation works. The claim was based on the plaintiffs' opinion that the costs for the project were (or should be) $1,917,605 and not the sum of $2,275,912.94 as was given to Don Ho. I need not dwell on this allegation nor that concerning the related allegation that the resulting difference of $358,302.58 was double counted as a loss. The evidence showed that these two points were clearly brought to Don Ho's attention and that he had addressed his mind to them. If he had any misgivings subsequently he must come forward and tell the court what they were. Mr Khoo himself had little to say about them in his submission other than pointing that the assertions in the affidavit of evidence-in-chief of Ang Chye Soon had not been challenged. This is not quite accurate. The crucial evidence of Don Ho's knowledge had been fully ventilated through cross-examination of Ang as well as Soh and the undisputed written submissions made by the parties to Don Ho in the course of his valuation exercise. The crux of the plaintiffs' evidence on these points can be found in para 202 of Ang's affidavit where he says:

> By failing to recognise the appropriate project costs and mis-matching it with the recognised project revenue of $1,917,605 GIE's valuation for the period 1 January to 31 July 1999, was undervalued by $506,378.57, for the TFP project. This comprised the fraudulently recognised loss of $358,307.94 and the imputed profit that ought to have been taken into account of $148,070.63.

The same points were made in their written submissions (Submission no 2) to Don Ho in which the same figures were also stated. The plaintiffs were virtually shouting "fraud" to Don Ho's face.

14 The claim involving EWTC concerned the allegation that Don Ho was misled into over-providing a liability in the form of a claim made by a company known as EWTC Electrical Engineering Pte Ltd ("EWTC") against GIE. The plaintiffs deposed that EWTC had taken GIE to arbitration in respect of a claim for US$863,100.69. They said that Seow fraudulently failed to disclose to Don Ho that EWTC had offered to settle by paying GIE US$500,000. If he had been told, the provision for loss would have taken this US$500,000 into account and been reduced accordingly. The arbitration was subsequently settled, after Don Ho's report was released, at US$490,000. Furthermore, it was alleged that Seow did not produce the documents that would show that GIE had a counterclaim for US$350,000. The documentary evidence showed that Don Ho was aware of the arbitration between EWTC and GIE and, in the absence of any evidence from him, I am unable to make any finding of fact as to what specific documents were or were not disclosed to him. But that is of little importance because the plaintiffs *had* drawn Don Ho's attention specifically to the counterclaim as well as the offer to settle at US$500,000. I do not see how any allegation of fraud can be sustained on these incontrovertible facts unless the plaintiffs are saying (which they do not) that the failure of Seow *himself* to make these facts known to Don Ho itself constituted fraud, notwithstanding that Seow's fraudulent designs were foiled when the plaintiffs provided the information to Don Ho. That had been Mr Khoo's main argument for not calling Don Ho. He submitted that Don Ho is not a relevant witness; that the only issue was whether "the valuation was tainted by fraud". He submitted that how "the fraud got past the valuer is irrelevant". That is a Thomist's notion of deceit (Aquinas propounded the view that *lying* is the making of a statement that the maker believes to be untrue, and it does not matter that the statement was, in fact, true). I do not think that this should be the test for fraud in a civil, as opposed to criminal law (where attempted fraud is itself an offence). In any event, the test must be whether Don Ho was deceived. Contrary to Mr Khoo's submission, Don Ho would have been a critical witness to the plaintiffs on this point.

15 In the course of the trial, Mr Khoo made various attempts to defend his witnesses from the searching cross-examination of Mr Shanmugam. I overruled his objections in many instances on the ground that I do not run a "witness protection programme". I shall now like to elaborate on that: An important aspect of the court's function is to let the witnesses say their piece; and to let counsel question them as they fancy, constrained only by the rules of evidence, time and counsel's vision. Thus, a court would not interfere just because the cross-examination is conducted more crossly or sternly than the opposing counsel may have liked. The hotter the fire, the brighter the truth. A court would not, of course, participate in the questioning of a witness, be it to damn him or to help him, lest it loses the aura of impartiality, if not impartiality itself. The witnesses in the present case were well educated and experienced professionals. Their testimonies in court were clear and articulate. And it was because the plaintiffs were subjected to such intense cross-examination that I was able to form the view that all three of them are honest men. They are competent and able in their own fields, and even appear to have an ostensibly good reason to ask how it was that a company that was once on the verge of public listing, with a potential asset value of $19.7m, be valued at only $3m barely eight months later. In the light of their acrimonious past, it was probably not unreasonable for them to suspect that Seow was responsible for that change. They each believed that Seow was the personification of the confederate villains, bad faith and chicanery. I had no opportunity to assess Seow since he did not testify as a witness. But before the court should consider drawing any adverse inference from his absence, it must be satisfied that his presence was necessary. The burden of proof in such a case is not the same for both parties because the plaintiffs must first prove that there was a case that required rebuttal, at least on some crucial issue. The plaintiffs expended great effort to find evidence to prove so. They had given all the discovered documents together with an analysis of the state of affairs (with assistance from their solicitors and expert accountant) to Don Ho – three times in writing and once orally. In between submissions, numerous letters were despatched by their solicitors to the defendants' solicitors and to Don Ho. In his response by way of letter and report, Don Ho made it clear that he had taken all the points raised by the plaintiffs into account. The evidence

at trial did not reveal anything exceptional or critically important that had not been raised previously to Don Ho. The gap between proof and suspicion may be as narrow as the slimmest thread; but unless it is bridged, that gap might as well stretch through infinity, whose end no eye could reach.

16 I find no evidence to satisfy me that there was any fraud on Don Ho. The burden of proof of fraud in a civil case is said to be higher than proof on a balance of probabilities but lower than that of proving beyond reasonable doubt. I doubt the wisdom of attempting a more precise definition of what that means, lest lawyers strain to pick the twigs and leaves and miss the picture altogether. It is sufficient to say that the judge must warn himself that an assertion of fraud is serious enough to merit a high degree of proof. How that burden is discharged depends on the individual circumstances of the case. That must include the nature of the fraud alleged, the instances of fraud, and how strong and reliable the evidence is. In the present case, there is a factor that is significant by its absence – the evidence of Don Ho. Mr Khoo has not succeeded in persuading me that Don Ho was not a material witness for the plaintiff. The detailed consent judgment forms the relief against which this present claim must be examined. The parties, especially the plaintiffs, had ensured that there would be scarcely any room for concealment, mischief, or sloth. None of the protective devices in that judgment was triggered. So, without Don Ho, this present action comes too late, with too little.

Plaintiffs' application to strike out Defence

17 That brings me now to address the plaintiffs' second substantive ground – that the Defence ought to be struck out on account of a contumelious breach of discovery orders. They include an "unless order" issued by me on 1 April 2002 (in the plaintiffs' appeal against the assistant registrar's refusal (on 9 July 2001) to strike out the Defence for failing to comply with discovery orders made previously). The major part of the plaintiffs' complaint concerned the balance budget summaries ("BBS"). These were documents recording the details or particulars in instances where there was a budget overrun. A purchase or works order is an example of such a document as it will contain the reason for the request and it will lead to other documentation as to what was done and the costs involved. The plaintiffs maintained that in many such instances, these documents (purchase/works orders) were not produced to support the transaction. The conclusion counsel wished me to draw is that the BBS were either falsely declared or falsely suppressed. In either way, the consequence was that Don Ho was not given the correct accounting material for his evaluation of the company's worth. Mr Khoo also submitted that contrary to Seow's evidence on affidavit, there were no BBS to record the many instances of budget revision. In some instances (*eg* the UEG project) the plaintiffs demanded sight of all BBS and all documents related to each of the BBS. The defendants have stated that in most of those instances Don Ho was aware that there were no available documents and he had taken that into account.

18 This was a difficult and unusual case to determine, at the interlocutory stage, whether there were any breaches of the discovery orders, and if so, what they were, and whether the breaches were of such a nature that the Defence ought to be struck out for non-compliance. It was also difficult and not very sensible to carry out a determination of these questions so close to the trial where the same issues were likely to arise (which as it transpired, was the case). I had therefore ordered that the plaintiffs' application (for striking out the Defence) be heard as part of the issues at trial. I was mindful that interlocutory matters should, as far as possible, be kept distinct from the bigger arena of the trial court, and to be dealt with at the interlocutory stage because that is the nature of interlocutory matters; they are skirmishes designed with the objective of preventing the trial from becoming too long or unmanageable. In the present case, I had taken into consideration the fact that many orders for discovery had already been made, and that there had been substantial compliance by the defendants. It also appeared that the plaintiffs had abandoned 11 of the 16 allegations of fraud after discovery. Finally, without the evidence of the experts (particularly Don Ho)

it was impossible to know what other documents were truly relevant, or even in existence at all. It would have been helpful had Don Ho deposed as to what other documents he would have liked to see, given the state of knowledge that the plaintiffs had at the time they asked for the specific discovery. Don Ho was conspicuous by his silence and absence.

19 It is always difficult for a court to order the production of documents at the interlocutory stage when the party in question has sworn that he does not possess the documents sought. Now, at the end of the trial, I am satisfied that there was no material non-disclosure of documents of a contumelious nature such that the Defence ought to be struck out. There were indications that there might be some documents that were not disclosed, for example, the defendants did not produce any BBS recording a transfer of RM60,000 on 7 June 1996, in one of the UEG projects, although it was noted in a BBS dated 27 September 1996. But this, as well as all the other instances raised, did not affect the critical findings of fact that I had to make in respect of the trial proper. The failure of the plaintiffs' case was due to the inherent inadequacy of their own primary evidence. The documents they sought in discovery should, at best, be corroboration of that evidence – not in lieu of it. This point requires some elaboration. The plaintiffs have alleged fraud and cited a number of events that they said constituted fraud in each of them. They must therefore satisfy the court that they had the evidence to support these allegations at trial. This duty does not affect an independent state of affairs in which evidence of fraud is discovered in the course of the interlocutory process. In that situation, the plaintiff would be entitled, if not obliged, to amend his claim so as to incorporate the fresh evidence of fraud. The thrust of Mr Khoo's argument on the discovery issue was that the failure to give discovery had prevented the plaintiffs from adducing evidence of fraud. But the plaintiffs have applied the discovery process (including the extra-judicial emphasis impressed upon Don Ho in regard to the materials sought) to the fullest. Seow had co-operated in some instances, and resisted others. In this regard, the discovery exercise proved to be a speculative exercise. In the end, I am of the view that there was no breach of the discovery orders sufficient to warrant a striking out of the Defence.

20 I shall now consider a little more fully the effect of Mr Shanmugam's submission of no case to meet. The basic rule is that the plaintiff must first prove its case to the court. The task of the Defence is to expose the weaknesses and flaws in that case so that the court may, on a balance of probabilities, find that the plaintiff's case cannot be sustained. Thus, all the tussles and the cut and thrust at trial are manoeuvres towards that objective. Where a defendant offers no evidence, it has to persuade the court that either the plaintiff's case cannot stand on its own, even without any rebuttal evidence from the Defence, or that the evidence does not disclose any cause of action in law. This approach was endorsed by the Court of Appeal in *Bansal Hermant Govindprasad v Central Bank of India* [2003] 2 SLR 33. The evidence of the plaintiffs here failed to persuade me that there was any *fraud on Don Ho*. (The last four words of the preceding sentence are emphasised because those words represent the foundation and mainstay of the plaintiffs' claim). There could only be fraud on the valuer (Don Ho) if fraud was practised on him without his knowing it. Fraud in this context would have included a situation in which he was aware of all the facts and events as they occurred, but was unable to see that he was being deceived in the process. In such event, he must tell the court that he has since realised the truth, and that had he known of it at the material time, his valuation would have been different. Although Don Ho did not testify, his report and all the submissions made to him were admitted in evidence by consent of the parties. It is not without significance that it was made clear to me at the trial that Don Ho was available as a witness and was prepared to testify. Neither party wished to call him because that would confer the advantage of cross-examination to the other side. Unfortunately for the plaintiffs, the absence of Don Ho's evidence undermined their case as effectively, if not more so, than if he were utterly destroyed by cross-examination. This was because all the evidence indicated very clearly that Don Ho was not deceived.

21 There is one other matter that emphasised the weakness of the plaintiffs' case. Under the consent order recorded by Rajendran J, the plaintiffs were entitled to refer to the court should there be a dispute concerning any non-disclosure of documents; or halt the valuation process (with liberty to re-commence it) by letter to the valuer; and to apply to court at any time before the valuation process ends. This appears to be a well-thought-through back-up procedure should things not go according to the parties' expectations. Of course, the fact that the plaintiffs did not exercise any of these rights does not mean that they are estopped from suing to nullify the valuation report, especially where fraud is involved. But it does mean that the court will have to consider the present allegations of fraud against this background. Seow might have taken advantage of ambiguities in accounting principles that the plaintiffs had not appreciated before, but that is not fraud in law. The plaintiffs had the choice of suing as they did, in which event, Don Ho became an indispensable witness to them; or they could have exercised their rights under the consent order and reverted to the court, prior to the release of the valuation, for more specific orders. There were clearly advantages and disadvantages in either case. The plaintiffs chose one over the other. It turned out to be the wrong call.

Conclusion

22 For the reasons above, I dismiss the plaintiffs' claim with costs. I will hear parties on the issue of costs if they are unable to agree costs.