Giorgio Ferrari Pte Ltd *v* Lifebrandz Ltd and others
[2012] SGHC 206

Case Number : Suit No 894 of 2009 (Registrar's Appeal No 219 of 2012)

Decision Date : 10 October 2012

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : David Liew (LawHub LLC) for the plaintiff/appellant; Chan Wei Meng and Ho Kheng Lian (Drew & Napier LLC)for the defendants/respondents.

Parties : Giorgio Ferrari Pte Ltd — Lifebrandz Ltd and others

Civil Procedure

10 October 2012

Andrew Ang J:

Introduction

1 This was an appeal against the learned assistant registrar Eunice Chua's ("AR Chua") decision on 14 May 2012 allowing the respondents' ("the Respondents") application under Summons No 1819 of 2012 ("SUM 1819/2012") to strike out the appellant's ("the Appellant") claim and enter judgment against the Appellant. The Appellant appealed against my decision dismissing the appeal. I set out below the grounds of my decision.

Background facts

2 On or about 8 December 2006, the Appellant entered into four separate contracts (in similar terms) with the second to fifth respondents ("the Second to Fifth Respondents") respectively ("the contracts") under which the Appellant agreed to sell to each Respondent various alcohol products during the contract period running from 1 January 2007 to 31 December 2008 ("the contract period").

3 The Appellant commenced an action against the Second to Fifth Respondents on or about 22 October 2009, claiming for loss and damages of $5,818,973.48 (this being the sum of the balance of the contract value of each contract as a result of alleged breaches of contract by the Second to Fifth Respondents) and the sum of $699,308.99 representing the refund for certain Advertising and Promotion Funds ("A&P funds") which the Appellant had provided to the Second to Fifth Respondents in support of all marketing activities related to the Appellant's products. The Appellant's position was that the claims were joint and several in respect of the Second to Fifth Respondents. The Appellant's claim against the first respondent ("the First Respondent") (the ultimate investment holding company of the Second to Fifth Respondents) was for loss and damages arising from the breach of the contracts by reason of an alleged oral agreement between the Appellant and the First Respondent.

4 The paragraph of the Appellant's Statement of Claim (Amendment No 4) ("ASOC4") from which the dispute in discovery documents arose is reproduced as follows:

> 18. The Plaintiffs will give credit for their costs and expense to be incurred had the Defendants fulfilled in full the Agreement and the four Contracts particularized herein, to be taken into

consideration in their claim for damages resulting from the Defendants' breach of the Agreement and the four Contracts, to be assessed.

Particulars

...

(2) Had the Agreement and the four Contracts been fulfilled in full by the Defendants, the Plaintiffs would have to incur costs of purchase, shipping, delivery, taxes, insurances, storage charges, custom and excise duties for the volume of their products to be supplied under the Agreement and the four Contracts, as well as the Plaintiff's' costs of doing business in Singapore to supply, stock and deliver the said volume of their products which the Defendants did not purchase, in breach of the Agreement and the four Contracts, as particularized in paragraph 18 herein.

...

(4) The Plaintiffs' average gross profit margin during the period of the Agreement and the four Contracts (that is for the year 2007 to the year 2008) is *an estimate of 49.64% of the total value of the Plaintiffs' products purchased by the Defendants* in the sum of $4,681,026.52, after taking into consideration their costs and expense incurred.

(5) The Plaintiffs aver that had they fulfilled the Agreement and the four Contracts in full, the Plaintiffs would also have made an *average gross profit of 49.64% of the total volume of the Plaintiffs' products* which the Defendants did not purchase in breach of contract, of the sum of $5,818,973.48, which is estimated at $2,888,538.44.

[emphasis added]

5 Based on the above pleadings, the Appellant was required to disclose the documents which were used to arrive at the figure of 49.64% representing the Appellant's average gross profit. These would include documents evidencing the net sales, costs and expenses incurred, and gross profit made in relation to supplying alcohol products to each of the Second to Fifth Respondents pursuant to the contracts. As such, the Respondents applied for specific discovery of the relevant documents in Summons No 5029 of 2010 ("SUM 5029/2010"). AR Chua, who heard the application, made the following orders ("the Specific Discovery Orders") on 8 December 2010:

(a) The Appellant to file and serve on the Respondents an affidavit, stating whether it has or has had at any time in its possession, custody or power, the documents set out in Annex A of SUM 5029/2010, by 5 January 2011;

(b) The Appellant to file and serve on the Respondents a Supplementary List of Documents, listing the documents set out in Annex A of SUM 5029/2010 which are in its possession, power or custody, by 12 January 2011;

(c) The Appellant to allow inspection of the documents listed in the said Supplementary List of Documents; and

(d) The Appellant to provide the Respondents with a copy each of the documents specified in the said Supplementary List of Documents.

6 There was no appeal against the Specific Discovery Orders. The Appellant nevertheless failed to file the said affidavit by 5 January 2011 and the said Supplementary List of Documents by 12 January 2011. During a pre-trial conference ("PTC") on 27 January 2011, the learned senior assistant registrar Ng Teng Teng Cornie ("SAR Ng") ordered the Appellant to comply with the Specific Discovery Orders by 10 February 2011. The Appellant subsequently filed and served its Third Supplementary List of Documents ("SLOD3") and an affidavit verifying SLOD3 on or about 10 February 2011, but failed to furnish copies of the documents listed in SLOD3. The Respondents then reminded the Appellant by way of a letter dated 11 February 2011 to furnish those documents by 17 February 2011. However, the Appellant did not do so.

7 In or about April 2011, the parties commenced settlement discussions, but the discussions eventually came to a halt. The exact point in time at which those negotiations broke down was disputed, although the Respondents submitted that this was around August 2011. On 5 December 2011, the Respondents sent another letter asking that the Appellant comply with the Specific Discovery Orders and provide copies of the documents in SLOD3. The Appellant did not comply.

8 When the parties appeared before SAR Ng for a PTC on 12 January 2012, almost a year after her order on 27 January 2011, she was informed that the Specific Discovery Orders had not been fully complied with. She then made an order that unless the Appellant complied with the Specific Discovery Orders and furnished copies of all the documents listed in SLOD3 by 4pm on 9 February 2012, the Appellant's case was to be dismissed with costs to the Respondents to be taxed or agreed ("the First Unless Order").

9 The Appellant appealed against the First Unless Order in Registrar's Appeal No 32 of 2012 ("RA 32/2012") and this was heard by Lai Siu Chiu J on 6 February 2012. Lai J gave a final extension of time for the Appellant to comply with the Specific Discovery Orders, granting an unless order for the Appellant to fully comply with the Specific Discovery Orders and provide copies of all documents in SLOD3 to the Respondents by 4pm on 20 February 2012, in default of which the Appellant's claim against the Respondents would be dismissed without further order with costs to the Respondents to be taxed or agreed ("the Varied Unless Order").

10 The Appellant served its Fourth Supplementary List of Documents ("SLOD4") on the Respondents and furnished copies of the documents listed in it on 17 February 2012. On 23 February 2012, the Appellant sent a letter to the Respondents explaining how the SLOD4 documents were relied on to compute the Appellant's profit margin. At a PTC before SAR Ng on 1 March 2012, she allowed the Respondents three weeks to review the documents and to seek clarification or make further requests by 22 March 2012. In a letter dated 13 March 2012, the Respondents sought clarification with regard to items 1 and 2 of SLOD3, as well as the SLOD4 documents, whilst reserving their rights with respect to the question whether the Appellant had complied with the Varied Unless Order.

11 The Appellant's solicitors sent a letter of clarification on 26 March 2012 to the Respondents' solicitors. On 27 March 2012, the Appellant then served its Fifth Supplementary List of Documents ("SLOD5") on the Respondents to further clarify its position on the 26 March 2012 letter.

12 At a PTC hearing on 29 March 2012, SAR Ng directed the Appellant to provide the documents listed in SLOD5 by 4pm on 30 March 2012, and adjourned the PTC hearing to 19 April 2012 so that the Respondents could review the Appellant's clarifications and documents. The SLOD5 documents were furnished to the Respondents on 30 March 2012.

13 After reviewing all the documents and clarifications, the Respondents were not satisfied that

the Appellant had complied with the Varied Unless Order, and made an application under SUM 1819/2012 for the Appellant's claim to be dismissed for failure to fully comply with the Varied Unless Order. This was heard by AR Chua on 14 and 25 May 2012. She found that the Appellant had failed to fully comply with the Varied Unless Order, and accordingly dismissed the Appellant's claim against the Respondents without further order. I heard the Appellant's appeal against the dismissal of its claim over two days, on 30 and 31 July 2012.

The decision below

14 AR Chua made the following findings:

(a) The Appellant had failed to comply with the terms of the Specific Discovery Orders and had taken the position that it was not necessary to produce the documents sought.

(b) It was not appropriate to grant an extension of time, which was requested for orally at the hearing. The Appellant had shown a cavalier attitude in saying that if the court took the view that its discovery obligation required disclosure of all the source documents, the Appellant would then apply for an extension of time to produce those documents. The Appellant had ample opportunity to seek clarification from the court as to the scope of its discovery obligations and to make a formal application for an extension of time but had failed to do so. There was also no basis for the distinction raised by the Appellant between a "housekeeping" unless order and one that was made pursuant to an application.

Appellant's case

15 The Appellant's position was that it had already given discovery of all substantial documents relevant to the dispute, but its claim had been struck out due to a technical point raised by the Respondents in their "incessant interlocutory applications". The Appellant maintained that if one were to consider the circumstances under which the Specific Discovery Orders, First Unless Order and Varied Unless Order were made, it was not the case that it had repeatedly breached these orders after having been given the chance to comply. The Appellant then cited *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR(R) 117 ("*Wellmix Organics*") where Andrew Phang Boon Leong J decided that the courts would only enforce unless orders if a party breached the order intentionally and either contumeliously or contumaciously (at [79], [103] and [107]):

> 79 ... notwithstanding the operation of normal contractual principles to consent unless orders, the courts ought still to have a residuary discretion to decide whether, in the circumstances of the particular case, *enforcement* of the consent unless order concerned ought to be effected. ...
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> ...
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> 103 ... I should point out, nevertheless, that in the light of the conclusion I had arrived at earlier – that the unless order was *not* a *consent* unless order but, rather, an "ordinary" unless order – it was necessary, in any event, to ascertain whether or not the defendant's breach in the context of the present proceedings was intentionally contumacious or contumelious ...
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> ...
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> 107 Like the learned assistant registrar, I find that the defendant's action, whilst intentional, was neither contumelious nor contumacious. Indeed, it seemed clear to me that there was a misunderstanding that not only contributed to the absence of an agreement but which also led

him to commit a merely technical breach of the order, having regard to the misunderstanding between the defendant and the plaintiff. These circumstances would themselves also constitute, in my view, extraneous circumstances, bearing in mind that this concept is neither mandatory nor writ in stone. ...

[emphasis in original]

16 Hence, the court would recognise situations where, despite the otherwise impeccable legal status of a consent unless order, the conduct by the party in breach may be insufficient to warrant the enforcement of that order. The threshold for enforcement was not merely a question of whether the conduct was contumelious or contumacious, but whether it was contumelious or contumacious to *such an extreme degree* that the consent unless order ought to operate (at [100]). In that case, Phang J found that there was an unless order (not a consent unless order), and while the defendant's action was intentional, it was neither contumelious nor contumacious. Rather, it was merely a technical breach by the defendant due to a misunderstanding. As a result, it did not warrant the harsh consequence of a striking out.

17 Accordingly, the Appellant argued that its breach, if any, did not warrant the harshest of consequences ensuing as a result of the breach. After all, it was clear from the affidavits of Giorgio Ferarri (the managing director of the Appellant) and Bernard Lim Miang (a director of the Respondents) that the parties had entered into protracted and without prejudice negotiations to try to settle the two ongoing suits between them from the time that the Specific Discovery Orders were made. The Appellant's failure to reply to the Respondents' solicitors' letters of reminder was due to the Appellant's pre-occupation with negotiating a global settlement. Hence, the Appellant's conduct between December 2010 and January 2012 could hardly be said to be deliberate or intentional, or without excuse or justification, or involving repeated non-compliance (whether contumelious or contumacious). Moreover, the First Unless Order was given by SAR Ng despite the fact that it was not applied for and was thus intended more as a housekeeping direction. According to the Appellant, this background was important in the assessment of whether the Appellant's behaviour was indeed contumacious and/or contumelious.

18 The Appellant argued that it had in fact *fully complied* with the Specific Discovery Orders and the Varied Unless Order. Based on the exact wording of the Specific Discovery Orders, there was no clear and specific direction or order that the Appellant had to give discovery of *all* the documents set out in Annex A of SUM 5029/2010 filed on 25 October 2010. The correspondence between the solicitors following the Varied Unless Order explained how the Appellant had relied on the documents (which had already been given to the Respondents) set out in SLOD3, SLOD4 and SLOD5 to compute its profit margin, as well as the manner and extent to which those documents had complied with the Specific Discovery Orders in full.

Respondents' case

19 The Respondents submitted that it was evident that the Appellant had not fully complied with the Varied Unless Order. This was clear from the Appellant's failure to produce all documents evidencing and/or relating to the Appellant's actual gross profit, net sales and cost of goods in relation to the supply of its products to each of the Second to Fifth Respondents from 2007 to 2008 (figures which the Appellant used to arrive at its average gross profit of 49.67%). This was in contravention of the Specific Discovery Orders and the subsequent Varied Unless Order to furnish all documents listed in SLOD3 by 4pm on 20 February 2012. Such a failure alone would be sufficient to warrant the Appellant's action being struck out. In *Wiltopps (Asia) Ltd v Drew & Napier* [1999] 1 SLR(R) 252, Lee Seiu Kin JC stated at [20]:

> ... *all that is needed is to determine whether the plaintiffs have complied with the terms of the unless order*. If they have not, then the action is dismissed without further order and if the defendants extract the order, as they have, then it is perfected. ... [emphasis added]

20 Since the terms of the Varied Unless Order were not complied with, the Respondents submitted that the Appellant's action should be dismissed. After all, despite having the opportunity to address its failure to comply with the Varied Unless Order, the Appellant nevertheless failed to provide any explanation and/or chose not to address specifically the manner in which it claimed that it had given full compliance. Thus, in the absence of good reasons, disobedience of a peremptory order should be treated as contumelious conduct which would justify the striking out of the Appellant's claim.

My decision

21 The law on the breach of an unless order is clear: non-compliance with an unless order would *prima facie* result in the action being dismissed or the defence being struck out. This was explained in *Singapore Civil Procedure 2007* (Sweet & Maxwell Asia, 2007) at para 24/16/2 as follows:

> ... An "unless" order spells out the consequences of failure to comply with its terms, and disobedience to such an order is likely to be held to be contumelious behaviour, resulting in the dismissal of the action or striking out of the defence. ...

22 Unless there are good reasons for non-compliance, disobedience of a peremptory order will be considered contumelious conduct justifying a striking out. This was stated by the Court of Appeal in *Tang Liang Hong v Lee Kuan Yew* [1997] 3 SLR(R) 576 where L P Thean JA held at [101]:

> In the circumstances, the only reasonable inference to be drawn was that Mr Tang had intentionally flouted the court orders. ***In the absence of good reasons, disobedience of a peremptory order is generally to be treated as contumelious conduct*** (*per* Lord Diplock in *Tolley v Morris* [1979] 1 WLR 592 at 603) **and *such contumelious disobedience justified striking out Mr Tang's defences*.** In our judgment, Goh Joon Seng J was fully entitled to make the orders which he did. The appeals against his orders are thus dismissed. [emphasis in original in italics; emphasis added in bold italics]

23 In *Syed Mohamed Abdul Muthaliff v Arjan Bhisham Chotrani* [1999] 1 SLR(R) 361 ("*Syed Mohamed*"), the Court of Appeal decided that the court should exercise its discretion whether to grant an extension of time for compliance with an unless order in the light of all the circumstances. The facts of each case should be scrutinised, and previous cases were mere guidelines, not conditions precedent. In particular, the court would decide if the failure to adhere to the unless order was *intentional and contumelious*. In this respect, the court should not be astute to find excuses for such failure since obedience to orders of the court was the foundation on which its authority rested. The onus would thus be on the offending party to demonstrate that he had in fact made positive efforts to comply and that he was not intentionally ignoring or flouting the order but was constrained by extraneous circumstances. In addition, the prejudice caused to the other party and the proportionality of depriving the offending party of a determination on the merits must also be taken into account.

24 While the case before me did not concern an application for an extension of time like that in *Syed Mohamed*, the principles enunciated in *Syed Mohamed* were still applicable as the Court of Appeal was examining the nature of unless orders in general. In fact, these principles were applied in *Changhe International Investments Pte Ltd v Dexia BIL Asia Singapore Ltd* [2005] 1 SLR(R) 598, where the Court of Appeal held that the defaulter had to give proper explanation for its failure to

comply and show that no further disobedience of the court orders would occur.

25 Therefore, I looked at whether the Varied Unless Order was in fact breached and, if so, whether the facts of this case justified the striking out of the Appellant's claim.

Was the Varied Unless Order breached?

26 As set out earlier, the Varied Unless Order issued by Lai J on 6 February 2012 was for the Appellant to fully comply with the Specific Discovery Orders by 4pm on 20 February 2012 by providing copies of all the documents in SLOD3 to the Respondents. Following the order, the Appellant served SLOD4 and furnished copies of the documents listed therein to the Respondents on 17 February 2012. Subsequently, the Appellant also sent a letter explaining the SLOD4 documents on 23 February 2012 and replied to the Respondents' queries via a letter on 26 March 2012. The Appellant then served SLOD5 on 27 March 2012 to further clarify its position, furnishing the documents listed therein to the Respondents on 30 March 2012, within the deadline set by SAR Ng on 29 March 2012.

27 However, despite this apparent flurry of activities, not all the documents in the possession, custody or power of the Appellant evidencing or relating to its gross profit, actual costs and net sales (as described in the Specific Discovery Orders) were provided by the Appellant *in accordance with the Varied Unless Order.* The Appellant's assertion that the Varied Unless Order was in fact complied with was nothing more than a bare assertion. The mere *submission* of documents within the deadline was not enough; in order to fully comply with the Varied Unless Order, the *substance* of the documents had to satisfactorily comply with the Specific Discovery Orders.

28 The Appellant asserted that this was the case as it had:

> ... clearly and sufficiently explained and clarified in [its] solicitors' letters how [it] relied on the various documents [it] had listed in SLOD 3, 4 and 5 to work out [its] profit margin as pleaded in paragraph 18 of [its] Statement of Claim (Amendment No. 4) and that these [were] the source documents [it had] relied on.

In other words, the documents provided by the Appellant were sufficient for full compliance with the Varied Unless Order. It is difficult to see how this could be so when the Appellant had failed to address the specific omissions and discrepancies described by the Respondents. Apart from sweeping statements that it had "fully complied" with the Specific Discovery Orders and "did not avoid replying" to the issues raised, the Appellant failed to address the following objections raised by the Respondents:

(a) Regarding item A in SLOD4, the e-mail correspondence provided by the Appellant only related to certain types of spirit and the source documents for other products (*eg*, wine, champagne and sparkling wine) was not provided.

(b) There were discrepancies between the aggregated "costs" listed in items 1 and 2 under the SLOD3 documents and item 65 of the SLOD4 documents of $813,720.64 in 2007 and $1,101,415.41 in 2008. Source documents for the actual costs of sales were incomplete, leaving the difference unaccounted for.

(c) Regarding items B and C in SLOD4, the source documents relating to the Suppliers' A&P Rebates were incomplete, accounting for only $181,933.92 in 2007 and $36,138.51 in 2008, and leaving $323,513.57 in 2007 and $178,384.37 in 2008 unaccounted for.

(d) Regarding item D in SLOD4, the documents produced showing the Appellant's purchase orders to suppliers failed to cover all the different products provided by the Appellant to the Respondents, as evidenced by the SLOD5 documents showing purchase orders in respect of other products supplied not found in SLOD4. There was also a shortfall of purchase orders accounting for the actual costs of goods according to items 1 and 2 of the SLOD3 documents. In addition, some of the purchase orders included under item D had missing pages. There were also no source documents in relation to the handling fees (such as freight forwarder's bills), custom duties (on the products delivered to the Respondents) and A&P Funds paid by the Appellant. Source documents for "other operating expenses" (referenced under item 66) were not provided. The documents provided under items 66 to 68 (audited income statements and general ledgers, which were also incomplete) were but summaries prepared by the Appellant and not source documents.

(e) Some of the internal computer-generated accounts and records (*ie*, items 1 and 2 of SLOD3) included invoices which were dated in the year 2006 (*eg*, "A/R Invoice 29999" which had a posting date of 12 December 2006) ("the 2006 invoice records"). The Appellant included the 2006 invoice records in items 1 and 2 of SLOD3, but failed to provide the source documents for them.

(f) Items 1 and 2 of the SLOD3 documents stated significantly lower actual gross profit margins than the 49.64% estimated at para 18(4) of the Appellant's ASOC4. No source documents were provided for the calculation of 49.64%.

(g) Despite assurances given by the Appellant, it was unable to produce the documents listed in item 5 of Schedule 2 of SLOD3 (source documents on which the Appellant's internal computer generated accounts and records were based). Even though these documents had reportedly been seized by the Customs and Excise Department ("the CED"), the Appellant had not made serious effort to recover the same despite having had ample time to make the necessary requests to the CED since the Specific Discovery Orders were made on 8 December 2010.

29 It was telling that despite the above points having been set out fully in Bernard Lim Miang's 23rd affidavit dated 9 April 2012, the Appellant failed to address them in its subsequent reply affidavit. It chose instead to make the bare assertion that the Varied Unless Order had been fully complied with.

30 On the face of it, by failing to produce documents that it had been ordered to under the Specific Discovery Orders by 4pm on 20 February 2012, the Appellant had breached the Varied Unless Order.

31 Nevertheless, beyond the fact of the breach, it was necessary to consider whether a striking out was warranted. As Phang J noted in *Wellmix Organics*, unless orders are "draconian in nature and effect" and will be enforced only if the "party breaches the order both intentionally and contumeliously or contumaciously" (at [2]).

Was the striking out justified?

32 It appeared that the level of specificity of documents demanded by the Respondents was not complied with because the Appellant insisted that the documents supplied were sufficient for the purposes of the Respondents' calculation of the actual gross profit, actual net sales and actual costs of goods. The Appellant felt that it had already:

> ... clearly and sufficiently explained and clarified in [its] solicitors' letters how [it] relied on the

various documents [it] had listed in SLOD 3, 4 and 5 to work out [its] profit margin as pleaded in paragraph 18 of [its] Statement of Claim (Amendment No. 4) and that these [were] the source documents [it had] relied on.

33 As observed by AR Chua, the Appellant did not argue that it did not have the disputed documents in its possession, custody and power, apart from the documents seized by the CED. In fact, while making an oral application for an extension of time before AR Chua in SUM 1819/2012, the Appellant's counsel appeared to concede (or at least it may be inferred) that the Appellant *did have* the documents:

> My client takes the view that he has complied with, but if Your Honour takes the view that discovery requires disclosure of *all* the documents, including purchase orders, invoices, tax receipts, etc. then we will have to apply for an extension of time. ***My client is willing to provide documents if this is indeed required of them*** . [emphasis in original in italics; emphasis added in bold italics]

34 Instead, the Appellant chose to justify its position by arguing that the documents yet to be produced were *unnecessary* for the calculations sought by the Respondents. The Appellant argued that it had already complied by producing indicative documents alongside various explanations and clarifications. The Appellant's position was clearly expressed in its counsel's submissions before AR Chua in SUM 1819/2012:

> We are saying that certain documents are *indicative* – not that we do not want to give. What we have done is to go through all the things, given it to the auditors, they cross check with the documents.
>
> What we are telling the Defendants is that *look at all our lists, we have relied on these documents and how we are relying on them*. That is the way my client has approached it.
>
> *I am not saying that my clients have given everything* to the Defendant but my client's point is that for example, purchase orders, we took *indicative* orders to show that the pricing is the same. *That is how we have approached it*. If Your Honour is of the view that that is not the order that has been given, then if that is the approach, if you look at principles of law should our conduct amount to contumelious conduct?
>
> [emphasis added]

35 In my view, the reason given by the Appellant was simply unacceptable; whether the documents supplied were sufficient for the purposes of verifying the figure of 49.64% was not a matter for the Appellant's unilateral decision. The Appellant could not assert that "indicative" documents should be sufficient for the discovery purposes just because those were the documents which the Appellant chose to rely on in its own calculations. Its duty to produce all the documents as required by the Varied Unless Order still remained and that duty had not been discharged.

36 Additionally, the Appellant argued that it had never affirmed that it could give specific discovery of all the source documents and so was not obliged to produce them. Again, this is not a good reason for non-compliance. In *Soh Lup Chee v Seow Boon Cheng* [2002] 1 SLR(R) 604, Choo Han Teck JC stated that where the court was satisfied that certain documents had to exist, the party had either to produce them or explain on oath what has become of them so that the contest at trial would be open and fair. In that case, the dispute was whether the source documents from which the "Balance Budget Summaries" (documents recording the details or particulars in instances where there was a

budget overrun) were based on ought to be produced. In holding that there were numerous obvious omissions of documents which must have existed and in the absence of good reason, Choo JC found that the appellant had made out a sufficient case to strike out the defence. However, while Choo JC eventually stopped short of striking out the defence, the principle that *omitted documents proven to exist must be accounted for* still remains. Source documents which have been shown to exist must be produced; this is regardless of whether the party had agreed or affirmed that such specific discovery could be given. Thus, the Appellant's mere assertion that it never agreed to disclose did not negate the existence of this duty.

37 The Appellant's argument that the Respondents' queries about the discrepancies in some of the figures given were unnecessary as the action had already been bifurcated was also correctly rejected by AR Chua. On 16 January 2012, the appeal against the bifurcation order (made by the learned assistant registrar Ong Luan Tze on 28 November 2011) was dismissed by Woo Bih Li J in Registrar's Appeal No 392 of 2011. Hence, when the parties appeared before Lai J in RA 32/2012 two weeks later on 2 February 2012, the Appellant could have raised its contention that the queries were no longer necessary *then*, instead of raising it so much later. In the absence of an application to vary the Varied Unless Order, it had to be fully complied with.

38 This point on bifurcation was addressed in *Federal Lands Commissioner v Neo Hong Huat* [1998] SGHC 131, where Chan Seng Onn JC stated at [37]–[39]:

> 37 I will now deal with the submission raised by counsel for the defendant that the documents in question have nothing to do with the issue of liability ...
>
> 38 *The learned Judicial Commissioner had made the orders. They have to be strictly complied with.* If the defendant felt that those discovery orders should not have included documents that pertain only to the assessment of damages and which were therefore irrelevant to the proceedings at that juncture, then *he could have appealed*. As far as I am concerned, that is not a relevant issue before me. *I am only dealing with the question of compliance with the orders of the court*.
>
> 39 In any event, I think that those documents ordered to be produced would be relevant to the question of damages and therefore, they are going to be relevant at the trial where the plaintiffs will have to prove damages. The plaintiffs have a right to be given a full and fair discovery of such documents, though they may relate entirely to the issue of the quantum of damages, which no doubt would be disputed at the trial ...
>
> [emphasis added]

39 Hence, it was clear that taking the position that the action had been bifurcated and that certain documents were not necessary because they related to damages would not prevent enforcement of an unless order.

40 The Appellant's argument that its breach was merely a technical one and thus should not warrant the enforcement of an unless order was also not valid. In support of that proposition, the Appellant cited *Wellmix Organics* where Phang J declined to strike out the defence as he found the defendant's breach of an unless order to be a technical one arising from a misunderstanding. However, a perusal of the facts in that case clearly show how the same could not be said of the case before me.

41 In *Wellmix Organics* the defendant breached the unless order by failing to *serve* the requisite

affidavits of evidence-in-chief ("the AEICs") to the plaintiff within the deadline of the unless order (*viz*, 21 June 2005) even though it had already *filed* the AEICs by 21 June 2005. This was due to the defendant's understanding that the parties had agreed to an "exchange" of AEICs on 21 June 2005, which later turned out to be incorrect. The defendant thereafter served its AEICs on the plaintiff at the first opportunity it had after realising that the plaintiff had no intention of exchanging AEICs the next day, *ie*, 22 June 2005. Under those circumstances, Phang J found that the misunderstanding had caused the defendant to commit a mere "technical" breach of the unless order. After all, the AEICs had already been filed and could easily have been served on the Plaintiff within the 21 June 2005 deadline. Thus, the defendant's actions were neither contumelious nor contumacious.

42 The facts of the case before me were vastly different. The Appellant's breach could not by any measure be considered "technical", and neither was it due to any misunderstanding between the parties. Rather, over the long-drawn proceedings from the time the Specific Discovery Orders were given on 8 December 2010 to the deadline of 20 February 2012 stipulated in the Varied Unless Order, the Appellant's efforts came across as tardy and half-hearted. Gaps in the documents were not rectified, discrepancies in figures were not addressed and source documents were simply not produced despite repeated prodding. Instead, the Appellant insisted on pointing to the documents already produced as being in full compliance. Thus at para 59 of its submissions the Appellant asserted:

> ... GF's Affidavit had clearly replied to the Defendants' contentions, in pointing out and in setting out on exhibits the various crucial Correspondence between the solicitors that followed after the Varied Unless Order was made, wherein the *Plaintiffs had explained in detail how they had relied on these documents set out in their SLOD 3, 4 and 5 to compute their profit margin and the manner and extent to which these documents had complied with the Specific Discovery Order* <u>*in full*</u> , as set out below. [emphasis in original underlined; emphasis added in italics]

43 The Appellant's excuse for failing to comply with the Specific Discovery Orders within the time limit was that the parties had been engaged in protracted and delayed negotiations in a bid to settle, exacerbated by the hectic travel schedules of Bernard Lim Miang and Giorgio Ferrari. As a result, the Appellant failed to reply to the Respondents' solicitors' reminders to provide the documents listed in SLOD3 as it had been preoccupied with the negotiations. It was disputed how long those negotiations took before breaking down. In any case, the Appellant only stated this reason in relation to the Specific Discovery Orders and not the First Unless Order or the Varied Unless Order.

44 However, this case *primarily* concerns the breach of the Varied Unless Order, and not the Specific Discovery Orders (even though the requirements of Specific Discovery Orders were substantially reflected in the Varied Unless Order). Hence, the period during which the Appellant's conduct would be the *most* relevant was the time when the First Unless Order was made until the deadline of the Varied Unless Order, *ie*, 12 January 2012 to 4pm on 20 February 2012 ("the material period"). While the distractions caused by the protracted negotiations still arguably formed part of "all the circumstances of the case" (*Syed Mohamed* (at [15]), it would not be given as much weight as the circumstances surrounding the Appellant's failure to comply with the Varied Unless Order itself. After all, the negotiations would not have had any impact on the Appellant's ability to comply with the First Unless Order and the Varied Unless Orderas these orders were made only *after* the negotiations had fallen through.

45 As for the Appellant's conduct during the material period, the Appellant did not give any reason for non-compliance, but firmly persisted in its assertion that the documents given were sufficient for the purposes of complying with the Specific Discovery Orders. As discussed above at para 27, such a bare assertion simply cannot mask the fact that the documents and letters of clarifications submitted

by the Appellant patently did not fully comply with the Varied Unless Order.

46 Accordingly, as the Appellant failed to give any good reason for its failure to comply or show extenuating circumstances demonstrating that it did not intentionally ignore or flout the Varied Unless Order, I was not persuaded that AR Chua's decision to strike out its claim was wrong. Being of the view myself that the Appellant's conduct was in fact contumelious, the striking out of the Appellant's claim was warranted.

Conclusion

47 In the event, the appeal was dismissed, with costs fixed at $600 for Summons No 3685 of 2012 and $5,000 for Registrar's Appeal No 219 of 2012 inclusive of disbursements.