IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 39

Suit No 1059 of 2017

Between

(1) Oei Hong Leong
(2) Oei Hong Leong Art Museum Ltd

… *Plaintiffs*

And

Chew Hua Seng

… *Defendant*

JUDGMENT

[Contract] — [Formation]
[Contract] — [Intention to create legal relations]
[Contract] — [Contractual terms]
[Contract] — [Breach]
[Contract] — [Remedies] — [Damages]

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Oei Hong Leong and another
v
Chew Hua Seng

[2020] SGHC 39

High Court — Suit No 1059 of 2017
Lee Seiu Kin J
2, 3, 9 September; 25 October 2019

24 February 2020 Judgment reserved.

Lee Seiu Kin J:

1 This suit concerns a parcel of shares held by the plaintiffs in Raffles Education Corporation Limited ("REC"), a public company listed on the Singapore Exchange ("SGX"). The plaintiffs claim that pursuant to an oral agreement, or alternatively, a part-oral part-written agreement, the defendant undertook to procure a buyer for those shares, at $0.44 per share, by 15 November 2017. The plaintiffs claimed that the defendant had failed to comply with this obligation and is now liable for damages. The defendant argues that the agreement in question was not legally binding and that in any event, he had fulfilled his obligations pursuant to this informal arrangement. I shall refer to this agreement, whether in the context of the position of the plaintiffs or of the defendant, as "the Agreement".

Facts

Background of the parties

2 The first plaintiff is Mr Oei Hong Leong ("Oei"), an experienced businessman who invests in the shares of listed companies.[1] Oei indirectly owns more than 90% of the shares in the second plaintiff, the Oei Hong Leong Art Museum Ltd (collectively, "the plaintiffs").[2]

3 The defendant is Mr Chew Hua Seng ("Chew"). He is the founder, Chairman and Chief Executive Officer ("CEO") of REC.[3] His wife, Ms Doris Chung Gim Lian ("Doris"), is REC's director of operations and human resources.[4]

4 At the material time, Oei and Chew had been good friends for about ten years.[5] Their families were well acquainted with one another[6] and Oei and his wife had holidayed with Chew and Doris, (collectively, "the Chews") on more than one occasion.[7] The Chews were also (and remain) close friends of Oei's sister, Ms Sukmawati Widjaja ("Sukma")[8], who is a neighbour of theirs.

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1 Notes of Evidence ("NE"), 2 September 2019, p 6 line 23 to p 7 line 4.

2 Oei Hong Leong's ("Oei") Affidavit of Evidence-in-Chief ("AEIC") at para 2.

3 Chew Hua Seng's ("Chew") AEIC at para 2.

4 Doris Chung Gim Lian's ("Doris") AEIC at para 2.

5 Chew's AEIC at para 4.

6 NE, 9 September 2019, p 25, lines 5 to 8.

7 NE, 2 September 2019, p 21, lines 3 to 10.

8 NE, 2 September 2019, p 21, lines 16 to 22; NE, 9 September 2019, p 112, lines 10 to 14.

5 Besides their personal friendship, Oei and Chew also shared a business relationship. Oei became a substantial shareholder in REC sometime in 2012 and steadily increased his stake over time. As of 25 September 2017, the plaintiffs held 14.04% of the share capital in REC.[9] As explained at [7], this share has since been diluted to 12.88%. The plaintiffs are the second largest shareholder in REC after the Chews who presently hold about 33.58% of the company's shares.[10]

6 Oei was not a passive investor. In or around August 2017, he introduced Chew to Mr Yang Wei Chang ("Yang"), a fellow businessman and potential investor, from the People's Republic of China ("China"). Oei believed that Yang would be able to assist REC, which was facing difficulties with its expansion into China.[11] Chew met with Yang on several occasions from August to October 2017.[12] He visited Yang's universities in China and took Yang to REC's college in Iskandar, Malaysia.[13] However, the pair did not reach an agreement on whether Yang would invest in REC.

The Placement Agreement

7 On 28 September 2017, the board of REC announced to the SGX that REC had entered into a placement with RHB Securities Singapore Pte Ltd ("RHB") on 27 September 2017 (the "Placement Agreement").[14] Under the

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9 NE, 2 September 2019, p 33, lines 2 to 10; 1 Agreed Bundle ("AB") 240 to 242.

10 Chew's AEIC, CHS-6 at pp 34 to 35.

11 Oei's AEIC at para 8.

12 Chew's AEIC at para 10(c).

13 NE, 3 September 2019, p 22, lines 13 to 21.

14 1AB 245 to 246.

Placement Agreement, RHB would source for subscribers for up to 95 million new ordinary shares, which would be issued by REC (the "Placement Shares"). The Placement Agreement had the effect of diluting the Chews' and the plaintiffs' shareholding.[15]

8 Oei had three main concerns about the Placement Agreement. First, REC had not disclosed the identities of the placees; second, there was no assurance that these placees would add value to REC that an investor like Yang would, which was Oei's preference; and third, there did not appear to be a financial need for the Placement Agreement. For these reasons Oei was suspicious of Chew's motives.[16]

9 Oei met Chew on a number of occasions in September and October 2017 to discuss his unhappiness over the Placement Agreement.[17] Chew's evidence is that Oei was disgruntled about not having been informed of the Placement Agreement ahead of the announcement on 28 September 2017. Chew said that Oei accused him of issuing the Placement Shares to parties acting in concert with him, which Chew denied. Oei also threatened to cause trouble for Chew if he did not give in to his various demands namely, to issue shares to Yang or to cancel the Placement Agreement. Oei denies that any such threats were made. According to him, he merely expressed his concerns over the Placement Agreement, at [8]. He also suggested that the Placement Shares should be issued to Yang as a "strategic investor".[18] Putting aside this divergence in accounts, it

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15 Chew's AEIC, CHS-13 at pp 75 to 79; Oei's AEIC at para 25.

16 NE, 2 September 2019, p 24 line 18 to p 27 line 9.

17 Chew's AEIC at para 10; Oei's AEIC at para 11.

18 Oei's AEIC at paras 14, 16.

is undisputed that the two men were unable to resolve their differences over the Placement Agreement. This caused their personal relationship to deteriorate.[19]

10 On 6 October 2017, Oei sent a letter, addressing Chew in his capacity as the CEO of REC, formally communicating his unhappiness over the Placement Agreement.[20] This letter was copied to the SGX and the Securities Industry Council. Oei said that "shareholders [had] the right to know the names of the actual placees and whether they [were Chew's] concert parties". Chew replied to this letter on the same day to state that:[21]

(a) The placees had been identified by RHB without any input from REC.

(b) The placement would not be made to any restricted persons under rule 812(1) of the listing manual of the Singapore Exchange Securities Trading Limited ("Listing Manual").

(c) Chew had confirmed to REC that none of the placees were acting in concert with him.

(d) REC would comply with its disclosure obligations under the Securities and Futures Act (Cap 289, 2006 Rev Ed) and the Listing Manual.

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19 NE, 3 September 2019, p 33, lines 16 to 20.

20 1AB 253.

21 1AB 255 to 256.

REC also issued an announcement to the SGX that it had received in-principle approval for the listing and quotation of the Placement Shares.[22] On 10 October 2017, the board of REC issued a further announcement that the Placement Shares had been allotted and issued and that they would be listed on the official list of the SGX on 12 October 2017.[23]

11 Oei remained dissatisfied. On 10 October 2017, Morgan Lewis Stamford LLC, Oei's solicitors at the time, wrote to the SGX on his behalf. The letter requested the SGX to obtain REC's confirmation that the Placement Agreement complied with rule 810(2) of the Listing Manual and that the Placement Agent was not subject to any restrictions and directions imposed by REC.[24]

12 On 12 October 2017, Oei issued a notice of requisition ("Notice of Requisition") on behalf of the plaintiffs to convene an extraordinary general meeting ("EGM") pursuant to s 176 of the Companies Act (Cap 50, 2006 Rev Ed) ("the CA").[25] This was motivated by his concerns over the Placement Agreement and the poor management and performance of REC.[26] Besides calling for a disclosure of the placees' identities, Oei also sought to have Chew removed from his position as Chairman and CEO. He proposed tabling the following resolutions for the EGM:

> **Resolution 1:** Disclose the identities of the placees and the number of shares placed to each of them in connection with the

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22 1AB 258 to 259.

23 1AB 288.

24 Defendant's Bundle of Documents ("DBD") 74 to 83.

25 1AB 313.

26 NE, 2 September 2019, p 28 lines 4 to 25.

> placement of 95 million new shares in the Company (the "**Placement Shares**") that were issued and allotted on 10 October 2017 at an issue price of S$0.30 for each Placement Share.
>
> **Resolution 2:** Removal of Mr. Chew Hua Seng as Chairman and Director of the Company (including terminating his employment with the Company) with effect from the date of the EGM and to take all steps necessary to remove him from any and all his other appointments (whether as director, corporate representative or otherwise) with the Company, its related and/or associated companies including all of its subsidiaries.
>
> **Resolution 3:** Appoint one of the independent directors of the Company as a non-executive Chairman or if none of the present independent directors are willing to accept the appointment, to direct that the Board search for and recommend a suitable candidate to assume the role of non-executive Chairman.
>
> [emphasis in original]

The Notice of Requisition was announced to the SGX by REC on the same day.[27] It was also reported in the local press.[28]

13 On 13 October 2017, REC held its Annual General Meeting ("AGM"). The company had posted a net loss over the last financial year and Chew urged investors to "give him more time to deliver on his promises". During the AGM, shareholders raised their concerns over the impending EGM. Questions were asked about the identity of the placees.[29] Chew refused to disclose the identities of the placees, citing issues of confidentiality. Separately, there were also suggestions that different individuals, in the interest of good corporate governance, hold the roles of Chairman and CEO. In response, Chew replied that separating the roles was a recommendation, not a requirement. Oei did not attend the AGM.

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27 1AB 315.

28 1AB 321; 3AB 1100 to 1101.

29 1AB 338 to 341.

The 16 October Meeting

14 On the evening of 16 October 2017, Oei, Chew, Doris and Sukma met at Sukma's house (the "16 October Meeting"). There, Oei proposed to buy out the Chews and launch a non-hostile takeover of REC.[30] Chew declined this offer because Chew considered his shares in REC to be a family asset and he wished to leave the business to his children.[31] Chew was also not agreeable to buying out the plaintiffs' stake in REC because he would then become obliged to make a general offer for the other shareholders' shares.[32]

15 According to Chew, Oei maintained that he wished to sell the plaintiffs' shares in REC and was prepared to do so at a price of $0.44 per share. He then asked Chew to help him find a buyer. Chew cautioned Oei that it would be difficult to find a buyer at that price, as it was significantly higher than the trading price of about $0.33 per share at the time.[33] Chew said that nevertheless, because of their longstanding friendship, he agreed to "try and help [Oei] find a buyer" within a month.[34] Chew suggested a deadline of one month because it was unlikely that the plaintiffs' shares could be sold if a buyer was not found within that time. Chew said that, Oei then said that he would withdraw the Notice of Requisition.

16 Oei's evidence on this is different. He said that it was Chew who suggested the sale price of $0.44 per share, which reflected the value of REC's

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30 Chew's AEIC at para 22; Oei's AEIC at para 34.

31 Chew's AEIC at para 23; NE, 3 September 2019, p 24, lines 19 to 20.

32 Chew's AEIC at para 23; Oei's AEIC at para 35.

33 NE, 3 September 2019, p 135, lines 4 to 10; Chew's AEIC, CHS-10 at p 65.

34 Chew's AEIC at paras 25 to 26.

net tangible assets.[35] He also undertook to "procure a buyer to buy [the plaintiffs'] shares. [Chew] said he would be able to complete the sale and purchase … within one month".[36] When Oei asked whether the transaction could be completed sooner, Chew said he would be more comfortable if he had a month to do so. Oei agreed to withdraw the Notice of Requisition at Chew's request[37] on condition that all the plaintiffs' shares would be bought at the requisite price by 15 November 2017.

17 Doris and Sukma did not participate in this discussion over the sale of the plaintiffs' shares. Doris' evidence is that the two women were engaged in their own conversation.[38] Oei then asked Chew to record the substance of the Agreement on a piece of paper ("16 October Note"). The 16 October Note read:[39]

> Confidential Agreement
>
> 16 Oct 2017
>
> Today at the house of Sukmawati both MR OEI HONG LEONG AND MR CHEW HUA SENG HAVE come to an amicable solution with regards to the differences of opinion of the operation of Raffles Education.
>
> MR CHEW will procure a buyer for MR OEI [*sic*] lot of shares to buyer [*sic*] at a price of SD0.44 cents per share within one month from today. The last day of transaction is on 15th Nov 2017. The lot of shares as of 16 October 2017 after market close is 12.88 percent …

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35 Oei's AEIC at para 37.

36 Oei's AEIC at para 39.

37 NE, 2 September 2019, p 92, lines 7 to 8.

38 Doris' AEIC at para 8.

39 1AB 343.

Oei and Chew both signed the 16 October Note and Sukma appended her signature as a witness. On Oei's further request, Chew copied the contents of the 16 October Note onto a second piece of paper. This was so that Oei could have his own copy.[40] Thereafter, Oei and Chew celebrated their resolution with champagne and a handshake.[41] This is documented in photographs taken of the pair.[42] Shortly after that, the parties left Sukma's house.

Subsequent developments

18 On 17 October 2017, Oei met up with Mr Tan Chin Nam ("Tan"), an independent director of REC, to discuss the drafting of an announcement to be made by REC. Oei informed Tan about the events of the previous evening. Oei's evidence is that he told Tan that Chew had offered to procure a buyer for the plaintiffs' shares and the plaintiffs had agreed to withdraw the Notice of Requisition subject to certain conditions.[43] Oei said he and Tan had a "good conversation on how to resolve the issues at hand".[44] It was agreed that Tan was to prepare a draft announcement specifying the plaintiffs' withdrawal of the Notice of Requisition. According to Oei, this announcement would only be issued *after* Chew procured a buyer for the plaintiffs' shares.[45]

19 Oei had a follow-up meeting with Tan on 19 October 2017 at which Oei proposed to either buy out the Chews' shares in REC or that he be bought out

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40 1AB 345.

41 NE, 3 September 2019, p 148, lines 10 to 25; Oei's AEIC at para 44.

42 1AB 331.

43 Oei's AEIC at para 47.

44 1AB 34 to 35.

45 Oei's AEIC at para 45.

by Chew. If not, then Chew would have to find a buyer for the plaintiffs' shares.[46] Tan informed Chew of this development via Whatsapp,[47] but it appears that no substantive action was taken to address Oei's new proposals. On 23 October 2017, a draft withdrawal letter and announcement, prepared by Allen & Gledhill LLP, was circulated by Tan to REC's other independent directors.[48] The approved drafts were then shown to Oei for his approval on 25 October 2017. However, Oei was unhappy with the wording of the draft announcement which stated, "the [plaintiffs] are now satisfied that the Placement was carried out in compliance with applicable laws and regulations".[49] Oei's position was that he had only agreed to the plaintiffs withdrawing the Notice of Requisition on the basis of Chew procuring a buyer for their shares.[50] No concessions had been made as to the propriety of the Placement Agreement.

20 On or around 25 October 2017, Oei received an update from Chew that he had found a potential buyer, a businessman from China known as Mr Peng Yusen ("Peng").[51] One qualification was that Peng would require time to secure the necessary funds unless he could make payment in Chinese Yuan ("RMB"). However, Oei made it clear that he would not accept RMB. Instead, it was agreed that Peng would make payment in Singapore currency ("S$") over ten consecutive weekly instalments.[52] According to Chew, in the midst of these

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46 Chew's AEIC at para 34.

47 Chew's AEIC, CHS-17 at p 91.

48 1AB 363 to 367.

49 1AB 383.

50 Oei's AEIC para 57.

51 Oei's AEIC at para 59.

52 Chew's AEIC at paras 43 to 44; Oei's AEIC at para 65.

discussions, Oei continued to suggest the possibility of him buying the Chews' stake in REC or selling the plaintiffs' shares to Chew. These suggestions were ignored. Chew requested REC's in-house counsel, Mr John Tham ("Tham") to prepare a template sale and purchase agreement.[53]

21 Chew showed Oei several drafts of the sale and purchase agreement. Edits were made, at Oei's behest, to shorten the draft to a one-page document.[54] Oei remained apprehensive over the deal because it was unlikely that the plaintiffs' shares would be completely bought out by 15 November 2017.[55] Oei refused to sign the finalised sale and purchase agreement between himself and Peng, shown to him by Chew on 28 October 2017 (the "SPA").[56] Instead, he proposed that Peng make an upfront payment of 20% and then subsequently pay in weekly instalments of 10%.[57]

22 Chew updated Tan accordingly via Whatsapp message that same day:[58]

> At 14:29 today, i told OHL that Peng is not agreeable to his proposal to put a deposit of 20 percent ie the first 2 installment payment of total of about Sd12 million without having the shares transferred to his name and he had asked me to look for someone else for help instead as he said this is 'ma fun' and he does not want to get involved anymore.

23 On 31 October 2017, Oei wrote a letter to Chew and Tan to defer the Notice of Requisition to a date after 15 November 2017. The letter referred to

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53 Chew's AEIC at para 38.

54 Oei's AEIC at para 63; Chew's AEIC at para 41.

55 Oei's AEIC, para 65.

56 Oei's AEIC at para 73.

57 Oei's AEIC at para 74.

58 1AB 280.

the fact that "Chew has agreed and undertaken certain actions by the 15 November 2017".[59] Chew was not inclined to agree to any deferment, mindful of the obligation under s 176(3) of the CA for directors to convene an EGM within 21 days from the date of a notice of requisition. In a Whatsapp exchange with members of the REC board, he wrote "[w]e will not accept his deferment but will accept his withdrawal. The law states 21 days and we need to perform our duty and therefore we should proceed as agreed".[60] REC responded on the same day, informing Oei that "[u]nless the Company receives a formal notice of withdrawal from you, in respect of the Notice of Requisition, the Company will comply with its obligations under section 176 of the [CA]."

24 On 2 November 2017, REC sent the necessary notice of the EGM and accompanying circular to its shareholders.[61] On 15 November 2017, the plaintiffs withdrew their Notice of Requisition.[62] It is the plaintiffs' position that they were not obliged to do so and acted only with the intention of upholding Oei's side of the agreement.[63]

The plaintiffs' case

25 The plaintiffs' primary case is that there was an oral agreement concluded between the parties.[64] The substance of the Agreement was that Chew was to procure a buyer for the plaintiffs' shares, at $0.44 per share, by

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59 1AB 418.

60 1AB 269.

61 1AB 434, 436.

62 1AB 480.

63 NE, 2 September 2019, p 101, lines 4 to 9.

64 Plaintiff's Closing Submissions ("PCS") at para 9.

15 November 2017.[65] This meant that Chew would "ensure" or "see to it" that the plaintiffs' shares would be bought.[66] Upon the satisfaction of this condition, the plaintiffs would withdraw the Notice of Requisition. In the alternative, the Agreement was partly oral and partly in writing, as documented in the 16 October Note.[67] The plaintiffs dispute the defendant's assertion that there was no intention to create legal relations. They rely on, *inter alia*, the events that transpired prior to the 16 October Meeting and the wording of the 16 October Note to support their case.

26 Not only was the Agreement legally binding, it was also breached when Chew failed to hold up his side of the bargain. Merely finding a potential buyer (*ie*, Peng) was not good enough.

27 Flowing from the defendant's breach, the plaintiffs claim:[68]

(a) Damages in the sum of $26,547,809, alternatively $20,617,270, alternatively, $15,029,256.

(b) Interest on the sum of damages awarded at the rate of 5.33% per annum from 16 November 2017 to the date of the judgment.

(c) Post judgment interest at the rate of 5.33% per annum.

(d) Costs.

The defendant's case

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65 Plaintiff's Opening Statement at para 4.

66 Plaintiff's Opening Statement at para 56.

67 PCS at para 10.

68 PCS at para 500.

28 There are three tiers to the defendant's case. Primarily, he disputes that there was ever an intention to create legal relations.[69] The 16 October Meeting was nothing more than a friendly, informal get-together and the 16 October Note only demonstrates that Oei and Chew had amicably settled their differences. This is also supported by the parties' subsequent conduct.[70]

29 Secondly, the defendant argues that even if there was a legally binding agreement, there was no breach.[71] Applying the principles of contractual interpretation, the parties only intended that Chew would *try* to find a buyer. He was under no requirement to ensure the sale of the plaintiffs' shares. Chew also satisfied this obligation, he found a potential buyer in the form of Peng. Chew even directed Tham to draft a sale and purchase agreement to facilitate the conclusion of this potential deal. It was Oei's unreasonable behaviour, which scuppered the deal.

30 Finally, the defendant submits that if he is liable for breach, the plaintiffs are nevertheless not entitled to the damages claimed. The plaintiffs failed to mitigate their losses, because of Oei's insistence that there be a 20% upfront payment.[72] In addition, the defendant also disputes the plaintiffs' quantification of damages. The details of this are set out later in this judgment.

Issues to be determined

31 The disputed issues are threefold:

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69 Defence (Amendment No 1) at para 24; Defendant's Opening Statement at para 29; DCS at para 94.

70 Defendant's Opening Statement at para 30.

71 Defendant's Opening Statement at para 31.

72 Defendant's Opening Statement at para 39.

(a) was there an intention to create legal relations;

(b) if so, did the defendant breach the Agreement; and

(c) what relief(s), if any, are the plaintiffs entitled to?

Was there an intention to create legal relations?

32 The test of whether parties intended to create legal relations is objective (*Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 at [40]). A court will evaluate the parties' assertions as to their subjective intentions against the available circumstantial evidence (Andrew Phang Boon Leong, *The Law of Contract in Singapore* (Academy Publishing, 2012) ("*The Law of Contract*") at para [05.007]). While much of this exercise is guided by the factual matrix of each case (*Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 ("*Gay Choon Ing*") at [71]), there are certain established presumptions which assist the courts in their task. "[A] commercial agreement [for example] is … viewed very differently from a non-commercial agreement" (John Cartwright, *Formation and Variation of Contracts* (Sweet & Maxwell, 2nd Ed, 2018) at para [3-10]). In the context of social and domestic arrangements, there is a presumption that parties *do not intend* to create legal relations (*Gay Choon Ing* at [72] citing *Balfour v Balfour* [1919] 2 KB 571). A converse presumption operates in the context of business and commercial arrangements; it is presumed that parties *do intend* to create legal relations (*Gay Choon Ing* at [72] citing *Rose and Frank Company v J R Crompton and Brothers, Limited and others* [1925] AC 445).

33 These presumptions do not, of course, detract from the fundamental task of ascertaining "the true bargain between the parties, to seek the substance and reality of the transaction and to ascertain what common intentions should be

ascribed to the parties" (*Hongkong & Shanghai Banking Corp Ltd v Jurong Engineering Ltd and others* [2000] 1 SLR(R) 204 at [43]). The presumptions merely signpost the parties' respective burdens of proof (*The Law of Contract* at para [05.011]).

34 In seeking to identify the "substance and reality of the transaction", a court is not necessarily confined to looking at the parties' conduct prior to, or at the time of, the purported agreement. In its recent decision in *Simpson Marine (SEA) Pte Ltd v Jiacipto Jiaravanon* [2019] 1 SLR 696 at [78], the Court of Appeal discussed the relevance of subsequent conduct in ascertaining whether a contract has been formed. It noted that whilst "the admissibility and relevance of subsequent conduct in the formation … of contracts has yet to receive detailed scrutiny … evidence of subsequent conduct has traditionally been regarded as admissible and relevant".

35 With this in mind, I consider whether either of the presumptions set out at [32] arise in this case. The parties have taken diametrically opposing positions. The plaintiffs argue that the Agreement, the substance of which related to the sale of shares, "[was plainly] struck in a commercial or business context".[73] Hence, it should be presumed that there was an intention for this to be legally binding. In contrast, the defendant asserts that he and Oei reached the Agreement with the aim of reconciling and mending their strained relationship. The presumption against the creation of legal relations extends to agreements between friends and those made on social occasions. Although the Agreement

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73 Plaintiff's Opening Statement at para 11.

involved the exchange of valuable consideration, the circumstances were "distinctly casual"[74] (*The Law of Contract* at para [05.019]).

36 *Prima facie*, the presumption of an intention to create legal relations applies on the present facts. Notwithstanding their longstanding personal friendship, Oei and Chew also had a distinct commercial relationship. My initial impression is that the agreement concluded at the 16 October Meeting, a transaction that would notably affect the shareholding of REC, was concluded in the context of that latter relationship. I emphasise that this is only a preliminary finding and it is for the defendant to displace this presumption on the balance of probabilities.

37 The available circumstantial evidence falls into two broad areas:

(a) Evidence as to the nature (*ie*, the purpose and tone) of the 16 October Meeting.

(b) Evidence as to the substantive content of the Agreement.

I shall examine these areas in turn.

What was the true nature of the 16 October Meeting?

38 In advancing their case, the plaintiffs place emphasis on the background to the 16 October Meeting. Oei and Chew were engaged in an increasingly hostile and public dispute over the management of REC, instigated by the Placement Agreement. The plaintiffs' Notice of Requisition not only called into question the propriety of the Placement Agreement, it also targeted Chew

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74 DCS at para 151.

personally by seeking to remove him as Chairman and CEO. This so-called vote of no confidence from a substantial stakeholder applied a very public form of pressure on Chew. It also generated concerns amongst REC's other shareholders (see [13] above).[75] Chew knew that Oei was an experienced businessman with an investment career spanning some 30 to 40 years.[76] He was also aware that Oei had a history of buying large stakes in listed companies before attempting to sell his shares at a profit or take over the company.[77] There was a real risk that Oei would succeed in passing the resolutions at the EGM. Chew was so concerned about the outcome of the EGM that, as the meeting drew nearer, he met with key shareholders to ensure that he would have enough votes to block the plaintiffs' resolutions.[78] The 16 October Meeting was motivated by Chew's desperation to cut a deal. He wanted to find an escape route from the impending EGM.[79]

39 The evidence does not support this assertion. Under intensive cross-examination, Chew maintained that he did not consider the plaintiffs' Notice of Requisition to be a serious threat or concern.[80] This was because he knew Oei was simply posturing.[81] Oei was not actually concerned about the management of REC or issues of corporate governance, which is why he did not attend REC's AGM. In fact, he saw REC as a valuable investment. In the months preceding

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75 See also, PCS at para 132.

76 NE, 2 September 2019, p 11, lines 11 to 13.

77 NE, 2 September 2019, p 7 line 1 to p 8 line 21; DCS at para 15.

78 NE, 9 September 2019, p 91, lines 2 to 9.

79 PCS at para 79(d).

80 NE, 3 September 2019, p 81, lines 13 to 17.

81 NE, 3 September 2019, p 121, lines 10 to 12.

the Placement Agreement, he had been increasing his shareholding.[82] The real reason why Oei issued the Notice of Requisition was that he wanted greater control of REC. He was unhappy that Chew was unwilling to accede to his demands, *ie*, to issues shares to Yang (at [9]). Chew harboured the suspicion that Oei and Yang were working together to dilute the Chews' stake in REC.[83] The Notice of Requisition was nothing more than a "stunt" to try to back Chew into a corner.[84] Chew was also confident that Oei would face defeat at the EGM.[85] Concerns raised at the AGM had come from a vocal but small camp of shareholders. Whilst Chew had canvassed support in the lead up to the EGM, this was only done to fortify his position. Chew's evidence on this point is supported by Oei's concession that it would have been difficult for him to succeed in passing the proposed resolutions at the EGM.[86] When considered objectively, it becomes clear that Chew was prepared to stand his ground in the face of Oei's hardball tactics. The Notice of Requisition did not apply pressure on Chew to the extent that it prompted him to seek out a meeting with Oei.

40 What then, was the purpose of the 16 October Meeting? The case put forward by the defendant is that it was for Chew and Oei to set aside their differences and reconcile.[87] Notwithstanding what had transpired in the wake of the Placement Agreement, Chew still treasured Oei as a friend and shareholder.[88] He did not want Oei to "lose even more face" by being defeated

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82 DCS at para 63.

83 NE, 3 September 2019, p 33, lines 2 to 7.

84 NE, 3 September 2019, p 81, line 16.

85 NE, 3 September 2019, p 75, lines 23 to 25.

86 NE, 2 September 2019, p 77, lines 9 to 13.

87 DCS at para 159(a).

88 NE, 3 September 2019, p 41, line 10; p 51, lines 11 to 12.

at the EGM.[89] A meeting to resolve their conflict privately would save the both of them further trouble. The plaintiffs assert that the defendant's position is simply unbelievable.[90] It was Chew's own evidence that on the various occasions that Oei had met with Chew between September and October 2017, Oei had threatened him with legal action.[91] This was followed by the Notice of Requisition to remove Chew as Chairman and CEO. Chew, the founder of REC, regarded his stake in the company as a "family asset" which he wished to pass on to his children. This attempt by Oei to take control of REC was a direct threat to his legacy.[92] The plaintiffs also point to Whatsapp messages exchanged between Chew and the other directors of REC where he called Oei a "threat" and contemplated commencing an action against him for defamation.[93] The 16 October Meeting was not an opportunity for mending fences but a chance to rid REC and Chew of a troublesome shareholder.

41 I accept the plaintiffs' submission that Chew's evidence of the degree of warmth and affection he felt towards Oei is somewhat exaggerated. However, this does not conclusively determine that the discussion during the 16 October Meeting was conducted in a purely business context. In this regard, I accord weight to the setting of the meeting. Oei and Chew did not convene their discussion in a formal setting or in the company of their legal advisors. Instead, they met outside business hours at Sukma's house with their family members, Doris and Sukma, in attendance. This would have been "an unlikely setting in

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89 NE, 3 September 2019, p 75, lines 18 to 22.

90 PCS at para 97.

91 NE, 3 September 2019, p 11, lines 21 to 24. See also, NE, 9 September 2019, p 49, lines 16 to 17.

92 PCS at paras 129, 166.

93 1AB 261, 263 to 264.

which to negotiate a contractual … arrangement" (*Mr Jeffrey Ross Blue v Mr Michael James Wallace Ashley* [2017] EWHC 1928 (Comm) at [81])[94] and supports the defendant's argument that the 16 October Meeting was intended to be an inherently informal and social gathering, rather than a business negotiation.

42 It is also worth noting how the meeting came to be organised. According to the defendant, Doris received a call from Sukma on the evening of 13 October 2017.[95] Sukma suggested that Oei and Chew should meet to resolve their differences and urged Doris to help her organise the meeting. Chew was then persuaded to meet Oei. The plaintiffs have a slightly different account. According to Oei, he received a call on 16 October itself from Sukma saying that Chew wished to meet him.[96] However, this contradicts the evidence of Chew and Doris that it was Sukma who initiated the event. As Oei did not call Sukma to give evidence, he cannot rely on what he had heard from Sukma as evidence that it was Chew who initiated it. The best case for the plaintiffs is that it was Sukma who had initiated it, and she had given different accounts to the parties in a bid to convince them to meet. The worst case would be that it was Oei who asked Sukma to arrange it. Whatever it is, there is sufficient evidence that both men were given an indication that the purpose of the 16 October Meeting was for them to hear one another out in an informal setting.

43 The overall tone of the meeting also supports this conclusion. According to Doris, the conversation between Oei and Chew "was also friendly in

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94 DCS at para 157(c).

95 Doris' AEIC at para 5.

96 Oei's AEIC at para 30.

nature".[97] Acknowledging the rift that had emerged between them, Chew explained that he and Oei spoke openly and honestly. There was no need for them to be as close as they had previously been, or even be friends, but there was also nothing to gain from them being enemies. They agreed, "[l]et's don't fight" and sought to bury the hatchet.[98] The objective of the Agreement was to make peace, a distinctly personal motivation. Following their discussion, Oei and Chew not only shook hands but also embraced.[99] It is telling that Oei does not substantially contest the Chews' evidence on the mood that evening. Oei also gave evidence that the discussion on the sale of the plaintiffs' shares concluded very quickly, lasting less than two minutes.[100] The parties then celebrated with champagne. This at the very least indicates that arms-length dealing was only a minor aspect of the 16 October Meeting.

44 The picture of the 16 October Meeting would be more complete if the plaintiffs had called Sukma to give evidence. She was one of the four people present at the 16 October Meeting. She was also a witness of the 16 October Note. The defendant submits that this failure to call Sukma is extremely telling.[101] It leads to the irresistible inference that Oei was concerned that Sukma would not support his account.[102] The plaintiffs strongly deny this.[103] They submit that Sukma's evidence would be of little meaning or relevance because she was not party to the discussion between Oei and Chew and would not be

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97 Doris' AEIC at para 9(b).

98 NE, 3 September 2019, p 137, lines 1 to 11.

99 DCS at para 159(b).

100 NE, 2 September 2019, p 91, lines 20 to 22.

101 DCS at paras 18 to 21.

102 NE, 2 September 2019, p 85, lines 1 to 5.

103 PCS at paras 184 to 185.

able to offer any additional context to the Agreement. Separately, her witnessing the signing of the 16 October Note is a superfluous consideration because "[t]he handwritten records and the contemporaneous documents relating to the meeting … are in evidence and speak for themselves".

45 I cannot accept this submission. Setting aside the substance of the Agreement, Sukma's evidence is clearly relevant in either supporting or detracting from the conclusion that the 16 October Meeting was, at its heart, an informal social gathering. I also agree with the defendant that Oei would have been apprised of the importance of Sukma's evidence, having received the benefit of legal advice. I am therefore compelled to draw an adverse inference against the plaintiffs in not calling Sukma to give evidence.

46 A final point for consideration relates to the duration of the 16 October Meeting. The defendant's evidence is that the Chews spent several hours at Sukma's house. It was an evening of dining and merriment amongst friends.[104] The atmosphere of the meeting very much embodied a spirit of reconciliation. The parties disagree on how long it lasted. Chew said they met for dinner at Sukma's house, implying that it lasted several hours. Oei's evidence is that the group was only together for about an hour.[105] Both Oei and Chew had attended a social event earlier that same evening, a fact that Chew conceded during cross-examination, and Oei only arrived at Sukma's at about 8.30pm.[106] The photographs taken of Oei and Chew after the conclusion of the Agreement are

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104 Chew's AEIC at para 21; Doris' AEIC at para 8; DCS at para 157(a).

105 NE, 2 September 2019, p 87, line 11; PCS at para 178.

106 NE, 2 September 2019, p 86 line 23 to p 87 line 9; PCS at para 177.

time stamped as 9.33pm.[107] At 9.47pm, Oei sent Sukma a Whatsapp message saying, "[g]oodnight"[108] suggesting that by then, the party had dispersed and Oei had returned home. The plaintiffs submit that this undermines the defendant's characterisation of the 16 October Meeting. The relatively short duration of the gathering indicates that the parties were focused on business.

47 I am not persuaded by this argument. The defendant's insistence that the 16 October Meeting lasted the entire course of the evening, even when there is evidence to suggest otherwise, can be attributed to a poor recollection of the event or a desire to buttress his case. I do not think that this detracts from the admitted evidence that the meeting was in the informal setting of Sukma's dining room, with alcohol flowing, if not throughout, certainly at the end of it. When the evidence is considered in its totality, it becomes apparent that the driving force behind the 16 October Meeting was Oei's and Chew's personal relationship. This displaces any initial presumption that the Agreement reached between the two men occurred in a "commercial or business context".

What was the substance of the agreement?

48 I now consider the substance of the Agreement concluded at the 16 October Meeting and whether it was the common intention of the parties that this be legally binding.

49 Preliminarily, the plaintiffs' case is that this was an oral agreement. Alternatively, it was both oral and written, with the 16 October Note reflecting the written part of the Agreement. I find that if the parties did conclude a legally

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107 1AB 331.

108 1AB 331 to 332; 3AB 1089.

binding agreement, a point that I have yet to determine, it was both an oral and written contract. The plaintiffs rely on the inclusion of a specific word, the term, "procure", in the 16 October Note to argue that certain obligations were undertaken by Chew (see [59] below). Whilst Chew gave evidence that the wording of the 16 October Note accurately reflected the preceding oral discussion[109], it is unclear whether the word "procure" was specifically used or if it emerged for the first time as Chew was recording the 16 October Note. Oei's evidence sheds no light on this point because he could not recall the precise wording used by Chew during their conversation.[110] In fact, he was more concerned with what was recorded in the 16 October Note. Given the importance of this term "procure" to the plaintiffs' case, it follows that any agreement must have been both oral and written.

50 The plaintiffs assert that there were two elements to the Agreement. Firstly, Chew agreed to "procure" a buyer for the plaintiffs' shares by 15 November 2017 at a price of S$0.44 per share. Secondly, on condition that this was done, the plaintiffs would withdraw their Notice of Requisition.[111] The defendant argues that the parties could not have intended this to be legally binding because if the terms of the Agreement were as the plaintiffs had characterised them to be, Chew would have been taking on a highly onerous obligation: to secure the sale of the plaintiffs' shares at a substantial premium within a relatively short period. In the absence of any personal incentive, it is inconceivable that he would have agreed to this.[112] I agree. The plaintiffs claim

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109 NE, 9 September 2019, p 27, lines 2 to 5.

110 NE, 2 September 2019, p 96, lines 9 to 25.

111 PCS at paras 14 and 16.

112 DCS at para 171.

that Chew was the one who suggested a sale price of $0.44 per share and the deadline of one month. This account only makes sense if Chew was threatened by the impending EGM and was therefore willing to go to extensive lengths (*ie*, propose and commit to a commercially insensible arrangement) to ensure the plaintiffs withdrew their Notice of Requisition.[113] I have already found that the evidence does not support this.

51 This is reinforced by the fact that there is no reference in the 16 October Note to the plaintiffs' obligation to withdraw the Notice of Requisition. If the 16 October Note was indeed an accurate reflection of the pair's discussion, and if the withdrawal of the Notice of Requisition was Chew's ultimate objective, why did he fail to record this *quid pro quo*? Oei himself could not explain why this had not been done.[114] Further, on the plaintiffs' case, they were only obliged to withdraw the Notice of Requisition *after* the purchase of their shares. It is therefore curious why Oei met with Tan to prepare the draft announcement for the plaintiffs' withdrawal of the Notice of Requisition, the day after the 16 October Meeting, even when there was no prospective buyer in sight. The plaintiffs' eventual withdrawal of the Notice of Requisition on 15 November 2017, after the SPA with Peng fell through, raises similar questions. There is no reason why the plaintiffs should have felt compelled to withdraw the Notice of Requisition to uphold their end of the bargain when Chew had not performed. Under cross-examination, Oei accepted that there was no barrier to the plaintiffs simply commencing legal proceedings.[115] The plaintiffs' conduct therefore suggests that the withdrawal of the Notice of

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113 PCS at para 237.

114 NE, 2 September 2019, p 118 line 22 to p 119 line 3.

115 NE, 2 September 2019, p 101, lines 4 to 16.

Requisition was not conditional on Chew securing a buyer. Rather, Oei had agreed to do so voluntarily. This also explains why the condition was absent from the 16 October Note.

52 The fact that Chew reminded Oei, on or around 27 October 2017, that the last day to withdraw the Notice of Requisition was 2 November 2017[116] does not undermine this conclusion. The plaintiffs say that this reminder was Chew trying to ensure that Oei complied with his side of the Agreement because by then, Chew had already identified Peng as a prospective buyer. I accept Chew's explanation that this was simply a matter of logistics; he needed to know whether the EGM would be going ahead because REC would have to print the relevant notices and secure a venue for the meeting.[117] The plaintiffs' withdrawal of their Notice of Requisition, while it would save Chew from embarrassment at the EGM, was not of any other consequence to him as he was certain that Oei's ploy would fail. Considered holistically, there is only one logical explanation for why Chew agreed to the arrangement with Oei. Oei wished to make a "clean break"[118] and out of regard for their former friendship, Chew agreed to help. The pair could then go their separate ways on amicable terms.

53 In arguing for the existence of a legally binding agreement, the plaintiffs rely heavily on the recording of the 16 October Note. Oei and Chew took the trouble to document the substance of their discussion. They each appended their signatures with Sukma as a witness. A duplicate of the 16 October Note was then produced so that the both of them would have a copy. This intentional

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116 Defence and Counterclaim (Amendment No 1) at para 35; PCS at paras 339 to 341.

117 NE, 9 September 2019, p 54, lines 3 to 12.

118 NE, 2 September 2019, p 88, lines 18 to 21.

exercise could not have been devoid of legal effect.[119] The defendant's explanation, that the 16 October Note was drafted to show their families that the two men had made peace[120], is completely unbelievable.[121] Why, the plaintiffs ask, would they have taken the trouble to prepare a written document when they could have simply told their families about their reconciliation? After all, Sukma and Doris were also present at the 16 October Meeting. The plaintiffs also draw attention to the wording of the 16 October Note:

(a) The substance of the 16 October Note is prefaced with the phrase "Confidential Agreement".

(b) There is specific and formal reference made to the date and location of the 16 October Meeting.

(c) The nature of and background to the Agreement is specified – "an amicable solution with regards to the differences of opinion of the operation of Raffles Education".

(d) The essential details of Chew's undertaking, such as his obligation to procure a buyer, the sale price of the shares and the last date of transaction, are particularised.

This language suggests that the 16 October Note was drafted with precision and care.[122] This would only have been done if it had been anticipated that the 16 October Note would carry legal significance.

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119 PCS at para 240.

120 DCS at para 161; NE, 3 September 2019, p 155, lines 7 to 18.

121 PCS at para 242.

122 PCS at para 270.

54 In my view, the fact that Chew and Oei supplemented their oral discussion with the 16 October Note does not conclusively demonstrate an intention to create legal relations. Indeed, it suggests the opposite. Both Chew and Oei are experienced businesspersons. Had the Agreement been meant to be legally binding, as commercial men, they would have instructed their lawyers to draft a legal document to capture their obligations accurately. But they did not do so. They considered the 16 October Note, drafted by a layperson, to be adequate precisely because it *did not* hold a legal function. It is important to reiterate the context of the 16 October Meeting, which was a gathering for Chew and Oei to resolve their differences. Against this backdrop, it is plausible that the pair may have wanted to use the 16 October Note as a symbolic gesture, evidencing their reconciliation.[123] This also explains why they both signed the 16 October Note and made Sukma witness this.

55 In the same vein, it is also unproductive to place too much emphasis on the wording of the 16 October Note. The plaintiffs' suggestion that the parties carefully drafted the substance of the 16 October Note is at odds with the "casual, friendly setting"[124] of the 16 October Meeting. I accept Chew's evidence that the 16 October Note and its duplicate were drafted with no real consideration being given to the terminology employed.[125] The objective was simply to capture the essence of the pair's "amicable solution".

56 I add that, contrary to the plaintiffs' suggestion, the wording of the 16 October Note does not clearly particularise the nature of the defendant's

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123 Chew's AEIC at para 28.

124 Defendant's Opening Statement at para 29(b).

125 DCS at para 104; NE, 3 September 2019, p 154, lines 3 to 8.

obligations. The 16 October Note refers to the "last day of transaction" being 15 November 2017. The plaintiffs themselves appear to be unclear on what this would have entailed. On the plaintiffs' case, "transaction" meant that the buyout of the plaintiffs' shares would have been completed by 15 November 2017.[126] Yet, during cross-examination, Oei gave evidence that "transaction" referred to the signing of a sale and purchase agreement by 15 November 2017.[127] There had to be a "done deal" although the sale itself did not have to be completed. The ambiguity stemming from the use of the word "transaction" is not surprising. The parties' oral discussion lasted less than two minutes. They would not have gone into the specifics of what Chew had to do by 15 November 2017. They also chose not to elaborate on this point in the 16 October Note. The reason for this is clear. This was a voluntary arrangement with no legal force and there was therefore no need to do so.

57 In any case, where the language of the 16 October Note *is* clear, it appears that the plaintiffs themselves did not consider these terms to be binding. The Agreement envisaged a sale of the plaintiffs' shares to a buyer found by Chew. Yet in his subsequent discussions with Tan and Chew, Oei continued to propose that he buy out the Chews or that Chew buy out the plaintiffs,[128] completely disregarding the substance of his arrangement with Chew. The plaintiffs cannot take the position that there was a binding contract when Oei's subsequent conduct indicates the contrary. I accordingly find that the defendant has successfully displaced the presumption that there was a common intention to create legal relations at the 16 October Meeting.

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126 PCS at para 287.

127 NE, 2 September 2019, p 109 line 14 to p 110 line 15.

128 DCS at para 174(c).

Breach of the agreement

58 I now consider, on the assumption that there *was* an intention to create legal relations, what were the defendant's obligations pursuant to the agreement? Did he breach those obligations?

59 The answer to the first of these questions turns on what the parties meant by "procure" in the 16 October Note. The plaintiffs' position is that the use of this term shows that Chew was obliged to *ensure* or "see to" the purchase of the plaintiffs' shares. This also coheres with what Oei understood from Chew during their oral discussion, which was that Chew would "guarantee" him or "undertake" to get a buyer.[129] The plaintiffs rely on the findings of the Court of Appeal in *Tan Hock Keng v L & M Group Investments Ltd* [2002] 1 SLR(R) 672 ("*Tan Hock Keng*").[130] There, the Court considered the nature and extent of the appellant's obligations under certain sale and purchase agreements. In the context of the relevant clause, the Court found that the term "procure" meant, "shall cause a thing to be done", "shall ensure" or "shall bring about" (at [28]).

60 The findings of the Court in *Tan Hock Keng* on the meaning of "procure" cannot be extrapolated to the present circumstances. This is because, as acknowledged by the Court in its analysis, "procure" holds a number of other potential meanings (at [28]). The exercise of contractual interpretation requires courts to look at "both the text *and* context" of an agreement [emphasis added] and consider how the two interact with one another (*Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd)* [2015] 5 SLR 1187 at [35]). The use of the word

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129 NE, 2 September 2019, p 91, lines 6 to 11.

130 PCS at paras 367 to 369.

"procure" in this case must be seen against the wider backdrop of the 16 October Meeting.

61 By the time of the 16 October Meeting, events surrounding the Placement Agreement had irreversibly damaged the Oei's and Chew's relationship. Oei no longer considered Chew to be a friend.[131] The most peaceable way forward with regard to REC was either for Oei to buy out the Chews or *vice versa*. While Chew was not agreeable to either of these suggestions, he agreed to help Oei look for a buyer. He may have been motivated partly out of self-interest, to see the withdrawal of the Notice of Requisition and save himself a confrontation at an EGM although one that he was confident he would win, but also out of a desire to assist Oei and therefore make peace with him. The defendant's position is that with this context in mind, the word "procure" would have referred to Chew using his "best efforts" to "try to find a buyer".[132] This was not a definite obligation to ensure a deal would be concluded by 15 November 2017. The defendant says that this is also supported by contemporaneous correspondence between Chew and REC's board members where Chew made clear that his arrangement with Oei was not legally binding.[133]

62 The plaintiffs contend that if this was truly what the parties had contemplated, Chew could have used alternative words such as "endeavour". This would have been a more accurate reflection of the substance of his obligations. During cross-examination, Chew accepted that he could have

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131 NE, 2 September 2019, p 61, line 15.

132 DCS at para 189.

133 1AB 269 to 271.

recorded that he would "try to find a buyer".[134] He could have also made it explicit in the 16 October Note that the Agreement was not legally binding[135], *ie*, that it was not enforceable or not for use in court. He did not do so. The simple reason for this is that the word "procure" accurately captured his obligation to conclude a sale of the plaintiffs' shares.

63 As I have already found, the 16 October Meeting was an informal gathering organised in the hope of reconciliation between Oei and Chew. I have also determined that the parties did not actively apply their minds to the significance of the words used in the 16 October Note (at [55] above). They would not have considered the various nuances and connotations to "procure" and why this may have been a preferable word choice over other possibilities. Assessing the parties' use of "procure" in the context of the events of 16 October 2017, I find that they only intended that Chew would find a *bona fide* buyer for the plaintiffs by 15 November 2017. He was not obliged to ensure that a deal was concluded or that the plaintiffs' shares would be sold by 15 November 2017. My reasons are as follows.

64 It is clear from the context of the discussions between Oei and Chew that the full terms of any sale and purchase agreement between that buyer and Oei would have to be negotiated as the Agreement only specified the price of the shares and no other term. Both Oei and Chew are experienced businessmen. They could not have contemplated that a transaction involving some $60m would be completed without the involvement of lawyers to sort out the compliance issues as well as the details of how payment would be effected.

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134 PCS at para 228.

135 PCS at 246.

They would have expected that the buyer might need to obtain funding from a financial institution and there could be negotiations on the terms of payment. Indeed, there was such negotiation. Peng had initially offered to make payment in RMB on account of capital controls in China. However, Oei rejected this and they settled on payment in Singapore dollars (S$) in ten weekly instalments. There was also some toing and froing regarding the sale and purchase documentation. Chew presented a 10-page draft agreement for the sale and purchase to Oei, but the latter wanted it to be simplified to a single page document. Although Oei said in his affidavit of evidence-in-chief that he was not obliged to enter into such negotiations[136], this was not communicated to Chew at the time. Given the scale and nature of the transaction, it was a position that I do not think Oei could have held at the time.

65 Turning to the second question, whether Chew had fulfilled his obligation to find a *bona fide* buyer by 15 November 2017, I find that he had done so, for the reasons given below.

66 It is common ground that Chew provided Oei with the SPA for Oei to sign on 28 October 2017. The SPA provided for payment in ten weekly instalments with a transfer of the corresponding number of shares to take place at each payment. The SPA was a single page document in accordance with Oei's request. However, Oei changed his mind and told Chew that he wanted Peng to pay a 20% deposit and the remaining payments to be in eight weekly instalments of 10%. Oei would transfer the first 10% of shares upon receipt of the first weekly instalment, with transfers of further 10% with each subsequent weekly instalment and the balance 30% would be transferred in the final weekly

136 Oei's AEIC at para 66.

instalment. In short, Oei wanted a 20% down payment without any transfer of shares. He said that he would withdraw the Notice of Requisition only after receipt of the 20% deposit. Chew proceeded to communicate this to Peng who reverted to say that he no longer wished to proceed with the transaction.

67 The plaintiffs say that Chew could not have fulfilled his obligations because Peng's offer was not genuine. The "clear and compelling inference" to be drawn from the circumstantial evidence is that Peng was not a real buyer and Chew was the person behind the alleged offer.[137] Peng was Chew's "puppet" or "nominee".[138] Oei's evidence is that following the agreement for Peng to make payment in ten weekly instalments, Chew suggested that Doris could pay the first instalment to Sukma under the guise of a payment in connection with the sale of Sukma's interest in a property in Switzerland.[139] Peng would subsequently repay Doris. Oei produced his WhatsApp messages to Sukma in which Oei said that Chew was making use of her for this purpose.[140]

68 Oei's allegations are denied by Chew. But Oei did not call Sukma to give evidence on the context of his WhatsApp messages to her, which on the face of it, contains protestations by Sukma that there was a *bona fide* intention by Chew to purchase her Swiss property. For reasons similar to those discussed at [45] above, the plaintiffs' failure to call Sukma as a witness undermines Oei's evidence on this point.

69 Indeed, Oei does not deny that he changed the terms previously agreed

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137 PCS at paras 390, 397.

138 NE, 9 September 2019, p 44, lines 17 to 19.

139 Oei's AEIC at paras 68 to 69.

140 Plaintiffs' Reply Closing Submissions ("PRCS") at para 338.

upon, *ie*, payment in ten weekly instalments with 10% of the shares to be transferred upon receipt of each instalment, to the requirement of a 20% down payment and transfer of the first 10% shares to be made only upon payment of the first weekly instalment. It was only after this change that Peng decided to pull out from the deal. Indeed, after Chew informed Oei of this, Oei told Chew that he was prepared to revert to the previous terms, but it was too late.

70 The situation can be summarised as follows. Peng was prepared to purchase the shares at the price stated and negotiations had reached the point where both parties agreed on payment by ten weekly instalments with 10% shares to be transferred on each instalment. However, Oei changed his mind at the last minute, which caused Peng to lose his patience and pull out. The issue is whether, in the circumstances, Chew had fulfilled his obligation under the Agreement to "procure a buyer". It was Oei's unreasonable behaviour that caused the deal to be called off by Peng. The parties could not have contemplated that Chew had to find a buyer who would patiently suffer Oei's last minute requirements to significantly change the terms of the deal they had agreed upon. I therefore find that the defendant did not breach the Agreement.

Did the plaintiffs fail to mitigate their losses?

71 Even if he did breach the Agreement, the defendant submits that the plaintiffs failed to mitigate their losses and are therefore not entitled to damages flowing from their own unreasonable actions.[141] In the course of negotiating the sale and purchase agreement with Peng, Oei should have either accepted payment in RMB, which was Peng's original offer, or agreed to payment in ten weekly instalments. By insisting that Peng pay a deposit of 20% of the purchase

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141 DCS at para 206.

price by 30 October 2017 and the balance in weekly instalments, which resulted in Peng backing out of the agreement, Oei did not take all reasonable steps to mitigate the plaintiffs' losses (citing *The "Asia Star"* [2010] 2 SLR 1154 ("*Asia Star*") at [24]). The plaintiffs contend that this argument is misconceived because the duty to mitigate only arises after an event of breach.[142] The defendant cannot rely on prior events to justify non-performance. In any case, the plaintiffs were under no obligation to accept payment in RMB or by way of instalments. The 16 October Note particularised the price in "SD", *ie*, S$.[143]

72 The central inquiry at the heart of the principle of mitigation is whether an aggrieved party acted reasonably to mitigate its loss (*Asia Star* at [30]). The Court of Appeal in *Asia Star* held that the question that underpins the reasonableness inquiry is: "what a reasonable and prudent man in the trade … have done in the ordinary course of his business if he had been in the aggrieved party's shoes" (citing *Dunkirk Colliery Company v Lever* (1878) 9 Ch D 20 at 25). It added that the standard of reasonableness required is not difficult to meet. An aggrieved party is not expected to "act in a way which exposes it to financial or moral hazard, such as taking steps which might jeopardise its commercial reputation or partaking in hazardous litigation…" (*Asia Star* at [31]).

73 It was known from the outset that Peng could not make a lump sum payment for the plaintiffs' shares unless the transaction currency was RMB. It was the plaintiffs' position that this constituted a breach of contract. Any analysis on damages must proceed on the basis that the plaintiffs' position is correct, in that Chew's failure to procure a buyer to complete the purchase of

142 PCS at para 475.

143 PCS at para 479.

the plaintiff's shares by 15 November 2017 constituted an actionable breach of the Agreement. Therefore, by 28 October 2017, there was no buyer in sight who could purchase the shares by 15 November 2017 and a breach was imminent. Peng was the *only* buyer willing to purchase the plaintiffs' shares at the required premium but it was conditioned on payment in ten weekly instalments. Pursuant to this tentative arrangement, a sale and purchase agreement was drafted by Tham and vetted by Oei. By insisting on a substantial change to the SPA's terms, *ie*, a 20% deposit, at the eleventh hour, Oei undid an arrangement that would have secured the plaintiffs' desired purchase price of over $60m. I therefore agree with the defendant that, even if there was a breach, the plaintiffs had failed to mitigate their losses.

Remedies

74 My findings above render it unnecessary to determine the appropriate measure of damages payable by the defendant, since the plaintiffs are not entitled to such relief. Nevertheless, for completeness, I shall set out the parties' arguments and give my reasons for why the upper limit of the defendant's quantification, $20,617,270, would have been appropriate had liability been established.

75 The parties agree that upon a breach of contract for the sale of shares, the *default* measure of damages is the difference between the contract price and the market price at the date of the breach[144] (*City Securities Pte Ltd (in liquidation) v Associated Management Services Pte Ltd* [1996] 1 SLR(R) 410, at [18]) (the "market price rule"). The defendant says that there is no reason to depart from this position. The plaintiffs assert that the market price rule is

144 PCS at para 414; DCS at para 211.

displaced because there was "no available market"; there was insufficient demand to readily absorb their shares (*ABD (Metals & Waste), Ltd v Anglo Chemical & Ore Company Ltd* [1955] 2 Lloyd's Rep 456 ("*ABD*") at 465).[145] Instead, the relevant market price should be the price at the end of the period taken to arrange a substitute sale.[146] The historical data shows that from 15 November 2017, it took 117 trading days for the trading volume of REC's shares to reach 136,629,600 shares (the number of shares owned by the plaintiffs).[147] Referencing the volume weighted average price of REC shares during this period, the plaintiffs calculate that they would have received $33,569,215 from the sale of their shares. Accordingly, the appropriate measure of damages is the difference between this figure and the contract price ($60,117,024), which is $26,547,809.[148]

76 I cannot accept either of the parties' starting positions. I do not agree with the plaintiffs' characterisation that there was no available market at the material time, justifying a departure from the market price rule. The facts of *ABD* are helpful in illustrating my reasoning. *ABD* concerned a breach of contract for the sale of 200 tons of high-grade Italian electrolytic zinc of 99.97% purity. This high-grade zinc was not dealt with on the London Metal Exchange (at 465); the market traded on zinc with a purity of 98%. It would have been more difficult for the sellers to re-sell the zinc. Notwithstanding this, Sellers J held that there *was* an available market (at 466). It was not necessary to establish the existence of a physical market (*eg*, a fixed place or building). There were

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145 PCS at para 415.

146 PCS at para 417.

147 PCS at para 423.

148 PCS at para 425.

sufficient traders, who made deals off the London Metal Exchange, which dealt with this type of high-grade zinc. The takeaway from *ABD* is this: the fact that there is a potential difficulty in selling goods, due to either quantity or quality, does not mean there is insufficient demand and therefore no available market. A court may adopt a broad interpretation of "market" in making this determination. On the present facts, putting aside the size of the plaintiffs' stake and the potential difficulties in selling this as one lot, there would have been an even greater likelihood of an available market than in *ABD*. This is because REC shares are publicly listed shares on the SGX, which offers a broad pool of potential buyers.

77 I am also unpersuaded by the other authority cited by the plaintiffs in furtherance of this argument. In *Scandinavian Bunkering (Singapore) Pte Ltd v MISC Bhd* [2015] 3 MLJ 753 ("*Scandinavian Bunkering*"), the parties entered into a fixed price bunker contract to purchase and accept delivery of 102,600 metric tons of marine fuel oil. Pursuant to this, the buyer took delivery of 20,334.59 metric tons of oil. However, following a significant decline in oil prices, the buyer wrongfully refused to accept any further deliveries. The Federal Court of Malaysia held that due to the declining market, the remaining marine oil could not have been disposed of in one lot (at [59]). The Court proceeded to calculate the appropriate measure of damages by determining the difference between the contract price and market price that the oil would have fetched if it had been sold in tranches from October to December 2008. This, the plaintiffs say, illustrates how courts adopt a "commercially realistic approach" in calculating damages where the market cannot absorb the asset at one go.[149] I am not so certain. The contract between the parties in *Scandinavian*

[149] PCS at para 421.

Bunkering stipulated delivery to take place over a period of three months – from October to December 2008 (at [7]). Seen in this context, the Court in *Scandinavian Bunkering* was not taking a rough and ready or pragmatic approach in computing damages. It simply considered the market price(s) over the original contractual timeframe for delivery. The contract in *Scandinavian Bunkering* is quite unlike the nature of the Agreement, which was to conclude the sale of the plaintiffs' shares by a *specific date*. The case does not assist the plaintiffs' argument for a departure from the market price rule.

78 While I have thus far expressed my unease with departing from the market price rule, there are also difficulties with the defendant's submission. The defendant's position is that there is no legal basis for applying a blockage discount to the quantum of damages derived via the market price rule. The definition of a blockage discount is set out by the plaintiffs' expert Mr Lie Kok Keong ("Mr Lie") in his expert report (citing Pratt, *Business Valuation: Discounts and Premiums*, (Wiley, 2nd Ed, 2012) at pp 118─119:[150]

> The concept of blockage applies primarily to a holding of publicly traded stock, when the block is so large relative to normal trading volume ["the block"] that either an instant sale probably would be at a discounted price compared to the prevailing market or else it would take a long time to sell …
>
> [A *blockage discount* is the] amount or percentage deducted from the current market price of [the block] to reflect the decrease in the per share value of [the block] …

Blockage discounts can apply to publicly traded stock, real estate or collections of personal property.[151] They are most commonly seen in determining fair

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150 Mr Lie Kok Keong's ("Lie") AEIC, p 22; Lie's Expert Report at para 6.19. See also Mr James Nicholson's ("Nicholson") AEIC, pp 65 to 66.

151 Nicholson's AEIC, p 73.

market value for gift and estate tax purposes but may operate in "other contexts as well".[152] In addition, there are no "hard and fast rules for quantifying blockage discounts … each case must be analysed on its specific facts and circumstances".[153]

79 It is undisputed that the plaintiffs own a sizeable block of REC's shares, the second largest after the Chews. While there may have been an available market on the SGX, they would have faced difficulties in selling a 12.88% stake at one go. The defendant's own expert Mr James Nicholson ("Mr Nicholson") considered that "given the size of the [plaintiffs'] shareholding, if the [plaintiffs'] shares were sold in their entirety on [15 November 2017], the market price of their shares … may reflect a blockage discount".[154] There is also nothing to suggest that the plaintiffs' shares fall within a category to which blockage discounts should not apply. On balance, I consider that a blockage discount would have been applied to a sale of the plaintiffs' shares. I therefore turn to quantifying this discount.

80 On this point, the parties rely on their respective expert reports. Mr Lie is a chartered accountant with more than 24 years' experience in valuing assets such as businesses and shares.[155] Mr Nicholson is a chartered financial analyst with a comparable scope of experience.[156] The experts arrived at different blockage discount ranges using different methodologies. It is helpful to set out these differences in some detail.

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152 Nicholson's AEIC, p 66.

153 Nicholson's AEIC, p 245.

154 Nicholson's AEIC, p 22; Nicholson's Expert Report at para 3.4.

155 Lie's AEIC at paras 1 to 2.

156 Nicholson's AEIC at paras 1 to 2.

81 Mr Lie determined that the appropriate blockage discount range was 9% to 25.55%.[157] He calculated the lower bound of his range using data from the listing of the Placement Shares (8.96% of REC's issued share capital) on 12 October 2017, pursuant to the Placement Agreement. The Placement Shares were listed at $0.30 per share, a discount of approximately 9% to the volume weight average price of $0.3298 on the SGX.[158] Mr Lie considered this a useful reference because the Placement Shares were placed only about a month before the material date for the assessment of damages, 15 November 2017. Further, because the Placement Shares exceeded the daily trading volume of REC's shares, the discount offered by REC would be relevant in determining the appropriate discount for an even larger parcel of shares. Minimally, the blockage discount on the plaintiffs' shares would have had to be higher than 9%.

82 As for the upper bound of his range, Mr Lie took a two-step approach. First, he referred to the research of Dr Shannon P Pratt ("Dr Pratt"), a well-known authority in the field of business valuation. More specifically, Mr Lie looked at Dr Pratt's study of nine American tax cases where blockage discounts of between 3.30% and 27.50% had been applied. Using this range, Mr Lie preliminarily concluded that the appropriate range in the present case should be between 9% and 27.5%. He then undertook a second stage of analysis, envisaging a scenario where the plaintiffs' shares would have been sold in parcels over a period from 15 November 2017 (the "dribble out method"). I pause to note that this differs from the factual premise on which he based his initial calculations (9% and 27.5%), the plaintiffs' shares being sold as an entire

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157 Lie's AEIC, p 19; Lie's Expert Report at para 5.8; PCS at para 431.

158 Lie's AEIC, p 24, Lie's Expert Report at para 6.28.

block.[159] Mr Lie used the same method of calculation at [75] to determine that the plaintiffs would have received approximately $33.57m from the sale of their shares. This is an average price of $0.25 per share, a 25.55% discount to the price of $0.33 per share. He used this second figure to adjust his upper bound value downwards. Applying his blockage discount range, Mr Lie calculated that the resulting range for damages is $19.09m to $26.55m.[160]

83 In estimating the applicable blockage discount, Mr Nicholson also relied on REC's placement of the Placement Shares. In fact, in his view, this provides the strongest evidence of the blockage discount that would have applied to the plaintiffs' shares because it considers the specific characteristics of REC's shares. In addition, as a means of cross-checking his conclusions, Mr Nicholson also considered:[161]

(a) The discounts implied by 46 private placements conducted by other companies listed on the SGX.

(b) Discounts discussed in financial textbooks.

(c) Precedents from American tax cases, where relevant.

He determined that a reasonable blockage discount would have been in the range of 9% to 13%.[162]

84 Separately, Mr Nicholson considered that the price of the plaintiffs'

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159 Lie's AEIC, p 22; Lie's Expert Report at para 6.13.

160 Lie's AEIC, p 27, Lie's Expert Report at para 6.53.

161 Nicholson's AEIC p 20; Nicholson's Expert Report at para 2.13.

162 Nicholson's AEIC p 20; Nicholson's Expert report at para 2.17.

shares would also have reflected a control premium. The definition of a control premium is set out in his report:[163]

> Control premiums relate to the perceived incremental value of being able to exercise control over a company's operations and strategy. A controlling interest gives the holder the ability to affect value (or extract value) in many ways, for example:
>
> (i) by deciding on the dividend policy (whether to pay dividends and if so, how much);
>
> (ii) by selecting management and setting their compensation;
>
> (iii) by changing the capital structure of the company (for example, issuing/redeeming shares or taking on debt);
>
> (iv) by buying or selling assets of the company; and
>
> (v) by merging, liquidating or selling the company. …

For these reasons, controlling shareholdings are considered to be worth more than their *pro rata* value. Although typically applied to majority stakes of more than 50%, Mr Nicholson noted that control premiums are also applied to smaller stakes, where those stakes confer a degree of control or influence over company operations. Given the plaintiffs' ability to call an EGM and call for Chew's resignation[164], he determined a small control premium of 0% to 2% was applicable to the plaintiffs' shares. Applying this premium to his initial blockage discount range, Mr Nicholson concluded that there would have been a net discount of 7% to 13% applied to the plaintiffs' shares. This translates to a range of $17,893,149 to $20,617,270 in damages.

85 Mr Lie did not consider the applicability of a control premium in his

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163 Nicholson's AEIC p 35; Nicholson's Expert Report at para 3.47.

164 DCS at para 233; NE, 9 September 2019, p 135, lines 11 to 18.

report. In his oral evidence, he explained that, in his view, the size of the plaintiffs' stake does not give them a level of control that is deserving of a premium.[165] The plaintiffs assert that Mr Nicholson's application of a control premium is flawed.[166] During cross-examination, Mr Nicholson conceded that none of the factors is indicative of a controlling interest, as defined in his report (at [84]), are present in respect of the plaintiffs' shares.[167] The mere fact that the plaintiffs were able to requisition an EGM does not mean that they had a degree of influence over REC's operations. Mr Nicholson's assertion that a controlling interest could even be held by a shareholder with a 10% stake, the minimum required to call an EGM pursuant to s 176(1) of the CA, further detracts from the plausibility of his position.[168]

86 In line with my findings at [39], it is unlikely that there was any significant pressure applied on REC's management via the Notice of Requisition. If there *was* pressure, it is also uncertain whether this would have been due to the size of the plaintiffs' stake, as opposed to Oei's business personality and the nature of his relationship with Chew. In any case, the disagreement between the parties on this point is somewhat academic. Mr Nicholson's own position is that the control premium may well have been 0%. This would place his lower bound value at 9%, the same value identified by Mr Lie. Taking into consideration the discount on the Placement Shares, it is relatively certain that the blockage discount on the plaintiffs' shares would have been greater than 9%. The question which remains is, how much greater?

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165 NE, 9 September 2019, p 129, lines 7 to 9.

166 PCS at para 441.

167 NE, 9 September 2019, p 164, lines 3 to 7.

168 NE, 9 September 2019, p 165, lines 19 to 21.

87 In my view, a blockage discount of 13%, as put forward by Mr Nicholson, is appropriate. Mr Nicholson primarily arrived at this figure via linear extrapolation, using the blockage discount applied to the Placement Shares as a point of reference.[169] While he accepts that "the relationship between the size of the stake and the size of the applicable blockage discount is unlikely to be perfectly linear … it is reasonable to assume a linear relationship in this case, given the relatively small difference in the size of the two stakes".[170] The plaintiffs regard this as illogical, uncommercial and unprincipled.[171] I disagree. The assessment of any applicable blockage discount is not a precise mathematical exercise. The experts can only make educated guesses as to what would have happened had the plaintiffs' shares been listed on 15 November 2017. When cross-examined on this point, Mr Nicholson clarified that he was not proposing a general method for assessing blockage damages.[172] In the present case, there was historical data available indicating that a discount of 9% had been applied to a 9% block of REC shares, not long before the material assessment date. *Both experts* considered this data relevant in the calculation of their blockage discounts. I accept Mr Nicholson's reasoning that a 12.88% stake would have attracted "a slightly larger discount"[173] and that 13% reflects a reasonable estimate.

88 It is also important to highlight that Mr Nicholson cross-checked his figure of 13% against other cases/resources, as set out at [83(a)] to [83(c)]. None

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169 DCS at para 230; NE, 9 September 2019, p 155, lines 17 to 19.

170 Nicholson's AEIC, p 31; Nicholson's Expert Report at footnote 61.

171 PCS at para 469.

172 NE, 9 September 2019, p 146, lines 7 to 8.

173 NE, 9 September 2019, p 149, line 15.

of the blockage discounts applied in those case studies exceeded 15%. This dispels notions that Mr Nicholson's figure is grossly off the mark. Applying a 13% discount to a 12.88% share value is a fair extrapolation based on data from the listing of the Placement Shares.

89 Even if I were inclined to reject the figure put forward by Mr Nicholson, there are inherent difficulties with Mr Lie's methodology. The first is his heavy dependence on Dr Pratt's research. In his report, Mr Lie acknowledges that blockage discounts are "based on the facts and circumstances of each case".[174] Yet he premised his initial upper bound value of 27.5% entirely on Dr Pratt's research. No analysis was done on how this research is applicable to the present factual matrix. Further, Dr Pratt's study focused on blockage discounts in the context of American tax cases. This presents a difficulty because, as noted by Mr Nicholson in his report, a number of these cases involved shares that were subject to the US Securities Exchange Commission's trading restrictions.[175] Shares subject to such restrictions are considered less valuable than freely traded shares. Separately, four of the cases considered by Mr Lie did not involve publicly traded shares in a listed entity; one related to the sale of real estate properties and three involved shares being traded over the counter rather than being listed on a public exchange.[176] Given these notable factual differences, the American cases are not a reliable guide in determining the applicable blockage discount.

90 The second main issue with Mr Lie's upper bound value relates to his

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174 Lie's AEIC, p 24; Lie's Expert Report at para 6.36.

175 Nicholson's AEIC p 27; Nicholson's Expert Report at para 3.14; See also, NE, 9 September 2019, p 133 line 25 to p 134 line 5.

176 Nicholson's AEIC p 28; Nicholson's Expert Report at para 3.17.

use of the dribble out method. As I have alluded to above, Mr Lie used two different premises to determine the range of his blockage discount. Whilst the calculation of his lower bound value assumed the plaintiffs' shares as having been sold as a block on 15 November 2017, he relied on hindsight information, details of REC's share price and trading volume *after* 15 November 2017, to determine his upper bound of 25.55%.[177] The plaintiffs submit that Mr Lie's methodology is not a conflation of approaches but a sequential process.[178] The dribble out method narrows the range of the blockage discount by calculating the exact amount the plaintiffs would have received from the sale of their shares. This explanation does not address the fact that Mr Lie's upper bound value is derived from a conceptually different starting point.

91 There are also practical difficulties with relying on the dribble out method. The transaction data post 15 November 2017 relates to the trading of REC shares by a number of other shareholders. It does not accurately reflect a situation of a single shareholder seeking to sell their stock.[179] Using this data to quantify the sale price of the plaintiffs' shares is therefore an artificial exercise. The use of such data also risks potentially arbitrary conclusions. As noted by Mr Nicholson:[180]

> [i]f the share price had gone up … after [15 November 2017], Mr Lie's method would have suggested that the shares could have been sold at a premium as of [15 November 2017]. Conversely, if they had fallen very strongly, he would have calculated a much bigger discount. So I think that tells us nothing, in principle.

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177 Nicholson's AEIC p 39; Nicholson's Expert report at para 4.4; DCS at para 225.

178 PRCS at para 376.

179 DCS at para 227; NE, 9 September 2019, p 174, lines 10 to 16.

180 NE, 9 September 2019, p 136, lines 17 to 23.

The thrust of the argument is this: the dribble out method provides no instruction on what the blockage discount *should* be, based on the available market information as of 15 November 2017. It only describes what it *could* have been, with the benefit of hindsight. I must stress that this is not to say valuation can *never* be done with the benefit of hindsight. "In an appropriate case [a court may take] account of what is known of the outcome of [a future] contingency at the time that the assessment falls to be made …" (*Ageas (UK) Limited v Kwik-Fit (GB) Limited and another* [2014] EWHC 2178 (QB) at [35]). This is not such a case. Until today, the plaintiffs have not sold their shares; the future contingency has not come to pass. Mr Lie's dribble out analysis only takes him into the realm of unnecessary speculation.

92 I therefore find that, in the event of liability, the appropriate quantum of damages payable by the defendant would be the sum of $20,617,270. This is calculated by way of the market price rule with an applicable blockage discount of 13%. For the present purpose, I do not consider it necessary to address the issue of interest.

Conclusion

93 For the reasons above, I dismiss the plaintiffs' claim in its entirety. I will hear counsel on the issue of costs.

Lee Seiu Kin
Judge

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