IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 78

Civil Appeal No 36 of 2020

Between

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

… *Appellants*

And

Chew Hua Seng

… *Respondent*

In the matter of HC/Suit No 1059 of 2017

Between

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

… *Plaintiffs*

And

Chew Hua Seng

… *Defendant*

EX TEMPORE JUDGMENT

[Contract] — [Formation]
[Contract] — [Intention to create legal relations]

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v
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14 August 2020

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Andrew Phang Boon Leong JA (delivering the judgment of the court *ex tempore*):

Introduction and background

1 This is an appeal against the decision of the High Court judge ("the Judge") in *Oei Hong Leong and another v Chew Hua Seng* [2020] SGHC 39 ("the Judgment") concerning an agreement pursuant to which the respondent was to procure a buyer of the appellants' shares in Raffles Education Corporation Ltd ("REC").

2 By way of background, the first appellant is Mr Oei Hong Leong ("Oei"). Oei indirectly owns more than 90% of the shares in the second appellant, Oei Hong Leong Art Museum Ltd. The respondent is Mr Chew Hua Seng ("Chew"), the founder, Chairman and Chief Executive Officer ("CEO") of REC. Chew's wife is Ms Doris Chung Gim Lian ("Chung"), REC's director

of operations and human resources. Oei's sister, Ms Sukmawati Widjaja ("Sukma"), is friends with Chew and Chung.

3 Oei and Chew are personal friends and business associates. As at 25 September 2017, the appellants collectively held 14.04% of the share capital in REC. In September and October 2017, the relationship between Oei and Chew deteriorated over the subject of a placement agreement that REC had entered into with RHB Securities Singapore Pte Ltd. Notwithstanding the unhappiness that Oei had expressed, REC allotted and issued 95 million shares on 10 October 2017 pursuant to the placement agreement. This reduced the appellants' shareholding in REC to 12.88%.

4 On 12 October 2017, Oei issued a notice of requisition on behalf of the appellants to convene an extraordinary general meeting of REC's shareholders ("the EGM") pursuant to s 176 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Notice of Requisition"). The appellants sought to put forward resolutions at the EGM seeking, among other things, the removal of Chew as Chairman and director of REC.

5 On the evening of 16 October 2017, Oei, Chew, Chung and Sukma met at Sukma's house for a meeting ("the 16 October Meeting"). It was on this occasion that the parties entered into the agreement that is the subject of this appeal ("the Agreement"). The parties agree that the Agreement was for Chew to procure a buyer for the appellants' shares in REC at $0.44 per share and for the appellants to withdraw the Notice of Requisition. Oei subsequently asked Chew to record the Agreement in writing (in what we shall refer to as "the 16 October Note", which is reproduced at [22] below). Oei and Chew signed the 16 October Note and Sukma appended her signature as a witness. Oei then requested that Chew reproduce the 16 October Note. Chew did so, and he, Oei

and Sukma appended their signatures to this copy as well. Oei and Chew each kept a copy of the 16 October Note and thereafter celebrated the resolution of their differences with champagne and a handshake.

6 On or around 25 October 2017, Chew informed Oei that he had found a potential buyer of the appellants' shares, namely, a businessman from China named Mr Peng Yusen ("Peng"). Chew facilitated negotiations between Oei and Peng on the sale and purchase of the shares, but the transaction fell through on 28 October 2017.

7 At the trial below, the appellants claimed that the Agreement was a legally binding contract. They sought damages for Chew's breach of contract in failing to procure a buyer of their shares in accordance with the Agreement.

8 The Judge dismissed the appellants' claim in its entirety. He found that the Agreement was not legally binding because the parties did not have a common intention to create legal relations. In the alternative, even if the Agreement was legally binding, Chew had not breached it because he had fulfilled his obligation to find a *bona fide* buyer of the shares at the requisite price by 15 November 2017. However, even if Chew had breached the Agreement, the appellants were not entitled to damages because they had failed to mitigate their losses. The Judge nonetheless considered the quantum of damages that the appellants would otherwise have been entitled to had liability been established.

The issues to be determined

9 There are three issues in the present appeal:

(a) first, whether Oei and Chew had entered into a legally binding contract with the common intention to create legal relations;

(b) second, whether, if Oei and Chew had entered into a legally binding contract, Chew was in breach of that contract; and

(c) third, whether, if both the aforementioned issues are determined in the affirmative, what remedies ought to be awarded to the appellants for Chew's breach of contract.

Our decision

10 We turn to consider the first issue – whether or not there was an intention to create legal relations. This is an important threshold issue. If there was, in fact, no intention to create legal relations between the parties in the present case, then there would have been no legally binding contract entered into between them. The remaining two issues relating to whether or not there was a breach of contract and, if so, what remedies could be claimed as a result of the breach, would not arise simply because there could not logically be any breach of a contract which did not exist in the first instance. Neither could there – by parity of reasoning – be remedies awarded for a breach that (as just mentioned) never existed to begin with.

11 The doctrine of intention to create legal relations is, by its very nature, an intensely factual one. Much would depend upon what the precise facts and circumstances of the case are. This is not unlike the doctrine of mitigation of damages in the context of contractual remedies, a doctrine which also figured in the court below (see the Judgment at [71]−[73]). This is the nature of certain legal doctrines where the legal or normative framework is relatively straightforward – the real difficulty lies in applying the relevant legal principles

to the facts and circumstances before the court. Not surprisingly, the doctrine of intention to create legal relations is one of the shortest chapters in every contract textbook. This is not to state that the doctrine is unimportant. On the contrary, as this court emphasised in *Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 ("*Gay Choon Ing*"), it is one of the essential legal elements that must be established before a binding contract can be found between the parties (at [46]).

12 As alluded to in the preceding paragraph, the applicable legal principles under the doctrine of intention to create legal relations are relatively straightforward (and, indeed, there appeared, correctly in our view, to be no dispute as to them by the parties themselves). These principles were succinctly described in the court below (see the Judgment at [32]−[34]). Suffice it to state that the inquiry in each case is an *objective* one. The mere subjective assertions of the parties are, in and of themselves, insufficient although relevant testimony may be helpful in assisting the court in ascertaining whether the parties had (or had not, as the case may be) intended (taken together with the rest of the relevant evidence) to enter into a legally binding contract.

13 It is also hornbook law that the law recognises two (contrasting) presumptions that might also assist the court in such an inquiry. As this court pointed out in *Gay Choon Ing* (at [72]), there is, in the context of social and domestic arrangements, a presumption that parties do *not* intend to create legal relations, *whereas*, in the context of business and commercial arrangements, there is a presumption that parties *do* intend to create legal relations. The Judge found, and the parties agree, that the latter presumption applies to the present case (see the Judgment at [36]). However, it is of the first importance to note that these presumptions are not writ in stone. Indeed, much would depend upon the precise facts and circumstances of the case concerned, and this brings us

back full circle, as it were, to the intensely factual nature of the doctrine itself. This would be an appropriate juncture to turn to the specific facts and circumstances of the present case.

14 We will not rehearse the parties' written as well as oral submissions. Having carefully considered them, we are of the view that the Judge was eminently justified in finding that there had been no intention to create legal relations based on the specific facts and circumstances of the case and, hence, no binding contract as such between the parties. Let us elaborate.

15 The appellants' case is – in substance – based largely upon submissions that the findings of fact arrived at by the Judge were wrong, although they also focus on the 16 October Note (which they, indeed, reproduce in the original handwriting right at the outset of their written case). We observe at the outset that to the extent that the appellants seek to impugn the findings of fact arrived at by the Judge, we are of the view that there is nothing in the appellant's written and oral submissions that demonstrate that the Judge was in error in so far as his findings of fact are concerned. Indeed, we agree with the Judge that if there was an agreement arrived at between the parties, it was a part-oral and part-written agreement. Hence, the Judge's assessment of the relevant witnesses' testimony is of no small importance.

16 Looked at in this light, we address the appellants' submissions on the factual findings made by the Judge as follows.

17 The appellants first focus on the relationship between Oei and Chew. They submit that Oei and Chew had a public dispute at the time and that Chew saw Oei as a threat. Accordingly, given that Chew wanted to stop the EGM, he entered into an agreement with Oei intending for it to be legally binding. We do

not accept this submission. Indeed, the Judge found that Chew was in a strong bargaining position and was not threatened by the appellants' issuance of the Notice of Requisition. This was a finding of fact arrived at by the Judge after considering Chew's evidence given "[u]nder intensive cross-examination" (see the Judgment at [39]). We see no reason to disturb this finding especially given that the appellants' shareholding in REC was, at 12.88%, far below the threshold needed to pass their proposed resolutions at the EGM. Oei himself admitted that it would have been difficult to succeed in passing the proposed resolutions.

18 Assessing the evidence led at trial, the Judge also found that the purpose of the 16 October Meeting was for Oei and Chew "to hear one another out in an informal setting" (see the Judgment at [42]), and the overall atmosphere that evening was cordial and friendly (see the Judgment at [43]). The appellants do not dispute this finding *per se*, but contend nonetheless that a contract can be made even in an informal setting without lawyers present. They rely on the Federal Court of Australia decision of *Barry v City West Water* [2002] FCA 1214 ("*Barry*") and the Supreme Court of Victoria decision of *Agius v Sage* [1999] VSC 100 ("*Agius*") as illustrative cases where an intention to create legal relations was found notwithstanding the informal nature of the negotiations that preceded the concluded contracts. As counsel for Chew notes, these cases are not useful precedents because the inquiry to be conducted is ultimately fact-specific – which is, in fact, *precisely the point we have emphasised earlier*.

19 However, even then, the facts in *Barry* and *Agius* are readily distinguishable. In *Barry*, the terms in dispute were reached following a mediation held in the context of ongoing legal proceedings. Allsop J (as he then was) held at [135] that it was relevant that the parties were present on an occasion organised *in order* that they might enter into legal relations; this was the point of a mediation. Further, even though lawyers were not present, the

parties had commercial experience (see *Barry* at [137]). In *Agius*, Byrne J found that the parties had a "long conversation" about a housing development (at [16]). They discussed various matters in relation to the housing project and the conversation turned to the prospect of one of them purchasing a unit. The parties haggled over the price and shook hands on the deal. One of the parties then prepared a handwritten document as a memorandum of their agreement, which he signed (at [17]). Byrne J found that by their conduct, the parties had entered into an immediate binding contract, which was confirmed by the terms of their written memorandum, with the contract to be formalised in due course (at [49]–[50], [62]).

20 In our view, the cases of *Barry* and *Agius* show that the absence of lawyers is in itself neutral, and this is especially the case here, considering that Oei and Chew were both sophisticated and experienced businessmen. That being said, the present facts are distinguished by the brevity of the discussions between the parties, which Oei testified to have lasted approximately two minutes (see the Judgment at [43]). Critically, it is not likely that Chew would have undertaken an onerous legal obligation to procure a buyer for the appellants' shares in such a primarily informal setting and with such sparse negotiations leading up to the alleged contract. In this regard, we emphasise that the parties do not dispute that the price at which the REC shares were to be sold (namely, $0.44 per share) was at a premium to the market price of the shares at the time (namely, $0.33 per share). Further, had a contract been concluded, Chew would have been legally bound to procure a buyer in a transaction involving $60,117,024, within a month and at a premium.

21 Relatedly, whilst the appellants attempt to argue that Chew was willing to procure a sale at $0.44 per share because *he* was the actual intended purchaser of the appellants' shares, this argument was rejected by the Judge (see the

Judgment at [68]). In this connection, Oei's evidence that Chew was the true purchaser rested on an alleged scheme that involved Chew making payment for the shares under the pretext of Chung purchasing Sukma's interest in a property in Switzerland. Sukma's WhatsApp messages indicated that she viewed the latter transaction to be *bona fide*, and the Judge held that the appellants' failure to call Sukma as a witness undermined Oei's evidence on this point. The appellants have not addressed their failure to call Sukma as a witness, and have provided no basis upon which the Judge's finding on this issue should be overturned.

22 Turning to the 16 October Note, the appellants submit that notwithstanding that the parties' oral discussions on the Agreement lasted less than two minutes, it took longer to draft, re-write and sign the 16 October Note. The appellants also challenge the Judge's finding that it was plausible that the parties only intended to use the 16 October Note as a "symbolic gesture" (see the Judgment at [54]). For reference, we reproduce the 16 October Note as follows:

> 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.
>
> [Signatures of Oei, Chew and Sukma]

23 It will be noticed that the 16 October Note clearly does not reflect the complete terms of the alleged agreement between Oei and Chew. In particular, there is no reference to Oei's obligation to withdraw the Notice of Requisition – a point which was noted by the Judge (see the Judgment at [51]). Indeed, the fact that the parties did not pay close attention to the drafting of the 16 October Note supports the view that they did not intend for what was stated therein to be legally binding. The appellants' argument that the abovementioned omission occurred because it concerned a "price sensitive matter" is, with respect, not persuasive. It was arguably Chew's obligation to procure the sale of the REC shares at a premium, and not the appellants' withdrawal of the Notice of Requisition, that would carry price implications, and which would have been omitted if that justification were indeed true.

24 All this having been said, we note, in fairness to the appellants, that the fact that the 16 October Note was incomplete does not *necessarily* mean that a legally binding contract had not been entered into between the parties. However, that only brings us back full circle to the other relevant evidence surrounding the oral part of the Agreement, which we have already dealt with above.

25 In the circumstances, it is clear in our view that the Judge was correct in holding that there was no intention to create legal relations between the parties and that they had not entered into a legally binding contract with each other.

26 As noted earlier in this judgment, in view of our decision that the parties had no intention to create legal relations and that they therefore had not entered into a legally binding contract with each other, the remaining issues relating to an alleged breach of contract as well as the remedies that ought to be awarded as a result of such an alleged breach are rendered moot. It is therefore not necessary for us to consider the appellants' arguments in relation to the second

and third issues. We should add, however, that we see no reason to disagree with the Judge's findings with regard to the second and third issues.

Conclusion

27 For the reasons set out above, we dismiss the appeal. Having regard to the parties' respective cost schedules, we award the respondent costs in the amount of $45,000 (all-in). There will be the usual consequential orders.

Andrew Phang Boon Leong Judge of Appeal	Steven Chong Judge of Appeal	Belinda Ang Saw Ean Judge

Davinder Singh SC, Jaikanth Shankar, Tan Ruo Yu, Yee Guang Yi and Terence De Silva (Davinder Singh Chambers LLC) for the appellants;
Alvin Yeo SC, Lim Wei Lee, Russell Pereira and Levin Low (WongPartnership LLP) for the respondent.