IN THE APPELLATE DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC(A) 19

Civil Appeal No 113 of 2021

Between

Ivy Ng Soh Peng

… *Appellant*

And

Solution Aircon & Engrg Pte Ltd

… *Respondent*

GROUNDS OF DECISION

[Contract — Formation]

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Ivy Ng Soh Peng
v
Solution Aircon & Engrg Pte Ltd

[2022] SGHC(A) 19

Appellate Division of the High Court — Civil Appeal No 113 of 2021
Quentin Loh JAD, Kannan Ramesh J and Hoo Sheau Peng J
21 April 2022

22 April 2022

Quentin Loh JAD (delivering the grounds of decision of the court):

1 This is an appeal by the appellant ("Ms Ng") against the decision of the trial judge ("the Judge") allowing a claim by the respondent ("SAE") against Ms Ng. The Judge's decision is reported at *Solution Aircon & Engrg Pte Ltd v Ivy Ng Soh Peng* [2021] SGHC 223 ("the Judgment"). Having heard the parties, we dismissed the appeal. We now give our reasons.

Background

2 On 17 May 2019, SAE was granted two options to purchase ("the OTPs") two commercial property units, #01-02 and #01-03 ("the Units") in Midview Building, for respectively $900,000 and $802,500 (collectively $1,702,500). One of the Units was owned by Ms Ng's company. The other was owned by Ms Ng and her ex-husband as tenants-in-common. It is not in dispute that Ms Ng had the requisite authority to act on behalf of the other sellers to

conduct the sale of the Units. In doing so, she dealt with one Mr Ng Peck Khuan ("Mr Ng"), who is a director of SAE. It is also not in dispute that Mr Ng had acted on SAE's behalf in all his dealings with Ms Ng relating to the sale of the Units.

3 Mr Ng claims that Ms Ng had made an oral agreement with him (acting on SAE's behalf) to purchase two racking systems located in the Units for $300,000 after completion of the sale and purchase of the Units ("the Agreement"). Mr Ng further alleges that the Agreement had been entered into for Ms Ng to provide SAE with a $300,000 discount on the purchase price of the Units from $1,702,500 to $1,402,500, without having to amend the sale price in the OTPs. This was apparently necessitated by the difficulties which Mr Ng had faced in financing the purchase of the Units.

4 The Judge allowed SAE's claim and held that the Agreement, which was collateral to the sale and purchase of the Units, satisfied the requirements of a legally binding contract and that Ms Ng had been in breach of the Agreement. He awarded SAE $300,000 in damages, representing the sum that was promised under the Agreement. In the appeal, Ms Ng raised the following:

(a) First, that the Judge had erred in finding that that the Agreement was borne out by the evidence, and that the Agreement constituted a legally binding contract between the parties.

(b) Secondly, even if the Agreement was borne out by the evidence, it was a sham. That is because the Agreement was meant for SAE to receive a $300,000 discount on the purchase price of the Units and did not involve a genuine sale and purchase of the racking systems.

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(c) Thirdly, this court should not give effect to the Agreement for reasons of public policy.

5 Ms Ng also raised a preliminary point. She claimed that the agreement, upon which the Judge had allowed SAE's claim, was not *the Agreement* in issue, but instead an agreement for the return of $300,000 of the purchase price by Ms Ng to SAE after completion of the sale and purchase of the Units. Ms Ng pointed to how the Judge had introduced the abbreviation "Alleged Agreement" (which he found to constitute the valid and enforceable contract on which he allowed SAE's claim) at [11] of the Judgment, which only made reference to Ms Ng's proposal to return $300,000 of the purchase price to SAE on completion.

6 We have little hesitation in rejecting Ms Ng's contention. We are of the view that the agreement which the Judge found to have been concluded and breached is *the Agreement* in issue. Ms Ng's proposal (as set out at [11] of the Judgment) was raised on 3 June 2019 but the Judge did *not* consider the "Alleged Agreement" as having been formed immediately on that day (see the Judgment at [48] and [52]–[53]). The Judge also considered the terms of the "Alleged Agreement" to be evidenced by an e-mail sent by Ms Ng to Mr Ng on 8 June 2019 at 5.26pm ("the 5.26pm E-mail") (set out at [14] of the Judgment) and an exchange of WhatsApp messages between Ms Ng and Mr Ng on the same day between 10.05.21am to 5.29.28pm, in which Ms Ng suggested to Mr Ng that she would effect the return of $300,000 by purchasing the racking systems at that price from Mr Ng (see the Judgment at [54]–[55]). It was therefore implicit in the Judge's reasoning that, by the time a legally binding contract came to be concluded between the parties, it was a term of the "Alleged Agreement" that the return of $300,000 was to be effected by Ms Ng purchasing the racking systems on completion. The "Alleged Agreement" which the Judge

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referred to is therefore *the Agreement* that is in issue. There is no second or other agreement as contended for by Ms Ng.

Whether the Agreement was a valid and enforceable contract

7 We now turn to Ms Ng's first and main contention on appeal, which we find to be without merit. We agree with the Judge's finding that the Agreement had been concluded orally between the parties before 8 June 2019. The evidence clearly shows that Mr Ng was having difficulty financing the purchase of the Units and that prior to 8 June 2019, the parties had begun discussing the $300,000 reduction in the purchase price. Ms Ng does not dispute this but argued that it only shows that there had been an agreement for the reduction of the purchase price of the Units and is not evidence in support of the Agreement. We disagree. Ms Ng's contention misses the point because it is part of Mr Ng's case that the Agreement had been entered into to facilitate the reduction in the purchase price of the Units. It was in the context of Ms Ng's promise to reduce the purchase price of the Units by $300,000 that the parties entered into the Agreement as the means of effecting that reduction. In these circumstances, evidence indicative of an agreement to reduce the purchase price of the Units would necessarily also lend weight to SAE's case on the Agreement.

8 We find the 5.26pm E-mail and WhatsApp messages on 8 June 2019 referred to earlier to be significant. In that e-mail, Ms Ng records Mr Ng and herself as having "agreed" on her purchasing the racking systems and other fixtures in the Units for $300,000, a deal which was subject to completion of the purchase of the Units. That e-mail was reiterated by Ms Ng in the WhatsApp message sent at 5.26.49pm (it appears that the WhatsApp message followed and referred to the 5.26pm E-mail). The 5.26pm E-mail and WhatsApp message sent at 5.26.49pm show that the parties had orally reached an agreement (in the terms

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of the Agreement) before that time, and which they wanted to record in writing then. Critically, the evidence of Mr Ng and Ms Ng on cross-examination also confirms that this was what they understood of the 5.26pm E-mail and the WhatsApp messages. Ms Ng accepted that the 5.26pm E-mail represented an agreement which had existed between herself and Mr Ng by that point in time. Mr Ng's evidence was also that the 5.26pm E-mail was meant to recapitulate Ms Ng's promise (allegedly given to him earlier over the phone) to purchase the racking systems for $300,000, to which he agreed. We therefore reject Ms Ng's contention that the 5.26pm E-mail merely constituted an offer. That cannot be correct because the 5.26pm E-mail was meant to *reiterate* in writing an agreement that had already been formed between the parties *before* 8 June 2019. The WhatsApp messages sent by Ms Ng subsequent to the 5.26 pm E-mail at 5.28.51pm and 5.29.28pm, which were quoted in the Judgment at [54], reinforced this conclusion and bear repeating:

> What i can put in writing is that i *buy over the racking system,* fixture and fitting including stay up to 30th sept 19 for a sum of $300k in total and *this is only applicable if the property is being transferred to you successfully to yr name then u can sell me back those racking systems in the property*
>
> This is the best i can do *if u wan me to put in writing that i can buy over and give u $300 cash.*
>
> [*sic*]
>
> [emphasis added]

9 The evidence of subsequent events also lend weight to SAE's case. On 10 June 2019, when Mr Ng informed Ms Ng that he still fell short of $70,000 cash on completion, Ms Ng suggested that sum be deducted from the $300,000 due from her, which she herself said was payable by her for "buying" the racking systems from Mr Ng. Ms Ng also provided Mr Ng with a series of post-dated cheques amounting to $300,000. We agree with the Judge's finding that

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these cheques were issued for the payment of $300,000 as consideration under the Agreement (see the Judgment at [62]) because it had been intended that they be deposited at a staggered timing following completion. The Judge found the latter point to be corroborated by WhatsApp messages sent by Ms Ng to Mr Ng on 6 and 9 September 2019, which were quoted in the Judgment at [61].

10 Ms Ng submitted that the Judge ought not to have relied on the evidence of the post-dated cheques in concluding that the Agreement existed because, first, the evidence at trial as to when those cheques were issued contradicted SAE's pleaded case, and secondly, the cheques discussed in the WhatsApp messages on 9 September 2019 were not the post-dated cheques but unrelated rental cheques.

11 We reject both arguments:

(a) As for the first argument, we find any such contradiction immaterial because the Judge, in finding that the evidence of the post-dated cheques supported SAE's case on the Agreement, had only relied on the fact that the cheques had been issued in circumstances which suggested that they were given as payment for $300,000 due under the Agreement, and not on the timing as to when those cheques were issued. As noted above, we agree entirely with the finding by the Judge. We also agree with the Judge that any inconsistency as to when those cheques were issued is immaterial because it is not an essential element of SAE's case (see the Judgment at [63]).

(b) As for the second argument, there were indeed two rental cheques for one of the Units (#01-02) in evidence, each for a sum of $4,066, and dated 30 September 2019 and 31 October 2019,

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> respectively. In Ms Ng's WhatsApp messages on 9 September 2019, she told Mr Ng "last cheque I wan to change to 29th nov" [*sic*] and "1st cheque u can bank in Thursday". However, "1st cheque" could not have referred to either of the rental cheques, because by "Thursday" (which would have been 12 September 2019), neither of those cheques could have been deposited, since they both post-dated 12 September 2019. The mentioned "last cheque" is also unlikely to be a reference to either of those rental cheques. Ms Ng did explain in her affidavit of evidence-in-chief that the reference to "last cheque" was to the rental cheque dated 31 October 2019, and she had wanted to amend the date of that cheque to 29 November 2019, because that was rental for the month of December 2019. However, Ms Ng's own evidence was that #01-02 had only been occupied until early December 2019, and in those circumstances, there would have been no reason for rental to have been payable for December 2019. We therefore agree with the Judge's rejection of Ms Ng's explanations about the WhatsApp messages on 9 September 2019.

12 Finally, we also agree with the Judge that the Agreement satisfied all the requirements of a valid and enforceable contract. While there is indeed some uncertainty in the schedule for the payment of $300,000, that does not render the Agreement unenforceable because it is clear that any such payment will become due following the completion of the sale and purchase of the Units. Whether the parties had the requisite intention is to be construed objectively and the court is not bound by a party's actual or subjective intentions (see *Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at para 05.006). Thus, even if Ms Ng's contention that the parties never intended to create legal relations "in the form of a buyer-seller

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relationship" for the racking systems were true, it is not open to her to rely on the parties' subjective intentions as such to claim that they never intended to create enforceable legal relations in the lead up to the conclusion of the Agreement when the objective evidence, which we have considered above, warranted the opposite conclusion.

Whether the Agreement was a sham

13 In her submissions before the Judge, Ms Ng argued that the Agreement was a sham. However, this point had not been pleaded. The Judge therefore considered that this argument need not be dealt with, given the general rule that the parties are bound by their pleadings as a matter of procedural fairness (see the Judgment at [70]; see also *V Nithia v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 at [37]). Before us, Ms Ng submitted that the Judge had erred in concluding that her allegation of a sham had to be pleaded, because it was simply a point of submission which arose from the evidence led at trial.

14 We disagree. The essential element of a sham is that the parties did not intend to create legal relations which the acts done or documents executed give the impression of creating (see *Toh Eng Tiah v Jiang Angelina and another appeal* [2021] 1 SLR 1176 ("*Toh Eng Tiah*") at [74]). There must be a common subjective intention on the part of all parties to the alleged sham to mislead (see *Chng Bee Kheng and another v Chng Eng Chye* [2013] 2 SLR 715 at [52] and [54]–[55]).

15 This was well put by Diplock LJ (as he then was) in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at 802:

> … it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means *acts done*

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> *or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties' legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create.* But one thing, I think, is clear in legal principle, morality and the authorities … that for acts or documents to be a 'sham' with whatever legal consequences follow from this, *all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a 'shammer' affect the rights of a party who he deceived.* There is an express finding in this case that the defendants were not parties to the alleged 'sham'. So this contention fails.
>
> [emphasis added]

The above definition was expressly endorsed by the Court of Appeal in *Toh Eng Tiah* at [73].

16 Ms Ng's argument about the Agreement being a sham is therefore an allegation of fact because it requires proof of the common intention on the part of both Ms Ng and Mr Ng to mislead third parties into thinking that there was a sale and purchase of the racking systems when in fact there was none. Ms Ng ought to have pleaded that the Agreement was a sham and her failure to do so deprived SAE of the opportunity at trial to address this allegation by way of evidence to the contrary.

17 The Judge was therefore correct in concluding that he need not consider Ms Ng's allegation of a sham. We therefore also disregard it for the purposes of the appeal and do not consider the argument on its merits. However, even if we had been minded to decide otherwise, we find no merit in the argument. Even if the Agreement had not been entered into for any sale and purchase of the racking systems, but only to provide SAE with a $300,000 discount on the purchase price of the Units, that alone did not make the Agreement a sham. It must further be shown that the parties had entered into the Agreement with the

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intention of misleading third parties, like the bank which was extending financing to SAE for the purchase of the Units. There is no pleading to that effect and no evidence has been led on this score. This was a purely private agreement between the parties, entered into after the OTPs had been exercised and when Mr Ng had difficulty completing the purchase. On the facts of this case, the object of misleading third parties was not in the minds of the parties because the only reason why they entered into the Agreement was to facilitate the sale and purchase of the Units as between themselves by reducing the purchase price of the Units. It is clear that Ms Ng was keen to complete the sale of the Units and was prepared to offer a discount because she had her own private reasons, unconnected to Mr Ng, for wanting the sale of the Units to go through, even at that discounted price (see the Judgment at [52]).

Whether the Agreement should be unenforceable for reasons of public policy

18 We now turn to Ms Ng's third and final contention in the appeal. In the first place, we noted, again, that this point about public policy unenforceability had not been pleaded by Ms Ng. Therefore, strictly speaking, Ms Ng is precluded from raising it on appeal. In any case, for Ms Ng to even sustain any argument to curtail contractual rights arising under the Agreement on the basis of public policy, she must prove to the court's satisfaction that the alleged public policy exists based on authoritative sources (see *UKM v Attorney-General* [2019] 3 SLR 874 at [162]). This she has not done, save for asserting that giving effect to the Agreement will be contrary to public policy as it would "send a wrong signal that parties can be less than transparent to … financial institutions". Thus, even if we had to consider the issue proper, we find no merit in Ms Ng's contention.

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19 Nonetheless, we address an apparent, and theoretical, (since this was not raised on the pleadings), legal issue raised by Ms Ng in her AEIC. She asserts that the racking systems in the Units always belonged to her company and it was not SAE's to sell. The illogic raised was that SAE could not have sold the racking systems to her when it never owned by them in the first place. There is an answer to this. The OTPs did not include any inventory of what was being sold with the Units. Clause 4 of the OTPs required the sellers to deliver vacant possession on completion. Clause 5 of the OTP provides that the Units were sold in their present state and condition on an "as is" basis. The sale of the Units was based on the Law Society's Conditions of Sale 2012, and cl 5.2 provides that where the contract specifies a sale with vacant possession on completion, all moveable property *not* included in the sale are to be removed from the property by completion. It is not disputed that the racking systems were not removed on or before completion. Ms Ng's pleaded position was that the racking systems were removed following completion, on 9 September 2019 (#01-03) and 8 December 2019 (#01-02) (see also the Judgment at [54]). Legal title in the racking systems therefore passed to SAE upon completion.

Whether SAE is entitled to claim $300,000 pursuant to the Agreement

20 The Judge regarded SAE's claim as an action for breach of contract (see the Judgment at [77]–[78]). He found that Ms Ng had acted in breach of contract by failing to pay Mr Ng $300,000 despite having taken delivery of the racking systems and therefore awarded SAE $300,000 in damages.

21 It is possible that some confusion may arise from the Judgment at [54] and the references there to specific performance. It arises because, first, in SAE's Statement of Claim (Amendment No 1), SAE claimed the following: "(1) The Defendant perform [*sic*] the contract specifically; (2) the sum of $300,000;

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(3) Alternatively, damages; …". On proper analysis, what SAE was asking for was payment of the $300,000 as agreed under the Agreement. It could not really be a true claim for specific performance because first, Ms Ng (through her ex-husband) had already removed the racking systems and scrapped it. Secondly, the true nature of what was to be performed under the Agreement, *viz*, an effective reduction in the purchase price of the Units, through a sale of the racking systems under the Agreement for $300,000. Having removed the racking systems after the completion of the sale and having scrapped it, there only remained the obligation to make payment under the Agreement. On final analysis, the sale and purchase of the Units had been completed, Ms Ng had removed the racking systems after completion, scrapped the same and kept the proceeds. The only outstanding obligation was therefore payment of the $300,000 as agreed.

22 It is possible to characterise SAE's claim as an action for the price under the Agreement, rather than an action for damages. When the claim is analysed as such, it raises the issue of whether SAE would have been entitled to maintain its action for the price. Section 49(1) of the Sale of Goods Act (Cap 393, 1999 Rev Ed) ("the SGA") provides that a seller may maintain an action against the buyer for the price of goods if, under a contract of sale, the property in the goods has passed to the buyer and he wrongfully neglects or refuses to pay for the goods according to the terms of the contract.

23 While we agree with the Judge that whether SAE had acquired title to the racking systems had no bearing on whether the Agreement is a valid and enforceable contract (see the Judgment at [41]–[44]), that issue is determinative of whether SAE could maintain its action for the price of $300,000 under the Agreement. If SAE never acquired title to the racking systems, then it could never have passed property in the racking systems to Ms Ng, and no action for

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the price is maintainable under s 49(1) of the SGA. However, for the reasons set out at [19] above, this difficulty does not arise because SAE did obtain legal title to the racking systems upon completion. As Ms Ng has refused to pay SAE $300,000 as required under the Agreement, SAE is entitled to maintain its action for the price under s 49(1) of the SGA.

Conclusion

24 For the foregoing reasons, we dismissed the appeal and affirmed the Judge's decision to enter judgment for $300,000 in favour of SAE. We fixed the costs of the appeal at $33,000 (all in) and made the usual consequential orders.

Quentin Loh
Judge of the Appellate Division

Kannan Ramesh
Judge of the High Court

Hoo Sheau Peng
Judge of the High Court

Vijai Dharamdas Parwani and Lim Shu Yi (Parwani Law LLC) for the appellant;
Goh Peck San (P S Goh & Co) for the respondent.

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