

CANADA / JUDGMENT

Oswald v. Start Up SRL

2021 BCCA 352

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 352 Oswald v. Start Up SRL

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Oswald v. Start Up SRL,

2021 BCCA 352

Date: 20210928

Docket: CA47171

Between:

Nevil Oswald

Respondent

(Plaintiff)

And

Start Up SRL

Appellant

(Defendant)

And

Narendra Mhamunkar and Nevil Oswald

Respondents

(Defendants by Counterclaim)

Before:

The Honourable Chief Justice Bauman

The Honourable Madam Justice MacKenzie

The Honourable Mr. Justice Harris

On appeal from: An order of the Supreme Court of British Columbia, dated
November 16, 2020 (Oswald v. Start Up SRL, 2020 BCSC 1730,
Vancouver Docket S166959).

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Place and Date of Hearing:

Vancouver, British Columbia

September 10, 2021

Place and Date of Judgment:

Vancouver, British Columbia

September 28, 2021

Written Reasons by:

The Honourable Mr. Justice Harris

Concurred in by:

The Honourable Chief Justice Bauman

The Honourable Madam Justice MacKenzie

Summary:

The appellant alleged the judge made a series of extricable legal errors in finding that a Memorandum of Understanding was a binding and enforceable contract in respect of the sale of shares to the appellant by the respondents. Held: Appeal dismissed. The judge did not make

extricable legal errors in his application of the test for the formation of a binding and enforceable contract, nor did he misapprehend the relevance of subsequent conduct in reaching his conclusions. The appellant has not demonstrated reversible error on the applicable standard of palpable and overriding error. The findings of fact and mixed fact and law were open to the judge on the evidence.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

- [1] The issue on this appeal is whether the judge erred in concluding that a Memorandum of Understanding ("MOU") constituted an enforceable contract. In concluding that it did, the judge found the parties objectively intended to enter into a binding contract for the sale of certain shares at a minimum price and the contract was enforceable and not uncertain. The judge went on to order specific performance of the share sale.
- [2] The appellant contends the judge fell into extricable legal error in applying the wrong test to determine whether the MOU is an enforceable contract, including misapprehending evidence of subsequent conduct and relying on evidence of subjective understanding. Accordingly, the judge erred in awarding specific performance.
- [3] While the trial was lengthy and engaged multiple issues, the focus of this appeal is narrow. For the reasons that follow, I would dismiss the appeal.

Background

- [4] The MOU is relatively short. It arose in a specific context that explains much of the judge's analysis. In brief, the respondents faced a corporate reorganization that would effectively eliminate the value of their shareholdings. The principal of the appellant corporation wanted the respondents to continue to be involved in the reorganized corporate structure, and needed their cooperation with the restructuring. The respondents were willing to negotiate about an arrangement that would, if successful, see them continue to be involved. However, they wanted assurances that would mitigate the risks of the loss of value of their shareholdings if those negotiations were unsuccessful and the reorganization occurred. Accordingly, the purpose of the MOU, as admitted by the appellant's principal, was to assuage the respondents' concerns by guaranteeing a minimum price for the respondents' shares in the event the negotiations failed and they left the organization. This was the factual matrix existing and known to the contracting parties when the contract was executed.

- [5] Accordingly, the MOU expressly contemplated two situations or options. Option A contemplated the continuing involvement of the respondents as shareholders in a reorganized corporate structure. Option B addressed the situation that would arise in the event that the parties could not reach an agreement under Option A. Option A did not come to fruition. The judge found that in those circumstances, Option B was triggered, and it constituted a binding and enforceable contract.
- [6] I will flesh out the background more fully in order to set the issues in context and because this background is part of the factual matrix the judge examined in reaching his conclusions.
- [7] The parties are all shareholders of ICTC Holdings Corporation ("ICTC"), a company in the business of manufacturing, distributing, and marketing paint-dispensing equipment. ICTC is a subdivision of a group of companies around the world known as the "Hero Group".
- [8] In July 2015, Start Up SRL ("Start Up"), the principal shareholder in ICTC, wanted to acquire additional shares of ICTC and to reorganize the companies controlled by ICTC. This reorganization would substantially reduce the value of ICTC by transferring assets owned by ICTC to Hero Europe, a company controlled by Start Up's principal, Alessandro Sacchet.
- [9] On July 16, 2015, Start Up, in furtherance of the proposed reorganization, entered into an agreement to purchase shares held by two other shareholders of ICTC for just over \$15 million, total. The shares purchased amounted to 41.32% of ICTC shares, on top of the 49.79% of shares Start Up already held.
- [10] One of the respondents, Mr. Oswald, held 8.44% of the shares of ICTC personally and 0.44% of its shares in trust for the other respondent, Mr. Mhamunkar. Mr. Oswald and Mr. Mhamunkar were concerned the reorganization would substantially reduce the value of their shares in ICTC. At the same time, their cooperation with the reorganization was needed for it to proceed. Mr. Oswald and Mr. Mhamunkar expressed their concerns to Start Up, informing it they would not consent to the reorganization unless an agreement was made guaranteeing the value of their shares. To obtain the cooperation of Mr. Mhamunkar and Mr. Oswald, Start Up negotiated and executed the MOU agreeing, or so the judge found, that it would buy the shares of Mr. Oswald and Mr. Mhamunkar at a minimum price of \$3,109,368 if it could not reach a different agreement in which Mr. Oswald and Mr. Mhamunkar would remain in the organization. On July 11, 2015, the parties entered into a two-page MOU regarding the role of Mr. Oswald and Mr. Mhamunkar in the new company following the reorganization.
- [11] The MOU defined Start Up as the first party and Mr. Oswald and Mr. Mhamunkar as the second party. The MOU contained two options: "Option A" and "Option B". It provided as follows:

This Memorandum of Understanding (MOU) sets for the terms and understanding between the First & Second party to define the terms and obligations of the First Party towards the transaction defined as below;

Background

The first party & second party are shareholders in I.C.T.C. Holding Corporation (ICTC) which in turn holds various subsidiary companies & other holding at Hungary etc. The first party is in the process of increasing its shareholding & will be buying out the shares of all shareholders except the second party in order to consolidate the business. The second party has over the years developed the APAC business for ICTC & has supported the first party in its plans for future growth.

The first party is currently closing the share purchase agreement with The Traub Family Trust, 6408788 Canada Corp & MGSL Corporation (sellers). The first party is obligated not to execute an agreement with second party & need to defer a written agreement before the share transfer process with the sellers is completed.

To provide comfort & a binding obligation of minimum assurance of value to the second party now the parties agree under this MOU to be bound by the conditions as set out below:

1. The parties wish to continue working together so as to expand the business in India & rest of the world.
2. Since the parties are still negotiating on the actual valuation & role in the new entity prior to as well as post restructuring, the first party promises to offer one out of the two options as below to the second party:

A. The first party would offer terms of continuing for the second party:

- (i) that would be favorable enough for the second party to continue working both on APAC region business
- (ii) as well as remain a shareholder with ICTC.
- (iii) These terms would be offered, finalized & an agreement reached within 7 days of signing this MOU.
- (iv) Besides other benefits, the second party would get an option to get a 25% share of the company ICTC (Hungary) Holdings KFT or any other company that would emerge as the holding company.
- (v) The second party would obtain this 25% holding in lieu of it's current holding in ICTC subject to a fresh shareholders agreement between the parties.
- (vi) All taxes applicable to the second party would be the responsibility of the second party only & the first party would not be responsible for such tax liability, whatsoever.

B. In case option A is frustrated & both parties are unable to reach a settlement as to the actual benefits for the second party, the first party through this MOU assures the second party a minimum valuation of at least CAD 3,109,368 (Canadian dollars three million one hundred nine thousand three hundred sixty eight only) towards for it's shares held in ICTC. [sic]

[12] In summary, the MOU stated as its purpose to "provide comfort & a binding obligation of minimum assurance of value". It also stated that the parties agreed to be bound by its terms. The MOU provided, among other things, that Start Up was in the process of buying out the shares of all other shareholders apart from those of Mr. Oswald and Mr. Mhamunkar; that Start Up was obliged not to execute an agreement with Mr. Oswald and Mr. Mhamunkar prior to the share transfer process with the other shareholders; and that the parties wished to continue working together to expand the business.

[13] At the risk of unnecessary repetition, I will outline the obligations in the MOU. The MOU canvassed two options. Option A contemplated negotiating an arrangement, within seven days, for Mr. Oswald and Mr. Mhamunkar to continue within the Hero Group as shareholders with ICTC. Option A also provides that Mr. Oswald and Mr. Mhamunkar would have the option to purchase a 25% share in the company following the reorganization, and that this share would act as a substitute for Mr. Oswald and Mr. Mhamunkar's previous shareholding. This new share would be subject to a fresh shareholders' agreement for each. Option B was available in the event Option A was frustrated and the parties were unable to reach a settlement. Option B assured Mr. Oswald and Mr. Mhamunkar of a minimum valuation of \$3,109,368 for their shares in ICTC.

[14] No agreement was ever concluded under Option A. After the seven-day window elapsed, the parties continued to negotiate but were unable to reach a settlement. Mr. Oswald and Mr. Mhamunkar ultimately demanded that Start Up purchase their shares pursuant to Option B. Start Up refused.

[15] Mr. Oswald and Mr. Mhamunkar applied seeking specific performance under the MOU for the sale of their shares to Start Up in exchange for a purchase price of \$3,109,368. They took the position that the failure of the parties to reach an agreement under Option A triggered Option B. Start Up counterclaimed against Mr. Oswald and Mr. Mhamunkar on the basis of fraudulent or negligent misrepresentations, which allegedly caused it to purchase ICTC shares from other shareholders at a price in excess of their true value.

The Trial Judgment

[16] From the perspective of this appeal, the relevant issues are whether objectively there was an intention to contract, agreement on essential terms, and sufficient certainty of those terms. Start Up argued there was no intention to contract; the MOU was nothing more than an agreement to agree; the terms of the MOU were not sufficiently certain to form a binding contract; and specific performance could not be ordered due to the lack of certainty in the terms of the MOU. The judge rejected these submissions.

- [17] At the outset, it is of some importance to note the judge made a series of findings of fact in the face of a complicated and substantial body of evidence about the parties' dealings. That evidence was often conflicting. The judge generally preferred the evidence of the respondents' witnesses over that of the appellant's. He found each of the three witnesses for the respondents to be credible and reliable, namely, Mr. Oswald and Mr. Mhamunkar themselves, as well as Mr. Traub, a former majority shareholder in ICTC. The judge took issue, however, with the evidence of the two witnesses for Start Up: Mr. Sacchet, the majority shareholder and directing mind of Start Up, and Mr. Rinero, Start Up's Chief Financial Officer. The judge made adverse credibility and reliability findings against Mr. Sacchet and Mr. Rinero, as they attempted to colour or manipulate their evidence, and at times were even untruthful. However, Mr. Sacchet made critical admissions about the purpose of the MOU.
- [18] The judge recognized that whether there is an enforceable contract involves a contextual analysis of all the material facts and circumstances, while excluding the subjective intentions of the parties. The evidence is to be analyzed from the perspective of the objective reasonable bystander. The subsequent conduct of the parties is, he accepted, relevant to whether, objectively, the parties had reached a binding contract at the material time. The judge accurately laid out the relevant principles he had to apply at paras. 120-28 of the judgment. No issue is taken with the judge's statement of the relevant tests he had to apply. Start Up contends the judge erred in his application of the tests to the evidence.
- [19] Based on his analysis of the evidence and the MOU, the judge concluded:
- [137] In my view, the intention of the parties, as determined from the perspective of a reasonable bystander, was that the MOU would be a legally binding document creating contractual rights and obligations as between the parties. More particularly: the wording and form of the MOU indicates an intent to create contractual relations; the events and circumstances immediately preceding the MOU indicate an intent to create contractual relations; and the events and circumstances after the execution of the MOU indicate an intent to contract. In reaching this conclusion, I have not taken into account the subjective intentions of the parties but rather I have ascertained their intentions from the perspective of an objective reasonable bystander, as I am required to do by the authorities. I shall now expand on my reasons for so concluding.
- [20] The judge went on to explain his findings in some detail. With respect to the intention to contract, the judge relied on the fact that Start Up wished to secure an arrangement whereby Mr. Oswald and Mr. Mhamunkar remained involved with the reorganized group. Previously, Mr. Oswald had raised concerns to Start Up about the lack of a binding agreement between the parties for the sale of his shares. The judge found the MOU was designed to address Mr. Oswald's concerns by providing such an agreement. He noted the repeated use of words like "agree" and "binding" in correspondence between the parties.

- [21] The judge further determined the parties' conduct after signing the MOU evinced an intent to contract at the time the MOU was signed. In support of this conclusion, the judge relied on email correspondence between the parties referring to the MOU as a binding agreement; a draft share purchase agreement sent by Mr. Oswald to Start Up, which was contingent upon Mr. Oswald entering into an employment agreement with Hero India; and further communications between the parties exchanging drafts of the employment contract and the share purchase agreement, which reflected Start Up's understanding that the employment contract was contingent upon the share purchase agreement.
- [22] The judge considered language in the MOU that Start Up submitted evinced the MOU was "an agreement to agree". This included the provision of the MOU stipulating that Start Up was obligated not to execute an agreement with Mr. Oswald and Mr. Mhamunkar, and was required to defer a written agreement pending the share transfer with other shareholders, as well as the reference in the MOU to the parties' ongoing negotiations. The judge concluded none of this language in the circumstances amounted to an agreement to agree in respect of Option B. The deferral, in his view, related to formal documentation required to give effect to the agreement in the MOU. He also found the ongoing negotiations related to Option A, not Option B.
- [23] With respect to the terms of the MOU, the judge remarked it was drafted on short notice by a lawyer in India and was not a model of clarity. However, applying substance over form, he concluded the wording of the MOU would indicate to any reasonable bystander that it was a contractual document intended to create binding obligations. He noted the MOU made repeated reference to binding obligations. Start Up submitted the MOU was too ambiguous in relation to whether there would be a purchase and sale of shares. The judge disagreed. He found that a sale of shares was implied in Option A by the reference to a new, 25% shareholding in the reorganized company. He also rejected the submission of Start Up that the reference to "valuation" referred to value only, not purchase price. He held that this interpretation would render the MOU meaningless and that "valuation" referred to "price". He confirmed this by reference to the surrounding circumstances, namely correspondence between the parties that reflected the intention that Start Up would purchase the shares of Mr. Oswald and Mr. Mhamunkar.
- [24] The judge also rejected Start Up's submission that the continuing discussions between the parties following the expiry of the seven-day time period outlined in the MOU were evidence that there was no common intention between the parties that Start Up was to purchase Mr. Oswald and Mr. Mhamunkar's shares when the seven-day period elapsed. The judge found the negotiations following July 11, 2015 related to Option A and not Option B, and found the conduct of the parties showed their implicit agreement to either disregard or extend the seven-day time period.

[25] It is important to observe that the judge examined the evidence from the perspective both of whether the parties objectively intended to create a binding contract and, if so, whether the terms of the contract entered into were sufficiently certain to be enforceable. In respect of the former question, the judge explicitly stated, at para. 147, that the question he was answering was whether the parties intended to contract on the terms set out in the MOU. He summarized his approach to the latter question as follows:

[148] As I have noted elsewhere, the MOU is not particularly well-drafted. This is undoubtedly because, at least in part, the parties and the lawyer who originally drafted it had limited proficiency in English. Regardless of the reason, the interpretation of the MOU presents difficulties. In approaching the interpretation of the MOU I apply the following principles which are derived from Hoban at paras. 47-55:

- a) the proper inquiry is whether the contract discloses the parties' intentions as to the substance of their agreement;
- b) difficulties of interpretation do not render a clause meaningless provided a definite meaning can be properly extracted from the words used;
- c) where there is ambiguity, extrinsic evidence may be considered;
- d) I should not apply the doctrine of certainty so rigidly that it thwarts the intentions of the parties;
- e) I should try to retain and give effect to the agreement the parties have created looking at substance and not mere form;
- f) I should not too readily find the contract void for uncertainty; and
- g) it is the responsibility of the parties, not the courts, to express the terms of their contract.

[26] In applying these principles, the judge accepted that the express language in the MOU dealing with a minimum valuation was ambiguous. He acknowledged the principle that where parties have objectively evinced an intention to contract, the court should attempt to interpret the contract to give binding effect to its terms but should not go so far as to create an agreement for the parties. The judge, therefore, had regard to the evidence and found that, objectively, the parties had agreed the reference to a minimum valuation was an agreement on a minimum price. If that were not so, he concluded, the entire commercial purpose of the MOU would be defeated, and Option B would be meaningless. The judge also concluded the subject matter of the agreement (Mr. Oswald and Mr. Mhamunkar's shareholdings) were clearly identified, and the absence of a closing date did not render the contract unenforceable because it was not an essential term. With respect to the completion date, the judge reasoned as follows:

[166] Start Up further submits that the MOU is invalid as a specific completion date is not set out in the MOU. I also reject this submission. There is no completion date specified because the sale under option B was not to take place unless and until the parties failed to reach

agreement on option A. It was therefore not necessary, and indeed would have been counterproductive, to have a specific date under option B. The sale under option B was to be completed only if and when the parties failed to reach agreement on option A. It is clear that by April 23, 2016, the date of Mr. Oswald's demand under option B, the parties had failed to come to agreement on option A.

- [27] The judge ultimately concluded the MOU formed a binding and enforceable contract in respect of Option B, and dismissed Start Up's claims of fraudulent or negligent misrepresentation, as its evidence fell "far short". He then turned to examine whether he should order specific performance. The judge concluded an award of damages could not be an adequate remedy and crafted an order for specific performance by way of a share transfer from Mr. Oswald and Mr. Mhamunkar to Start Up in exchange for the agreed-upon purchase price.
- [28] Start Up did not comply with the judge's order for specific performance, and on February 22, 2021, the judge issued directions to complete the share purchase and set a closing date of March 1, 2021. Start Up did not comply with this order.

On Appeal

- [29] Start Up contends the judge made three errors. First, he applied the wrong test and ignored express terms of the MOU in concluding that the parties objectively intended to enter into a binding and enforceable contract. Second, he misapprehended the evidence of the conduct and negotiations of the parties after the MOU was entered. Third, he made inconsistent evidentiary rulings about the admissibility of certain evidence which led him to take into account evidence of the subjective intentions of Mr. Oswald.
- [30] With respect, I would not accede to any of these errors.

Standard of Review

- [31] A conclusion that the requirements for the formation of a contract have been satisfied is a question of mixed fact and law, reviewable for palpable and overriding error. Similarly, the standard of review for the interpretation of the contract is palpable and overriding error, absent extricable legal error. An appellate court will defer to a judge's interpretation of a contract unless an error is obvious and material to the outcome.
- [32] While extricable legal error is reviewable on a standard of correctness, appellate courts are to be cautious in approaching the question whether an alleged error is truly extricable or not.

Finding of a Binding and Enforceable Contract

- [33] On a fair reading of the judgment, it is apparent the judge applied the correct legal test to determine whether the parties entered into a binding and enforceable contract. As the Supreme Court of Canada has recently confirmed, a contract is formed when the parties "have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract", and the surrounding circumstances may be considered: G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011) at 15; *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22 at paras. 36-37 [Ethiopian Orthodox]. The court must consider "how each party's conduct would appear to a reasonable person in the position of the other party": *Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corp.*, 2020 SCC 29, at para. 33. "The question in every case is what intention is objectively manifest in the parties' conduct": *Ethiopian Orthodox* at para. 38.
- [34] The applicable legal principles to determine whether an enforceable contract has been formed were succinctly set out in Mr. Mhamunkar's factum at para. 67 as follows:
- (a) there must be an intention to contract;
 - (b) the essential terms must be agreed to [by] the parties;
 - (c) the essential terms must be sufficiently certain;
 - (d) whether the requirements of a binding contract are met must be determined from the perspective of an objective reasonable bystander, not the subjective intentions of the parties; and
 - (e) the determination is contextual and must take into account all material facts, including the communications between the parties and the conduct of the parties both before and after the agreement is made.
- [35] Start Up suggests the judge erred by applying the wrong test to determine whether the MOU was a contract or an agreement to agree. The specific error alleged is that the judge asked the wrong question. Start Up contends the judge asked only whether the parties had a "general" intention to contract, rather than an intention to contract on the terms of the MOU. In support of this argument Start Up points to the judge's reasons:
- [147] Accordingly, given the wording of the MOU, the conduct of the parties immediately before the execution of the MOU and the conduct of the parties subsequent to the MOU, I find, applying the objective standard of the reasonable bystander, that the parties intended to contract upon the terms set out in the MOU. The question now becomes what those terms were, and whether they were sufficiently certain.
- [36] Start Up says the last sentence indicates the judge determined whether the parties intended to contract only in a general sense and without regard for the specific terms of the contract.

- [37] I do not agree. On a fair reading of the reasons as a whole it is apparent the judge asked and answered the question referred to in the previous sentence, namely, whether the parties intended to contract upon the terms set out in the MOU. Of course, whether those terms were sufficiently certain to make an enforceable contract is another question.
- [38] Firstly, the judge correctly identified the legal test. In paras. 121-28 the judge, for example, referred to the decision of this Court in *Berthin v. Berthin*, 2016 BCCA 104 [Berthin], where, at para. 46, the following is found:
- [46] The test, of course, is not what the parties subjectively intended but "whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract": see G.H.L. Fridman, *The Law of Contract in Canada* (6th ed, 2011) at 15
- [39] At paras. 124 and 125 of his reasons, again in reference to *Berthin*, the judge expressly identified that an enforceable contract requires a consensus between the parties on all of the essential terms of their agreement.
- [40] While it is true that the judge uses the expression "an intention to contract" without always adding a phrase referring expressly to the terms of the contract, this is simply a shorthand way of capturing the test. I cannot infer the judge lost sight of the question of whether the parties agreed objectively to contract on the terms of the MOU. It is apparent from his reasons that this question was central to his analysis.
- [41] Indeed, when it came time to apply the test, the judge said, at para. 137, it was the intention of the parties, as determined from the perspective of a reasonable bystander, that the MOU would be a legally binding document creating contractual rights and obligations as between the parties. As I have referred to already, in stating his conclusion at para. 147, the judge said: "the parties intended to contract upon the terms set out in the MOU".
- [42] Respectfully, *Start Up* took one phrase in one paragraph out of context and ignored other statements of principle. It also ignored the substance of the judge's application of the test to the facts. It is clear the judge focused on whether the parties objectively intended to be bound by the contract they entered on the terms it contained. And, I repeat, whether those terms are sufficiently certain to create an enforceable contract is a separate question.
- [43] Accordingly, I see no legal error in the test applied by the judge. The judge made findings of fact that were open to him on the admissible evidence. He reviewed the wording of the MOU and the factual context in which it was entered into, as well as the conduct of the parties both leading up to and following its execution. I can see no error in the judge's reliance on the wording of the MOU, which expressly says that it is a "binding obligation" and that the parties "agree to be bound by the conditions as set out below".

- [44] Moreover, it was open to the judge to conclude that in substance the parties agreed to a contract under which they had an opportunity to negotiate (Option A), but made provision for what would occur if those negotiations did not result in a different agreement (Option B). No persuasive argument was advanced that the judge fell into palpable and overriding error in his findings of fact. I would not accede to this ground of appeal.
- [45] Incorporated into this ground of appeal are arguments that principally focus on the second question, that is, concerning the certainty of terms. Here, Start Up says the judge's conclusions are undermined by the wording of the MOU. For example, the absence of a completion date, the reference to a minimum valuation and not a specified price, and the failure to act on Option B within seven days, all suggest the parties had not objectively entered a binding and enforceable agreement.
- [46] To reiterate, these alleged errors are all reviewable on a standard of palpable and overriding error. That standard has not, in my opinion, been met. First, I can see no such error in the judge's finding that a completion date is not an essential term of this contract. Start Up acknowledged that the absence of a completion date does not always render a contract unenforceable; it depends on the facts. I have extracted the judge's reasoning on this point (see above, at para. 26 of these reasons) and see no reversible error in it.
- [47] Second, Start Up says the assurance of a minimum value of the shares indicates both that price is uncertain since an objective reasonable observer could not know at what price the sale would occur, and that Option B contemplated nothing more than further negotiations on what the actual price would be.
- [48] Once again, no reversible error has been identified. There is, in my view, nothing unenforceable in principle about an arrangement whereby parties agree to negotiate (Option A), but only on condition of an enforceable agreement covering what will happen if negotiations fail (Option B). Specifically, the judge explained in detail why the reference to value should be understood as price. I can see no error in principle or fact in his conclusion that failing to reach agreement under Option A, Mr. Oswald and Mr. Mhamunkar had an enforceable right to sell their shares for a minimum price. No doubt they also had a right to attempt to negotiate for a higher price, but that right subsists with the right to insist on the minimum price. Anything less, as the judge found, would defeat the commercial purpose of the MOU by denying Mr. Oswald and Mr. Mhamunkar exactly what they bargained for as the price of cooperating with the corporate reorganization: a guaranteed exit that protected the value of their pre-reorganization interest.
- [49] Accordingly, I reject the argument that a contract to buy an asset at a specified minimum price in the event a higher price is not agreed is inherently uncertain or necessarily defeats a finding of an objective intention to contract on such a basis. In any event, no palpable and overriding error has been demonstrated.

Misapprehension of Evidence of Subsequent Conduct

- [50] The second ground of appeal relates to the judge's conclusions about subsequent conduct of the parties. Again, it is incontrovertible that subsequent conduct of the parties can be relevant to ascertain whether, objectively, they had entered into a binding and enforceable contract. Among the subsequent conduct in this case are emails from Start Up confirming the existence of a binding agreement.
- [51] Start Up suggested the judge misapprehended the evidence in concluding that the negotiations concerned only Option A. It points to share purchase agreements exchanged between the parties and says that such an agreement was not contemplated by Option A and must have been in reference to Option B.
- [52] I can see no palpable and overriding error in the judge's apprehension of the evidence or findings of fact. His conclusion was that subsequent negotiations to determine whether an agreement could be reached on a continuing relationship took place only under Option A. The existence of a binding obligation under Option B is not undermined by those negotiations nor by the fact that they extended beyond the seven-day period contemplated in the MOU. The judge was entitled to find:
- [146] Option A of the MOU does stipulate that the parties were to finalize an agreement concerning the continued participation of Mr. Oswald and Mr. Mhamunkar in the reorganized group within seven days. However, this did not occur and the parties continued long after the seven-day period to discuss employment terms and how Mr. Oswald and Mr. Mhamunkar's shares in ICTC would eventually be sold. The parties' discussions and communications following July 18, 2015, were solely in relation to trying to come to an agreement under option A, not option B. This was the evidence of Mr. Oswald and Mr. Mhamunkar, and their evidence is corroborated by the fact that the draft share purchase agreements that were being exchanged and discussed were conditional on the continued employment of Mr. Oswald and Mr. Mhamunkar. It is true that the parties never formally extended the seven-day time period in option A. However, it is equally clear that the parties, by their conduct, implicitly agreed to either disregard or to extend the seven-day time period.

Conclusion on the Intention to Contract

- [147] Accordingly, given the wording of the MOU, the conduct of the parties immediately before the execution of the MOU and the conduct of the parties subsequent to the MOU, I find, applying the objective standard of the reasonable bystander, that the parties intended to contract upon the terms set out in the MOU. The question now becomes what those terms were, and whether they were sufficiently certain.

- [53] Option B was about the terms on which the respondents would leave. Option A dealt with the terms on which they would stay. The judge concluded that the share purchase agreements related to the continued involvement of Mr. Oswald and Mr. Mhamunkar in the organization. This is supported by the fact that the share purchase agreements were conditional on entering employment contracts, and that Option A contemplated an increase in shareholding interests.
- [54] In addition, Start Up criticizes the judge's conclusions about the parties continuing to negotiate Option A after the expiry of the seven-day period when it says there was no evidence of an agreement to alter or waive the seven-day period. However, as Mr. Oswald and Mr. Mhamunkar point out, the judge's reasons simply reflect the parties' conduct; they clearly continued to negotiate after the seven days expired. The judge was entitled to these findings. I would not accede to this ground of appeal.

Inconsistent Evidentiary Findings

- [55] Finally, I turn to the question of whether the judge made inconsistent evidentiary findings. In argument, counsel for Start Up agreed this ground is in reality an allegation the judge relied on subjective intentions and not exclusively evidence of objective intention in concluding the parties intended to contract.
- [56] It seems to me that the judge was careful to rely on admissible evidence to ground his findings. I have not been persuaded, on a review of the judge's reasoning, that he relied on inadmissible evidence.
- [57] Under the parol evidence rule, evidence of subjective intention or understanding is inadmissible to support the existence of, to add to, to subtract from, to vary, or to contradict a contract that has been wholly reduced to writing: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 59 [Sattva]. However, evidence of what was said, communicated, or done by witnesses or parties remains generally admissible as part of the factual matrix or surrounding circumstances that are known or ought to have been known to both parties at or before the date of contracting. In my view, the judge used the evidence in accordance with the guidance provided in *Sattva*. Once again, I would not accede to this ground of appeal.
- [58] I acknowledge that Justice Rowe for the Supreme Court of Canada in *Corner Brook (City) v. Bailey*, 2021 SCC 29, has noted the tension between the longstanding, traditional rule that evidence of negotiations is inadmissible when interpreting a contract, and the direction in *Sattva* to consider the surrounding circumstances in contract interpretation: see para. 56. The Court left the issue of whether, and if so, in what circumstances, negotiations will be admissible in interpreting a contract, to a case in which negotiations are determinative of the proper interpretation of the contract: see para. 57. Similarly here, I do not think the judge's reliance on negotiations, to the extent he relied on them, was determinative of his critical conclusions. As I have said, in my opinion, the judge correctly followed the dictates

of Sattva.

Disposition

[59] I would dismiss the appeal.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Chief Justice Bauman"

I agree:

"The Honourable Madam Justice MacKenzie"

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