

# Court says no chance for missed opportunity claim

The High Court recently handed down its judgment in the case of *Wong Yu Cho, Rolly and Another v Art Statements Ltd and Others* [2023] HKCU 1518. The case is interesting as it sets out how the Court approaches loss of opportunity claims and factors taken into account when assessing claims for the recovery of expenditure incurred pursuant to a written agreement.

## Background

The 1<sup>st</sup> Plaintiff, Rolly Wong, professed to be a famous art collector. The 2<sup>nd</sup> Plaintiff, Wong Wing King, was the 1<sup>st</sup> Plaintiff's late wife. The 1<sup>st</sup> Defendant has been operating an art gallery named Art Statements in Hong Kong and has been in the business for more than 15 years. The 2<sup>nd</sup> Defendant, Dominique Perregaux, was a shareholder and director of the 1<sup>st</sup> Defendant.

On 27 March 2017, the Plaintiffs and the 1<sup>st</sup> Defendant entered into a written Consignment Agreement in respect of 16 artefacts, amongst which were a pair of stone lions and a marble Guanyin statue. The Consignment Agreement contained the following provisions:

- ❑ The Guanyin statue and the stone lions were described as being from the Ming Dynasty and the value attributed to them were HK\$3.5 million and HK\$500,000 respectively;
- ❑ The consignment period was from 27 March 2017 to 30 June 2017;
- ❑ The distribution of the sale proceeds in the event of sale by the 1<sup>st</sup> Defendant of any of the consigned artefacts was 70% to the 1<sup>st</sup> Plaintiff and 30% to the 1<sup>st</sup> Defendant;
- ❑ The 1<sup>st</sup> Defendant agreed to assume full responsibility, including transportation and insurance coverage from the date of delivery to the date of return; and
- ❑ The artefacts were not to be loaned or consigned to any third party without the 1<sup>st</sup> Plaintiff's prior written permission.

The Plaintiffs claimed that they had come across a potential buyer who expressed an interest in purchasing the stone lions and the Guanyin statue in late April 2017. The 1<sup>st</sup>

Plaintiff did not want to lose the opportunity to sell the said artefacts and purportedly issued a letter to the Defendants on 27 April 2017, asking the Defendants to return the 16 artefacts. The 1<sup>st</sup> Plaintiff further submitted that he had subsequently issued two more letters to the Defendants on 31 May 2017 and 23 June 2017 asking the Defendants to return the 16 artefacts as he had allegedly received a deposit from the potential buyer for the stone lions and Guanyin statue. The 16 artefacts were however not returned to the Plaintiffs until 30 November 2017. It was alleged that the potential buyer was unable to view or inspect these two artefacts, and eventually decided against purchasing them. On this basis, the Plaintiffs claimed they had lost the opportunity to sell the items given the Defendant's failure to return the artefacts immediately after the consignment period.

The Plaintiffs claimed against the Defendants for the sum of HK\$400,000 being 10% of the aggregate value of the two artefacts as being their loss of opportunity to sell them ("**Loss of Chance Claim**"). In response, the 1<sup>st</sup> Defendant submitted that the Plaintiffs had breached the Consignment Agreement as the 16 artefacts were not genuine articles or of low value. The 1<sup>st</sup> Defendant counterclaimed against the Plaintiffs for the expenditure incurred, being the transportation costs to and from its gallery and the installation costs to exhibit the 16 artefacts at its gallery.

## Decision

The Court found in favour of the Defendants and dismissed the Plaintiffs' Loss of Chance Claim. In reaching its decision, the Court adopted the guiding principle laid down in the case *Hong Jing Co Ltd v Zhuhai Kwok Yuen Investment Co Ltd* [2013] 1 HKLRD 441. Where the defendant had not breached the contract, and the plaintiff claims that a third party would have acted in a certain way so to benefit him, the plaintiff only needs to demonstrate that there was a real or substantial chance of the third party's act. The Court must first assess the likelihood of that hypothetical act occurring, usually as a percentage, and then reduce the plaintiff's damages for his loss by reference to that percentage.

The Plaintiffs in this case did not claim that they were actively marketing the 16 artefacts or that there were other potential buyers before the artefacts were returned on 30 November

2017. In fact, the Plaintiffs' own case was that there was only a 10% chance that the potential buyer would have purchased the stone lions and Guanyin statue. The Court held that the Plaintiffs had failed to demonstrate a real or substantial chance of selling the stone lions and Guanyin statue between the expiry of the consignment period and the date on which the 16 artefacts were returned.

The Court also considered the credibility of the factual witnesses. The 1<sup>st</sup> plaintiff admitted that the letter dated 27 April 2017 was not written on the date stated. Further, no evidence was given as to the identity and background of the potential buyer, the price discussed with the potential buyer and the amount of deposit paid by the potential buyer. The Court therefore had serious doubts as to whether the potential buyer actually existed.

The Consignment Agreement did not provide any provisions to the effect that the 1<sup>st</sup> Defendant would be entitled to 30% share of the sales proceeds even if the sale was procured by the 1<sup>st</sup> Plaintiff himself. As such, there was nothing to prevent the 1<sup>st</sup> Plaintiff from directing the potential buyer to view the stone lions and Guanyin statue at the 1<sup>st</sup> Defendant's gallery. The Court was therefore not convinced by the 1<sup>st</sup> Plaintiff's explanation that he did not wish to direct the potential buyer to the 1<sup>st</sup> Defendant's gallery so to avoid sharing the sales proceeds with the 1<sup>st</sup> Defendant pursuant to the Consignment Agreement.

The Court found that the Plaintiffs had not presented sufficient evidence to support their claim. Further, the Plaintiffs' evidence was inconsistent. Considering the 2<sup>nd</sup> Defendant was not a party to the Consignment Agreement, he could not be held liable for the alleged breach of the Consignment Agreement. For these reasons, the Court rejected the Plaintiffs' Loss of Chance Claim.

In dealing with the 1<sup>st</sup> Defendant's counterclaim, the Court turned to the terms of the Consignment Agreement. The Court held that the Consignment Agreement expressly contemplates that the 1<sup>st</sup> Defendant would be responsible for the expenditure incurred for the period from the date of delivery to the date of return. This was the case even if none of the consigned artefacts were sold. Whilst the 1<sup>st</sup> Defendant's counterclaim was premised that all 16 artefacts were not genuine or of low value, the 1<sup>st</sup> Defendant failed to fully discharge its burden of proof. Apart from the stone lions and the Guanyin statue, the 1<sup>st</sup> Defendant failed to demonstrate how the Plaintiffs were otherwise in breach in respect of the remaining 16 artefacts. The 1<sup>st</sup> Defendant also failed to explain why the expenditures incurred could be said to have been entirely wasted when it was alleged that only the stone lions and the Guanyin statue amounted to a breach of the Consignment Agreement. The Court therefore dismissed the 1<sup>st</sup> Defendant's counterclaim.

### Key takeaways

This case highlights the importance of clear and unambiguous contract drafting. In the context of consigned goods, the contract should clearly set out terms such as the consignment period and how the sale proceeds will be divided between the parties. The contract should also outline the consignee's responsibilities for the storage, display and transportation of the consigned goods. To better protect the consignor, time in respect of the return of the consigned goods should be of the essence. The contract should set out what would happen in the event the consignee fails to return the consigned goods after the consignment period and include indemnity provisions under which the consignee shall pay the consignor any loss caused by the late return of the consigned goods. On the other hand, the consignee would want to include the consignor's representations and warranties about the provenance, value and ownership of the consigned goods. In practice, consignees should make necessary inquiries on the consigned goods, ensuring that that the consigned goods are in fact what they are purported to be in the contract.

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