Broadley Construction Pte Ltd
v
Alacran Design Pte Ltd

[2018] SGCA 25

Court of Appeal — Civil Appeal No 139 of 2017
Judith Prakash JA, Steven Chong JA and Quentin Loh J
20 March 2018

Contract — Misrepresentation — Fraudulent

Contract — Unilateral mistake

16 May 2018 Judgment reserved.

Steven Chong JA (delivering the judgment of the court):

1 The conclusion of most written agreements is typically preceded by oral discussions and/or negotiations. In situations where the parties contemplate that the agreement would eventually be reduced into writing, not infrequently, the written text may vary or even contradict what parties believed was orally agreed. To the question as to what terms would govern the contractual relationship between the parties, the answer would almost invariably be the express terms of the written agreement. Should the position be any different if one of the parties, in the course of the oral discussions, indicates a different understanding of the agreement and the other party remains silent in the face of such indication? On these bare facts, the position may not be altogether clear as a host of imponderables may affect the outcome.

2 This dispute concerned a case where the party who allegedly remained silent had, following the meeting at which the alleged understanding was conveyed, produced a draft written agreement which contained a clause in direct contradiction to the other party's alleged understanding. Instead of rejecting the clause or seeking clarification, that other party signed the written agreement without any reservation or qualification. Under these circumstances, is it open to that other party to renounce the terms of the written agreement on the basis that by keeping silent, the party who drafted the written agreement is precluded from relying on the written text on account of fraudulent misrepresentation and/or unilateral mistake? For the reasons set out below, we hold that the answer is in the negative.

Facts

3 In July 2013, the appellant, Broadley Construction Pte Ltd ("Broadley"), entered into a contract with the respondent, Alacran Design Pte Ltd ("Alacran"), for Alacran to supply equipment for the construction of a residential development project ("the Contract"). Broadley was Singbuild Pte Ltd ("Singbuild")'s sub-contractor and used the equipment supplied under the Contract to fulfill its obligations under its contract with Singbuild.

4 Broadley began defaulting on payments to Alacran in 2015 because Singbuild, in turn, was not paying Broadley. Mr Lin Zhonghan ("Mr Lin"), Alacran's former business development manager, chased Mr Govindaraju Elanthiriyan ("Mr Govin"), Broadley's managing director, for the payments. They met twice to discuss Broadley's payment of the outstanding sum of $423,407.34 ("the Outstanding Sum"). They first met in August 2015 ("the First Meeting") and again three months later in November 2015 ("the Second

Meeting"). Certain facts regarding the meetings are disputed. For the First Meeting, it is not disputed that Broadley issued post-dated cheques (for September 2015) to Alacran for the Outstanding Sum ("the Cheques"), to be encashed by Alacran only after Singbuild had paid Alacran. What is disputed is who suggested the issuance of the Cheques. Mr Lin and Mr Govin point to each other.

5 The main factual dispute arises from the Second Meeting:

(a) Mr Lin, representing Alacran, claims that (i) Mr Govin proposed that an undertaking be issued to authorise Singbuild to pay the Outstanding Sum directly to Alacran from the money that Singbuild owed Broadley; (ii) Mr Lin informed Mr Govin that it did not matter who paid the Outstanding Sum as long as it was paid, but if Singbuild defaulted on the payment, Broadley would remain liable for any outstanding amount; and (iii) Mr Govin remained silent in response to Mr Lin's statement in (ii).

(b) Mr Govin, representing Broadley, alleges that (i) Mr Lin asked Mr Govin to issue an undertaking as Alacran wished to collect the Outstanding Sum directly from Singbuild; (ii) Mr Lin said that he would return the Cheques to Broadley once the undertaking was signed; and (iii) Mr Govin agreed to prepare an undertaking and informed Mr Lin that the undertaking would absolve Broadley from all further liability to Alacran.

For reasons we will go into later (see [9] below), the Judge found that Mr Lin's version was more likely on a balance of probabilities.

6 Two days after the Second Meeting, on 6 November 2015, Broadley (through one Ms Chatterly, a senior quantity surveyor at Broadley) sent a draft of the undertaking to Mr Lin via email. The email stated "please find draft Undertaking letter which we [Broadley] will send to SingBuild".[1] The undertaking is a one-page letter ("the Undertaking"), on Broadley's letterhead and addressed to Singbuild. When the draft of the Undertaking was sent to Mr Lin on 6 November 2015, it had not been signed by any of the parties. Broadley (through Mr Govin) and Singbuild signed the Undertaking at a subsequent site meeting. Mr Lin then took the Undertaking back to his office and signed it on behalf of Alacran.[2] No changes whatsoever were made to the text of the Undertaking. It read as follows:

> RE: UNDERTAKING LETTER FOR SWITCHES & ELV SYSTEMS OUTSTANDING BALANCE
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> We, [Broadley] … has appointed [Alacran] … to supply … [equipment] for the above mentioned project. Two payments has been issued to Alacran, and to date we have outstanding balance amounting to S$423,407.35, including GST. This amount is final and has been agreed with Alacran and no further claims shall be submitted in relation to this contract.
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> We, [Broadley] … hereby authorises [Singbuild] … to pay on our behalf, the total outstanding balance due to Alacran, which sums to S$423,407.35 including GST, details as attached and agreed by the supplier. We agree that this amount be deducted from our Remaining Contract Amount with Singbuild Pte Ltd.
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> This agreement has been agreed by [Singbuild], [Broadley] and [Alacran]. This letter indemnifies [Broadley], and is free of any responsibility and is no longer liable with regards to the outstanding balance with [Alacran].

7 Both Mr Lin and Mr Govin state that the Undertaking was meant to reflect what they had discussed at the Second Meeting. Mr Lin's evidence was

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1 ACB vol 2 p 74; ROA vol 5 Part A p 237.

2 ACB vol 2 p 63.

that he believed that the Undertaking only authorised Singbuild to pay on behalf of Broadley without releasing Broadley from liability for the Outstanding Sum, whereas Mr Govin's evidence was that the purpose of the Undertaking was for Singbuild to assume all of Broadley's liability to Alacran and to absolve Broadley from all liability to Alacran. In other words, Mr Govin understood the Undertaking as effecting an assignment of the debt, *ie*, the Outstanding Sum.

The Judge's decision

8 Eventually, Singbuild did not pay Alacran and Alacran sued Broadley for the Outstanding Sum. Broadley predictably relied on the Undertaking, arguing that it was absolved from any liability in respect of the Outstanding Sum to Alacran. In response, Alacran pleaded that:[3]

> (a) the Undertaking did not have the effect of releasing Broadley from its obligation to pay, but was merely a letter authorising Singbuild to pay Alacran the Outstanding Sum owed to them by Broadley;
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> (b) the Undertaking was not a valid agreement because there was a total failure of consideration;
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> (c) if the Undertaking was a valid agreement,
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> (i) Alacran entered into it by its unilateral mistake of a kind sufficient to vitiate the Undertaking;
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> (ii) Alacran was not aware of the nature and effect of the Undertaking and could rely on the doctrine of *non est factum*; and/or

[3] ACB vol 2 pp 24–27.

(iii) Alacran had been induced into entering into the Undertaking based on Broadley's fraudulent misrepresentation that the Undertaking would not absolve Broadley of its liability.

9 The Judge found in favour of Alacran. Her judgment is published as *Alacran Design Pte Ltd v Broadley Construction Pte Ltd* [2017] SGHC 162 ("the Judgment"). On the facts, she found that since both parties accepted that the Undertaking arose out of the discussions from the Second Meeting, she had to first determine what transpired at the Second Meeting. She preferred Mr Lin's account of the events which took place at the Second Meeting as summarised at [5(a)] above for the following reasons:[4]

(a) Mr Lin's testimony had been consistent and credible. In particular, his evidence that it was Mr Govin who had suggested the Undertaking appeared in his affidavit filed for summary judgment well before the trial. This was not refuted by Mr Govin until Mr Govin was cross-examined.

(b) Alacran's conduct in retaining the Cheques was consistent with Mr Lin's account that Alacran would look to Broadley if Singbuild did not pay Alacran.

(c) Mr Govin's evidence that he had agreed with Mr Lin that Singbuild would assume full responsibility for the Outstanding Sum and Broadley would be absolved of all liability to pay the same, and that this would be reflected in the Undertaking (drafted by Broadley), did not comport with the actual terms of the Undertaking. Singbuild's role, as

[4] Judgment at paras 17–21.

expressed in the Undertaking, was instead limited only to be authorised to pay the Outstanding Sum to Alacran on Broadley's behalf.

(d) Mr Govin's evidence had been inconsistent. He first stated that he was the one who mentioned to Mr Lin that Broadley would be absolved of all liability if Singbuild were to assume it in place of Broadley, but then said that it was one Mr L N Ramesh, who also worked for Broadley, who mentioned it. Mr Ramesh was not called to testify.

(e) Mr Govin's version of the agreement made no commercial sense as Alacran already knew that Singbuild was facing cash flow problems and it was unlikely that Alacran would agree to absolve Broadley of its liability and seek recourse against Singbuild instead.

10 Based on the above factual findings, the Judge found that the Undertaking was a valid agreement in the sense that the parties intended to create legal relations and sufficient consideration was furnished.[5] But the Undertaking could be rescinded for fraudulent misrepresentation or alternatively, it was void for unilateral mistake. She found that Mr Govin had, through his silence at the Second Meeting, fraudulently misrepresented to Mr Lin that Broadley would remain liable for the Outstanding Sum to Alacran if Singbuild failed to pay Alacran.[6] This misrepresentation operated on Mr Lin's mind when he entered into the Undertaking, and thus Alacran could rescind the Undertaking. Further, she found that Alacran (through Mr Lin) had entered into the Undertaking based on a unilateral mistake which was its belief that the Undertaking did not have the effect of absolving Broadley from liability to pay

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5 Judgment at para 24.

6 Judgment at paras 29–30.

the Outstanding Sum. This was a sufficiently important and fundamental mistake as to the terms of the Undertaking to allow it to resile from the Undertaking. She also found that Broadley (through Mr Govin) was aware of this mistake. The Judge held that Alacran succeeded on both fraudulent misrepresentation and unilateral mistake, and thus Broadley remained liable to Alacran to pay the Outstanding Sum.

11 Finally, she found that the doctrine of *non est factum* was not made out on the facts.

The parties' cases on appeal

12 Broadley appeals against the Judge's decision, both as regards her findings of fact as to what happened at the Second Meeting and her legal conclusions in relation to fraudulent misrepresentation as well as unilateral mistake. There is no cross appeal by Alacran.

13 In relation to fraudulent misrepresentation, Broadley's case is that no representation was made at the meeting. It contends that Mr Lin's evidence as to what transpired at the Second Meeting was not sufficient to support a finding of fraud. Even if Mr Lin's evidence was accepted, Mr Govin's silence could not amount to a clear and unequivocal representation. Further, such a representation, even if made, was not intended to be relied upon (since a written agreement was expected) and was not in fact relied upon, since the representation would have been corrected by the express terms of the Undertaking.

14 In response, Alacran argues that the Judge's findings of fact were not against the weight of the evidence. Mr Govin's silence amounted to active

concealment of a particular state of affairs, which amounted to a misrepresentation. Further, the parties' evidence was that the Undertaking would encapsulate the terms of the agreement reached by the parties at the Second Meeting, and Mr Lin relied on this when signing the Undertaking. The misrepresentation was hence not corrected.

15 In relation to unilateral mistake, Broadley contends that the Judge erred in finding that Broadley (through Mr Govin) had actual knowledge of Alacran's mistake. Mr Lin had been sent the one-page Undertaking, which would have corrected any mistake on his part, was given all the time he needed to read the Undertaking, and signed on the very page that contained the term that he was allegedly mistaken about. Mr Govin would have, from these circumstances, fairly assumed, and indeed did assume, that Mr Lin was not mistaken as to the terms of the Undertaking. In response, Alacran argues that the last clause (indemnifying Broadley) had been surreptitiously included in the draft, and Mr Lin had been misled by Mr Govin into thinking that the Undertaking encapsulated the agreement reached at the Second Meeting. Mr Govin was therefore aware of Mr Lin's mistake at the time when Mr Lin signed the Undertaking.

Our decision

16 Having considered the arguments, although we agree with the Judge's findings of fact, we find that neither fraudulent misrepresentation nor unilateral mistake has been made out. We give our reasons below.

Events at the Second Meeting leading to the Undertaking

17 We start with the Judge's findings as to what transpired at the Second Meeting. Alacran contends (and the Judge accepted) that during the Second Meeting, Mr Govin had suggested that Singbuild be authorised to pay Alacran directly out of the sum that Singbuild owed Broadley. Mr Lin said that it did not matter who paid the Outstanding Sum but if Singbuild did not pay Alacran, Broadley would remain liable. Mr Govin kept silent in response. Conversely, Broadley contends that the parties had actively agreed, at the Second Meeting, that Broadley would be absolved of all liability in respect of the Outstanding Sum.

18 We agree with the Judge's reasons for preferring Mr Lin's account (see [9] above) and do not find any merit in Broadley's arguments. Broadley submits that the Judge did not consider its argument that stronger evidence was required to establish a finding in Alacran's favour given the allegation of fraud. It is trite that a finding of fraud is a serious matter and although the civil standard of balance of probabilities applies, the evidence must be strong and cogent before such a finding is justified: see *Gimpex Ltd v Unity Holdings Business Ltd and others and another appeal* [2015] 2 SLR 686 at [183]–[185] ("*Gimpex*"). But simply because the Judge did not make an express reference to this principle does not mean that she had failed to appreciate that an allegation of fraud required proof by credible evidence. Cases such as *Gimpex* have never suggested that there needs to be an additional *step* in the inquiry as to whether the evidence is sufficient for a finding of fraud, only that the court should consider whether the evidence is credible and cogent. The Judge found Mr Lin's testimony consistent, both internally and also when stacked up against the other objective evidence, such as Mr Lin's retention of the Cheques which indicated

that he considered that Broadley remained liable for the Outstanding Sum. The Judge thus did not misdirect herself.

19 Further, Broadley's arguments as to Mr Lin's hedging and prevaricating do not stand up to scrutiny. First, Broadley contends that it is suspicious for Mr Lin to claim that he had understood the whole Undertaking *except* for the clause which absolved Broadley of all liability.[7] In our view, it is not unreasonable that the effect of an indemnity, which is a legal concept, might not have been immediately apparent to a layperson or properly appreciated without any legal advice such that its earlier omission from the matters that Mr Lin understood should necessarily be viewed negatively. However, this does not mean that Alacran was not bound by the written text of the Undertaking. That is a separate inquiry which we will address below.

20 Second, Broadley argues that it is suspicious that Mr Lin did not mention in his earlier affidavit (for summary judgment)[8] that he had told Mr Govin at the Second Meeting that Broadley would remain liable if Singbuild did not pay the Outstanding Sum and that Mr Govin had kept silent in response despite the importance of this term to Alacran's case.[9] This is again entirely reasonable when seen in the context in which the claim was initially framed. It was not included in the first version of Alacran's statement of claim (filed in May 2016)[10] because Alacran's claim was then characterised as a simple debt claim for the Outstanding Sum. This is consistent with its understanding that the

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7 Appellant's case ("AC") at para 57.

8 ROA vol 5 part B, pp 13–14.

9 AC para 59.

10 ROA vol 2 pp 10–12.

Undertaking did not operate to release Broadley from liability. The application for summary judgment was also taken out on this basis. There was no need to include the alleged misrepresentation in Mr Lin's supporting affidavit at that time. Alacran's counsel applied to amend its pleadings to include fraudulent misrepresentation and unilateral mistake in response to Broadley's reliance on the indemnity provision in the Undertaking to resist the summary judgment application. Prior to that, there was strictly no occasion for Alacran to refer to the events which took place at the Second Meeting. This was also added quite some time before the trial. Alacran's position was hardly suspiciously belated.

21 In any event, it is not uncommon for the significance of certain points to be properly appreciated and brought up at a later stage of the proceedings. The relevance and credibility of points being raised at a subsequent stage of the proceedings are matters to be assessed by the trial judge. In our view, the Judge did consider Mr Lin's omission and rightly held that it did not affect her findings (Judgment at [23]). She accepted that Mr Lin's account of the facts in his affidavit for the summary judgment application was consistent with Alacran's initial Reply and its position at the trial, *ie*, that the Undertaking merely authorised Singbuild to pay the Outstanding Sum and no more, and there had been never been any mention of Broadley being absolved from liability to Alacran for the Outstanding Sum.

22 For these reasons, we see no reason to disturb the Judge's findings as regards the events which transpired at the Second Meeting.

Legal analysis

The agreement in the Undertaking

23 We begin our analysis with the parties' agreement as reflected in the Undertaking. The Undertaking is reproduced for ease of reference:

> RE: UNDERTAKING LETTER FOR SWITCHES & ELV SYSTEMS OUTSTANDING BALANCE
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> We, [Broadley] … has appointed [Alacran] … to supply … equipment for the above mentioned project. Two payments has been issued to Alacran, and to date we have outstanding balance amounting to S$423,407.35, including GST. This amount is final and has been agreed with Alacran and no further claims shall be submitted in relation to this contract.
>
> We, [Broadley] … hereby authorises [Singbuild] … to pay on our behalf, the total outstanding balance due to Alacran, which sums to S$423,407.35 including GST, details as attached and agreed by the supplier. We agree that this amount be deducted from our Remaining Contract Amount with Singbuild Pte Ltd.
>
> This agreement has been agreed by [Singbuild], [Broadley] and [Alacran]. This letter indemnifies [Broadley], and is free of any responsibility and is no longer liable with regards to the outstanding balance with [Alacran].

There are three paragraphs in the Undertaking corresponding to three specific clauses. We will refer to the first clause as the "background clause", the second as the "authorisation clause", and the third as the "indemnity clause".

24 We agree with the Judge that the Undertaking was a valid agreement supported by valuable consideration. This holding was not challenged by Alacran on appeal. As regards the legal effect of the Undertaking, the parties did not disagree with the Judge's holding that the Undertaking on its face absolved Broadley of all liability for the Outstanding Sum. We agree with this interpretation. In fact, we should add that it was Alacran's pleaded case that the

Undertaking "purported to indemnify [Broadley] and absolve them from their liability to pay [Alacran] the sums owed".[11] Although the *authorisation clause* appears only to provide for Singbuild to pay the Outstanding Sum to Alacran *on Broadley's behalf* (in concurrent fulfillment of Singbuild's obligation to Broadley), the *indemnity clause* crucially states that Broadley is indemnified and would no longer be liable for the Outstanding Sum to Alacran. Given the clear intention of the indemnity clause to release Broadley from all liability in respect of the Outstanding Sum, the authorisation clause should be interpreted as operating as an assignment of debt, in that Singbuild undertakes Broadley's debt obligation to Alacran in consideration of Singbuild's debt to Broadley being extinguished. This would mean that Broadley drops out of the picture entirely; Alacran no longer has any cause of action against Broadley and Broadley has none against Singbuild.

25 The Undertaking was indisputably an agreement supported by consideration and had the effect of absolving Broadley from all liability for the Outstanding Sum. The only remaining question, as rightly formulated by the Judge, was whether the Undertaking should stand in the light of Broadley's alleged misrepresentation or Alacran's unilateral mistake which was allegedly known by Broadley (Judgment at [24]). We examine these two grounds in turn.

Fraudulent misrepresentation

26 The elements of fraudulent misrepresentation are: (a) there must be a representation of fact by words or conduct; (b) the representation must be made with the intention that it should be acted on by the plaintiff; (c) the plaintiff had

[11] Statement of Claim (Amendment No 2) at para 21(a).

acted upon the false statement; (d) the plaintiff suffered damage by so doing; and (e) the representation must be made with the knowledge that it is false; it must be wilfully false, or at least made in the absence of any genuine belief that it is true: see *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 at [14]. Broadley essentially contests elements (a), (b) and (c), contending that Mr Govin's silence did not amount to a representation of fact, or alternatively that his representation by way of silence was not intended to be relied upon because a written agreement was envisioned, and that representation did not induce Alacran to enter into the Undertaking because it had been corrected by the express terms of the Undertaking.

27 As stated above (at [18]), we accept the Judge's finding that Mr Lin had told Mr Govin that if Singbuild did not pay Alacran, Broadley would remain liable for the Outstanding Sum, and that Mr Govin had remained silent in the face of Mr Lin's stated position. Mr Govin's silence forms the basis of Alacran's case in fraudulent misrepresentation.

28 The law has always been cautious in ascribing legal significance to a party's silence. This applies to silence as acceptance of terms in a contract (see *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521 at [53]–[54]), silence as waiver of rights (see *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 ("*Audi Construction*") at [58]–[61]), and squarely in cases of misrepresentation by silence (see *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801 at [65]). Silence, being passive conduct, and inherently lacking the definitive quality of an active statement, is rarely considered sufficient to amount to a representation. But the courts have also made it clear that silence can in appropriate circumstances acquire a positive content and

amount to a representation. Such cases have been characterised as situations where there is a duty on the alleged representor to speak or disclose certain facts, and in cases of misrepresentation, that failure to do so renders a statement previously made by the representor false or (more rarely) itself constitutes a false statement. Such a duty may arise out of the relationship of the parties and/or other circumstances in which the silence is maintained, and is to be assessed by reference to how a reasonable person would view the silence in the circumstances: *Audi Construction* at [61].

29 In the present case, we find that Mr Govin's silence could not have amounted to a misrepresentation, much less a fraudulent one. This was not a situation where his silence would have been viewed by a reasonable party as unequivocal assent to Mr Lin's position. The circumstances instead pointed to the converse. Mr Govin and Mr Lin were negotiating the payment of the Outstanding Sum, in the face of Broadley's default, from opposing positions and with opposing interests. It was clearly in Broadley's interest that it be absolved from liability. That Mr Lin reminded Mr Govin of Broadley's continuing liability and Mr Govin omitted to respond in fact indicates that Mr Lin thought it necessary to put forth Alacran's position which Mr Govin either did not expressly agree to or was at the very least non-committal. The silence was therefore ambiguous at best, and in our view, a reasonable person in the circumstances would not have understood Mr Govin to have assented to Mr Lin's position through his silence.

30 Further and importantly, both parties expected that a written agreement would be forthcoming, even if they had agreed that the oral agreement at the Second Meeting would form the basis of the written agreement. This is especially relevant because Mr Govin's silence occurred *before* the Undertaking

was drafted by Broadley. Broadley's disagreement with Mr Lin's position was manifest from the terms of the Undertaking. We therefore find that no representation was made by Mr Govin *via* his silence at the Second Meeting. We emphasise that this was not a case where Mr Govin had shrugged, or nodded, or did anything by way of his conduct that might have signified agreement. On Mr Lin's evidence, Mr Govin did absolutely *nothing* in response, and in our judgment, this could not possibly amount to a representation.

31 Alacran's claim in fraudulent misrepresentation thus fails at the first stage. Since the parties have addressed the other stages of the inquiry extensively in their respective submissions, particularly the question whether the misrepresentation had been corrected, we will proceed to evaluate them. In our view, even if Mr Govin's silence did amount to a representation, we find that there is no evidence to suggest that Mr Govin intended for his silence to be relied upon given that both parties had agreed that the agreement would be reduced to writing.

32 Next, even if Mr Govin's silence could conceivably amount to a misrepresentation at the Second Meeting, we find that it was in fact corrected by the draft Undertaking which *expressly* provided that Broadley was released from liability for the Outstanding Sum, such that Mr Lin could not have been induced by the misrepresentation into signing the Undertaking.

33 The effect of a representor's correction of his earlier misrepresentation can be analysed in two ways. First, it may be said that there is no longer a misrepresentation at the time of the contract because it has either been withdrawn or corrected. Second, even if the earlier misrepresentation was still in effect, the representee, now being aware of the truth or the withdrawal of this

earlier misrepresentation, cannot be said to have been induced by it: see *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at para 11.063 and the accompanying footnote. The first approach focuses on whether the correction had extinguished the earlier misrepresentation, whereas the second approach focuses on whether the earlier misrepresentation had nonetheless induced the representee notwithstanding the correction. We think that in practice, there is little to choose between these two approaches (which was also acknowledged by Clarke LJ in *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2003] Lloyd's Rep IR 131 ("*Assicurazioni*") at [63]). Ultimately, the appropriate analysis depends on the facts, but we generally prefer the second approach for two reasons. First, when a misrepresentation has been made to the representee, it cannot as a matter of reality be extinguished or withdrawn. Any further representation really only has the effect of altering the effect of the earlier misrepresentation on the representee's mind, which is essentially an inquiry into inducement. Second, we consider this to be more practically feasible because where a further representation falls short of entirely withdrawing or correcting the earlier misrepresentation but merely qualifies it to an extent, or makes no reference to the earlier misrepresentation at all, the court's inquiry should not be limited to determining to what extent the earlier misrepresentation had been corrected, but instead focus on the impact both representations, taken together, had on the representee. If there is any ambiguity as to how the representations interact with each other, the determining consideration is whether the earlier misrepresentation was still operative in that it still had the effect of inducing the representee to enter into the contract.

34 Whether the representee was induced by the representor's misrepresentation into entering into the contract is a question of fact. When the representor contends that the representee was not induced by the misrepresentation because the misrepresentation had already been corrected, in our judgment, the representor needs to show that he has brought the correction to the representee's attention such that the representee is aware of the correction. It would not suffice for the representor to show that the representee *could* have discovered the truth: see *Assicurazioni* at [64]; *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] 2 Lloyd's Law Rep 511 ("*Peekay*") at [40]. The correction must obviously also have been made *prior* to the representee's entry into the contract or any other act of reliance on the statement.

35 The present case is one where the misrepresentation (assuming the silence constituted a representation) was dispelled by the express terms of the contract. In arguing that this was sufficient to show that the representation had been corrected and Mr Lin was not induced by Mr Govin's earlier misrepresentation, Broadley relied heavily on the case of *Peekay*. In that case, the defendant bank was selling an investment product, namely a deposit linked to Russian government bonds. The bank's regional manager contacted the plaintiff, Peekay (through one Mr Pawani), to see if it would be interested in investing, and made statements to the effect that Peekay would, through its investment, obtain some sort of proprietary interest in the Russian government bonds. This was not actually the case and that was made clear by the final terms and conditions sent to Peekay *before* the investment was entered into. Peekay had also signed a Risk Disclosure Statement that referenced these final terms and conditions. The English Court of Appeal held that the bank's regional

manager had misrepresented the nature of the investment product to Peekay (at [46]). However, Peekay had not been induced by the bank's misrepresentation to enter into the investment because the bank's description had only been "rough and ready", and Peekay knew that the final terms and conditions sent to it contained the formal description of the investment. Peekay had in fact regarded the documents sent to it as important (*Peekay* at [69]) and was concerned to make it clear that it was investing pursuant to the terms of those documents. Under those circumstances, Peekay would have been expected to read and understand the contract before signing it, and if it did not do so, it was not induced to sign the contract by reason of the bank's misrepresentation but by its own assumption that the documents corresponded with the bank's description.

36 *Peekay* stands for the proposition that a plaintiff would not ordinarily be held to be induced by a misrepresentation if the express contractual terms, which the plaintiff placed importance on, read and signed, and which the defendant expected that the plaintiff would read and understand, contradict or correct the defendant's misrepresentation. We note that *Peekay* has been critiqued for undermining the principle in *Redgrave v Hurd* (1881) 20 Ch D 1 that it is not a defence to misrepresentation that the representee could have discovered the truth through reasonable endeavours. In Edwin Peel, *Treitel: The Law of Contract* (Sweet & Maxwell, 13th Ed, 2011), the author states (at para 9-024) that *Peekay* should be interpreted as authority that a claim for non-fraudulent misrepresentation may be defeated where it is reasonable to expect the representee to make use of the opportunity to discover the truth. We respectfully disagree with this reading. It is still the law that representees are not obliged to test the accuracy of the representations made to them, and it does not matter if

they had the opportunity to discover the truth as long as they did not actually discover it (*Peekay* at [40]). But where the true position appears clearly from the terms of the very contract which the plaintiff says it was induced to enter into by the misrepresentation (*Peekay* at [43]), the position is quite different. After all, it is a corollary of the basic principle of contract law that a person is bound by the terms of the contract he signs, notwithstanding that he may be unaware of its precise legal effect. Such a claimant should be taken to have actually read the contract and known the falsity of the earlier representation. To hold otherwise would undercut the basis of the conduct of commercial life – that businessmen with equal bargaining power would read their contracts and defend their own interests before entering into contractual obligations, and that they would rely on their counterparties to do the same.

37 The Judge found that *Peekay* was distinguishable from the present case as the court in *Peekay* did not in fact find any misrepresentation at all. She based this on the High Court's decision in *Jurong Shipyard Pte Ltd v BNP Paribas* [2008] 4 SLR(R) 33 ("*Jurong Shipyard*") at [104], which observed that *Peekay* held that in the absence of any misrepresentation, the plaintiff's signature on the risk disclosure form estopped the plaintiff from advancing arguments in contradiction of the representations made therein (Judgment at [36]). With respect, this is an inaccurate reading of *Peekay* and *Jurong Shipyard*. It is clear that the English Court of Appeal found that the defendant bank had made a factual misrepresentation: *Peekay* at [46]. But despite this misrepresentation, the court held that Peekay's cause of action in misrepresentation was not made out because Peekay had not been induced by the *misrepresentation* into entering into the investment. It had instead been induced by *its own assumption* that the investment product to which the document related corresponded to a description

that was previously made by the bank, for the reasons we have described above (at [35]). When the High Court in *Jurong Shipyard* spoke of the absence of misrepresentation in *Peekay*, that was, in our view, a reference to the court's finding that there was no *actionable* misrepresentation. It bears mention that the claim in misrepresentation in *Peekay* failed due to the absence of the element of inducement and not the lack of any *factual* misrepresentation.

38 In our judgment, the reasoning in *Peekay* applies with equal force to the present case. The Undertaking clearly contradicted or corrected the position that Broadley would remain liable for the Outstanding Sum. Both parties knew and acted on the basis that the written Undertaking was meant to be the operative contract between them and not the oral agreement made at the Second Meeting. It was incumbent on Mr Lin to read and understand the Undertaking, which was brief and simple and which he had ample time to read before signing. Broadley's position was patently obvious from the Undertaking. If Mr Lin did not understand or did not agree to its terms, he could have declined to sign the Undertaking or sought clarification as to the legal effect of the Undertaking (either from Mr Govin or through legal advice). If he chose instead to sign the Undertaking without seeking any clarification, this was completely pursuant to his own assumption that it reflected the agreement at the Second Meeting, and the consequences arising therefrom must fall on Alacran alone. This is especially so in the present case since the indemnity clause was not buried in a mass of small print but clearly appeared just above the space for signature by the parties.

39 Alacran contends that *Peekay* is distinguishable from the facts of this case on two grounds. First, the transaction in *Peekay* involved a complex financial product being described over the phone and would have necessitated

the subsequent review and execution of formal documentation. The present case involves a straightforward arrangement at the Second Meeting which the Undertaking was intended to formalise and give effect to. We do not think this makes a material difference. In fact, given the large sum of money involved and the significantly shorter and simpler Undertaking, Alacran would have been expected to read and ensure that the agreement reached at the Second Meeting was accurately captured. Given the brevity of the Undertaking, this was hardly an onerous task. Second, Peekay's representative had signed a risk disclosure statement providing that it had ensured that it fully understood the nature of the transaction and the contractual relationship, whereas Mr Lin had never signed anything to that effect. Although this distinction is correct, this was actually not material to the misrepresentation analysis in *Peekay*. The focus of the decision was on Peekay's actual awareness that the final terms and conditions contained the true and complete description of the investment product: *Peekay* at [50]–[52].

40 We find that Mr Govin's misrepresentation (if any) did not induce Mr Lin to enter into the Undertaking. The above analysis is distinct from cases where a representation is made as to the *effect and contents* of the contractual document, such as in *Curtis v Chemical Cleaning and Dyeing Co Ltd* [1951] 1 KB 805 where the shop assistant told the plaintiff that the document she was about to sign limited the shop's liability to a lesser extent that the document stated or *Lloyds Bank plc v Waterhouse* [1993] 2 FLR 97 where the defendant was induced to sign a guarantee for a loan by the bank's misrepresentation as regards the *scope* and *content* of the guarantee. In *Peekay* it was not argued that the bank had represented anything as to the effect of the investment documents: *Peekay* at [60]. Here, it is common ground that the parties intended that the

agreement reached at the Second Meeting would form the basis of their written agreement. Part of Alacran's pleaded case appears to be that Mr Govin had represented that the Undertaking would *only* serve to expedite payment by Broadley to Alacran by authorising Singbuild to pay the Outstanding Sum.[12] The Judge seems to have considered this when she held in the alternative that Mr Govin had represented to Mr Lin that Broadley would authorise Singbuild to pay the Outstanding Sum and that the parties agreed that what was orally agreed would be encapsulated in the Undertaking (Judgment at [34]). We do not think it is clear on the evidence that Mr Govin and Mr Lin had agreed that *only* what was discussed in the Second Meeting would find its way into the Undertaking. Even if that was so, that agreement could not have amounted to a representation by Mr Govin that the Undertaking Mr Lin would eventually sign would *only* reflect this. The parties met before the Undertaking was signed and could have made changes to the Undertaking had they desired to do so. But even if such a representation were made, in our judgment, Mr Lin similarly could not be said to have been induced by this representation to enter into the Undertaking. That representation was made well *before* the Undertaking was even drafted, and Mr Lin was given more than enough time to review its contents. The divergence from the representation, if any, was obvious in the language of the Undertaking, and for the reasons set out at [38] above, we find that this argument cannot assist Alacran.

41 Thus, we find that the Judge erred in finding that Mr Govin's silence amounted to a fraudulent misrepresentation.

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12 ROA vol 2 p 55.

Unilateral mistake

42 The Judge held in the alternative that Mr Lin's common law unilateral mistake was sufficient to vitiate the contract. She found that the requirements in *Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502 ("*Chwee Kin Keong*") were satisfied, namely that for a unilateral mistake to succeed, it must be proved that: (a) one party has made a mistake; (b) the mistake is a sufficiently important or fundamental mistake as to a term; and (c) the non-mistaken party has actual knowledge of the mistaken party's mistake.

43 Even if we accept the Judge's finding that Mr Lin had made a mistake as to a term of the Undertaking, namely the term's effect on Broadley's liability for the Outstanding Sum, which was sufficiently important and fundamental to the Undertaking, we respectfully disagree that Mr Govin had actual knowledge of Mr Lin's mistake. There was nothing in the evidence that showed that Mr Govin was aware of this mistake. In fact, in our view, the evidence before us suggested quite the opposite. Mr Lin's own evidence at the trial was that he had time to review the Undertaking, had a subsequent meeting with Singbuild and Broadley where Singbuild and Broadley signed the Undertaking, before Mr Lin took it back to his office and signed it.[13] Given these events and the express wording of the Undertaking absolving Broadley of all liability, it would have been entirely reasonable for Mr Govin to have assumed that Mr Lin had read, and was agreeable to, the terms of the Undertaking, which included the indemnity clause. We also do not think that Mr Govin could, on the evidence, be considered wilfully blind to Mr Lin's mistake. In our view, it is clear that

[13] ACB vol 2 pp 60, 63-64; NE 18 Apr 2017 (Day 1) at pp 11, 14–15.

Alacran has not shown on a balance of probabilities that Mr Govin had actual knowledge of Mr Lin's mistaken understanding of the terms of the Undertaking when he signed it.

44 For completeness, we have also considered the doctrine of unilateral mistake in equity, where knowledge falling short of actual knowledge coupled with some form of unconscionable conduct would be sufficient to render the contract voidable. This point was raised by Alacran in the court below though it was not expressly addressed by the Judge in the Judgment. In *Chwee Kin Keong* at [80], Chao Hick Tin JA held that the doctrine of equitable unilateral mistake is part of Singapore law. It also requires the mistake to be sufficiently important and fundamental, but differs from the common law unilateral mistake in that (a) constructive knowledge with an element of impropriety ("sharp practice" or "unconscionable conduct") as opposed to actual knowledge is sufficient for equitable unilateral mistake; and (b) equitable unilateral mistake renders the contract voidable instead of void. However, in our judgment, equitable unilateral mistake is also not made out on the facts. There is nothing on the evidence to suggest that Mr Govin could be fixed with constructive knowledge that Mr Lin was labouring under a mistake. Having remained silent at the Second Meeting, drafted the Undertaking to absolve Broadley of all liability, sent the Undertaking (which was barely ten lines long), and given Mr Lin ample time to review the Undertaking, it could not conceivably be said that Broadley must have had a suspicion that Mr Lin was mistaken as to the terms of the Undertaking.

Conclusion

45 For the reasons set out above, we allow the appeal. Although we have some sympathy for Alacran's difficulty in recovering the Outstanding Sum, it is inherent in our law of contract and integral to commercial life that parties who freely enter into a bargain are expected to read and understand the contracts they choose to enter into. They cannot escape the consequences of such contracts based on doctrines of mistake and/or misrepresentation if they failed to do so, and instead seek to shift the blame on the counterparty for not looking out for their interests.

46 In the circumstances, Broadley is entitled to costs here and below. In the court below, an aggregate costs of $21,000 and reasonable disbursements were awarded to Alacran for the summary judgment application and the trial. We reverse the costs order and award the same sum of $21,000 plus reasonable disbursements to Broadley for the trial. In addition, Alacran is ordered to pay Broadley costs of the appeal fixed at $30,000 inclusive of disbursements.

Judith Prakash	Steven Chong	Quentin Loh
Judge of Appeal	Judge of Appeal	Judge

Eugene Thuraisingam and Syazana Binte Yahya (Eugene Thuraisingam LLP) for the appellant;
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