IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC(I) 4

Suit No 3 of 2020

Between

(1) Larpin, Christian Alfred
(2) Quo Vadis Investments Limited

… *Plaintiffs*

And

(1) Kaikhushru Shiavax Nargolwala
(2) Aparna Nargolwala

… *Defendants*

JUDGMENT

[Contract — Misrepresentation — Action for rescission]
[Contract — Misrepresentation — Fraudulent]
[Contract — Misrepresentation — Damages]

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Larpin, Christian Alfred and another
v
Kaikhushru Shiavax Nargolwala and another

[2022] SGHC(I) 4

Singapore International Commercial Court — Suit No 3 of 2020
Roger Giles IJ
27, 28, 29, 30 September, 1 October, 5 November 2021

21 February 2022 Judgment reserved.

Roger Giles IJ:

Overview

1 The plaintiffs claim rescission of agreements for the purchase of shares giving rights to a villa in Thailand, return of the purchase price, and damages to be assessed, on the ground of misrepresentations material to the decision to purchase the shares.

2 The Andora Resort in Phuket ("the Resort") was a leisure resort developed by Mr Allan Zeman comprising luxury villas, hotel suites, a leisure complex and other facilities. A villa could be acquired for personal use, or as an investment let out through the Resort by a letting agent.

3 Villa 29 ("the Villa"), built in 2007, was acquired by the defendants, Mr Kaikhushru Nargolwala and Mrs Aparna Nargolwala, in that year. They were and are Singapore residents, and for reasons of Thai property law concerning

ownership of land by foreign nationals the acquisition was through the ownership of all the shares of Querencia Ltd ("Querencia"), a company incorporated in the British Virgin Islands ("the BVI"). Querencia held a lease of the land on which the Villa stood, ownership of the building on the land, and a construction permit and house registration, those matters together giving occupation rights to the Villa.

4 The Nargolwalas used the Villa for their own purposes until late 2014, when they moved to a second villa they had purchased in an associated Andara development. The Villa was made available for rental, and was also available for sale – in legal terms sale, purchase and ownership all being referable to the shares in Querencia.

5 On occasions the Villa was rented by Mr Solomon Lew, an Australian resident. In September 2017 Mr Lew decided that he wanted to purchase the Villa. As will be considered in more detail below, negotiations towards a purchase took place with the Nargolwalas through Mr Daniel Meury, the General Manager of the Resort.

6 In late October 2017 the first plaintiff, Mr Christian Larpin, became aware that the Villa was available for sale. Mr Larpin, a Hong Kong resident, was interested in acquiring a villa or villas in the Resort as an investment. Again as will be considered in more detail below, negotiations towards a purchase took place with the Nargolwalas, initially through Mr Martin Phillips, a real estate agent in Phuket, and then directly.

7 The Larpin negotiations were successful. Mr Larpin purchased the Villa (by the purchase of the shares in Querencia) through his Hong Kong incorporated company, the second plaintiff Quo Vadis Investments Ltd ("Quo

Vadis"), for US$7,900,000. On 9 November 2017 a Reservation Agreement was executed between the Nargolwalas and Quo Vadis and a reservation deposit of US$790,000 was paid. On 14 November 2017 a Share Purchase Agreement was executed between the same parties. On 15 November 2017 the balance purchase price of US$7,110,000 was paid, and the Share Purchase Agreement was completed by transfer of the Querencia shares on 16 November 2017.

8 As will be told in the more detailed consideration, however, the culmination of the sale to Mr Larpin was not without incident. Late on 14 November 2017 the Nargolwalas became aware of a claim by Mr Lew in relation to the Villa – I deliberately speak in general terms at this point, as the detail later considered is important in the parties' contentions in these proceedings. Again in general terms, on 15 November 2017 they told Mr Larpin of the claim and that they believed it was unsustainable, and offered the opportunity to delay or abort the transaction. Mr Larpin said he would proceed. Much more will be said of these events.

9 But Mr Lew followed up on his claim, now contending that he had a binding agreement with the Nargolwalas to purchase the Querencia shares. In late November 2017 he brought proceedings against Quo Vadis and Querencia in the BVI, obtaining a Stop Notice effectively freezing any dealing by Querencia with its shareholder's rights. In early 2018 he brought proceedings in the Singapore High Court against the Nargolwalas, Quo Vadis, Mr Larpin and Querencia ("the Lew proceedings"), claiming that a binding oral contract of sale had been reached between him and Mr Meury, as agent for the Nargolwalas, on 11 October 2017. He claimed that in entering into the Share Purchase Agreement and completing the transaction the Nargolwalas acted in breach of that contract, and consequently in breach of fiduciary duties owed to him and in breach of trust in transferring the shares to Quo Vadis; that Mr Larpin

and hence Quo Vadis had knowledge of the contract such that they were liable for inducing the breach; and that Querencia was liable for dishonestly assisting the Nargolwalas in their breach of fiduciary duties and breach of trust. In further proceedings brought in the BVI in June 2018, he obtained injunctive relief against Quo Vadis and Querencia similar to the Stop Notice, pending the final determination of the Lew proceedings in Singapore.

10 The Lew proceedings were transferred to the Singapore International Commercial Court. In *Solomon Lew v Kaikhushru Shiavax Nargolwala and 4 others* [2020] 3 SLR 61, delivered on 5 February 2020, Simon Thorley IJ dismissed the action against all the defendants. So far as presently relevant, his Honour held that no binding oral contract had been entered into on 11 October 2017 because what had been said and done was at best an agreement subject to contract, and also because Mr Meury had not had authority to enter into a contract on behalf of the Nargolwalas.

11 Mr Lew appealed. In *Solomon Lew v Kaikhushru Shiavax Nargolwala and 4 others* [2021] 2 SLR 1, delivered on 10 February 2021, the Court of Appeal dismissed the appeal. Again so far as presently relevant, while differing from the trial judge on the subject to contract point their Honours held that, although Mr Meury had led Mr Lew to understand that a contract had been made, he had not had authority from the Nargolwalas to contract with Mr Lew.

12 Mr Larpin and Quo Vadis joined with the other defendants to the Lew proceedings in resisting Mr Lew's claims, including denying that a contract binding on the Nargolwalas had been made. However, as plaintiffs in the present proceedings they seek to undo the purchase of the Villa by Quo Vadis. They say that in the course of the Lew proceedings they became aware of matters that had occurred in the negotiations through Mr Meury towards a purchase by Mr Lew,

matters which they say the Nargolwalas "actively concealed" from them thereby making material representations. The representations, they say, were false, and were made fraudulently; at least in their pleading, they say that if they were not made fraudulently, reliance is placed on s 2 of the Misrepresentation Act (Cap 390, 1994 Rev Ed) ("the MA"). Had they known of the matters, the plaintiffs say, Quo Vadis would not have entered into the Reservation Agreement, or entered into the Share Purchase Agreement, or completed the purchase.

13 The present proceedings were commenced in the High Court in October 2019, shortly before the first instance hearing in the Lew proceedings. They were subsequently transferred to the Singapore International Commercial Court. The plaintiffs claim rescission of the Reservation Agreement, of the Share Purchase Agreement, and of "the completion of the transfer of the Querencia Shares"; return of the purchase price of US$7,900,000; and damages being the solicitor and client costs incurred in the proceedings in the BVI and in Singapore in excess of the party and party costs awarded in those proceedings.

14 The Nargolwalas deny actionable misrepresentation, in particular that any non-disclosure was made fraudulently. They deny reliance on any representation. They say that in any event Quo Vadis affirmed the Reservation Agreement and the Share Purchase Agreement by Mr Larpin choosing to proceed on 15 November 2017; that rescission should otherwise be refused; and that as a matter of law there cannot be recovery of the costs in excess of party and party costs.

15 After a hiatus waiting for the decision of the appeal in the Lew proceedings, evidence in the proceedings was taken on 27, 28, 29 and 30 September 2021. Evidence in the plaintiffs' case was given by Mr Larpin and

Mrs Dao Te Lagger, a co-director of Quo Vadis, who were both cross-examined, and affidavits of Mr Meury and Mr Martin Phillips were admitted although they were not available to give evidence. Evidence in the defendants' case was given by Mr Nargolwala and Mrs Nargolwala, who were both cross-examined. There was an agreed bundle of documents of over 9,000 pages, which included almost all if not the entire records of the proceedings in the BVI and of the Lew proceedings, at both levels, in Singapore. Closing submissions were heard on 5 November 2021, with supplementary written submissions received on 19 November 2021.

16 For the reasons which follow, the proceedings should be dismissed.

The legal framework

17 It was common ground that Singapore law is the governing law in the proceedings.

18 In *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 ("*Panatron*"), speaking of the tort of fraudulent misrepresentation, the Court of Appeal said at [14]:

> The essentials of this tort have been set out by Lord Maugham in *Bradford Building Society v Borders* [1941] 2 All ER 205. Basically there are the following essential elements. First, there must be a representation of fact made by words or conduct. Second, the representation must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which includes the plaintiff. Third, it must be proved that the plaintiff has acted upon the false statement. Fourth, it must be proved that the plaintiff suffered damage by so doing. Fifth, the representation must be made with 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.

19 Implicit in this is that the representation must indeed be false, and it is sufficient that it is substantially false: *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA and others and other appeals* [2018] 1 SLR 894 at [173].

20 At common law, rescission was available to a party who was induced to enter into a contract by a fraudulent misrepresentation. It was necessary that the representation be made fraudulently, see *Lord Gilbert Kennedy v The Panama, New Zealand, and Australian Royal Mail Co (Limited)* (1867) LR 2 QB 580 at 580:

> In order to entitle a party to rescind a contract, it is sufficient to shew that there was a fraudulent representation as to any part of that which induced him to enter into the contract. But when there has been only an innocent misrepresentation, it is not a ground for rescission, unless it was such as that there is a complete difference in substance between the thing bargained for and that obtained, so as to constitute a failure of consideration.

21 Equity did not insist on the representation being made fraudulently, and rescission was available to a party induced to enter into a contract by an innocent misrepresentation. In *Redgrave v Hurd* (1881) 20 Ch D 1 at 12–13, Jessel MR said:

> As regards the rescission of a contract, there was no doubt a difference between the rules of Courts of Equity and the rules of Courts of Common Law – a difference which of course has now disappeared by the operation of the *Judicature Act*, which makes the rules of equity prevail. According to the decisions of courts of equity it was not necessary, in order to set aside a contract obtained by material false representation, to prove that the party who obtained it knew at the time when the representation was made that it was false. It was put in two ways, either of which was sufficient. One way of putting the case was, 'A man is not to be allowed to get a benefit from a statement which he now admits to be false. He is not to be allowed to say, for the purpose of civil jurisdiction, that when he made it he did not know it to be false; he ought to have found

> that out before he made it'. The other way of putting it was this: 'Even assuming that moral fraud must be shewn in order to set aside a contract, you have it where a man, having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract. To do so is a moral delinquency: no man ought to seek to take advantage of his own false statements'. The rule in equity was settled, and it does not matter on which of the two grounds it was rested.

22 In the well-known case of *Derry v Peek* (1889) 14 App Cas 337, Lord Herschell said succinctly at 359:

> Where rescission is claimed it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand.

23 However, equity did not grant damages; to recover damages, it was necessary to establish the tort of fraudulent misrepresentation. Section 2 of the MA modifies this, giving additional or alternative remedies in damages in the case of innocent misrepresentation. It provides:

> **2.** (1) Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable grounds to believe and did believe up to the time the contract was made that the facts represented were true.
>
> (2) Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded, the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission, if of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as

> well as to the loss that rescission would cause to the other party.
>
> (3) Damages may be awarded against a person under subsection (2) whether or not he is liable to damages under subsection (1), but where he is so liable any award under subsection (2) shall be taken into account in assessing his liability under subsection (1).

24 Apart from a false representation founding rescission of a contract, damages can also be awarded to compensate for loss suffered by reason of a fraudulent misrepresentation, under the tort described in *Panatron*.

The plaintiffs' pleading of representations

25 The pleading of the representations on which the plaintiffs relied was not straightforward.

26 The plaintiffs began with pleadings that:

(a) by executing the Reservation Agreement on 8 November 2017, the defendants made to them what was called the Reservation Agreement Representation;

(b) by executing the Share Purchase Agreement on 14 November 2017, the defendants made to them what were called the Share Purchase Agreement Representations; and

(c) in a telephone conversation between Mr Nargolwala and Mr Larpin on 15 November 2017, Mr Nargolwala made to Mr Larpin what were called the Oral Representations.

27 But the plaintiffs did not go straight to pleading that these representations were false, and did not rely on them as the actionable

misrepresentations. Instead, they pleaded a number of matters in the dealings between the Nargolwalas and Mr Lew in the period to 12 October 2017, called the Material Facts, and more matters in those dealings on 14 November 2017, called the Further Material Facts, which they said were material to the decision to purchase the Villa and were not disclosed to them. The representations on which they relied were then pleaded as representations made by "actively concealing" the Material Facts and the Further Material Facts, as the case may be, called the 8 November Representations, the 14 November Representations and the 15 November Representations, which representations were more extensive but included representations that the Reservation Agreement Representation, the Share Purchase Agreement Representations and the Oral Representations were true.

28 To illustrate, the pleading of the 8 November Representations was:

> 17. By actively concealing the Material Facts from the Plaintiffs, read with the Reservation Agreement Representation, the Defendants represented to the Plaintiffs that the following were true as at 8 November 2017, and continue to be so:
>
> (1) There were no issues in relation to them selling the Villa, through the Querencia Shares, to the Plaintiffs, and that there were no possible adverse claims in respect of the Villa, and the Querencia Shares, by any third party; and
>
> (2) The Reservation Agreement Representation was true.
>
> (Collectively '**8 November Representations**')

29 The pleading of the 14 November Representations and the 15 November Representations was in similar form, but in both cases referring to active concealment also of the Further Material Facts and including respectively as true as at 14 November 2017 that the Share Purchase Agreement Representations were true, and as true at 15 November 2017 that the Share Purchase Agreement Representations and the Oral Representations were true.

30 There are one Reservation Agreement Representation, three Share Purchase Agreement Representations and two Oral Representations. The pleading contains fourteen separate representations on which the plaintiffs relied, albeit in part by repetition as true as at the later dates of the representations as at the earlier dates. Within these representations, sometimes two or more separate representations are expressed, such as the "no issues" and separately the "no possible adverse claims" in the first of the 8 November Representations above at [28].

31 All of the representations relied on as actionable representations begin, "By actively concealing [the Material Facts/the Further Material Facts]…". Active concealment was put as an essential part of the plaintiffs' case. In the written closing submissions, speaking of all of the Reservation Agreement Representation, the Share Purchase Agreement Representations and the Oral Representations (and after asserting that each was a statement of fact), it was said that the plaintiffs' position was "not that these statements of fact are, taken alone, actionable misrepresentations", but that:

> What is critical in the circumstances of this case, is the deluge of material, and important facts that were intentionally withheld by the Nargolwalas. In the words of the Honourable Justice Belinda Ang Saw Ean (as her Honour then was) in ***Trans-World (Aluminium) Ltd v Cornelder China (Singapore) [2003] 3 SLR(R) 501 ('Trans-World')***, *'the misrepresentation of statements comes from the wilful of suppression of material and important facts thereby rendering the statements untrue'.*

32 The plaintiffs' case was squarely one of representation by failure to disclose, more particularly by active concealment. By active concealment was meant more than simple failure to disclose, from the above passage in the submissions being intentional withholding and as later discussed (see at [41]–[53] below) being concealment with the dishonest intention to mislead the

plaintiffs. As the plaintiffs pleaded their case, the representations themselves were because of failure to disclose, by active concealment, the Material Facts/ Further Material Facts.

33 The many representations by active concealment were maintained in submissions. This can be seen as a lawyers' endeavour, although as later appears not without some incongruence, to give legal clothing and consequences to Mr Larpin's basic complaint that he was not told of, or enough about, the defendants' dealings with Mr Lew and Mr Lew's claim. One consequence is that this judgment is rather lengthy, in order to explain and consider the many representations.

34 Two matters arise from the case so pleaded. One is that, in order to determine whether the pleaded representations were made, it is necessary to consider when failure to disclose can amount to a representation. The other is that it is necessary to consider whether, as submitted on behalf of the defendants and it seems accepted by the plaintiffs, a representation by active concealment is not made out unless there is dishonest intention to mislead.

When can failure to disclose produce a representation?

35 In *Broadley Construction Pte Ltd v Alacran Design Pte Ltd* [2018] 2 SLR 110 ("*Broadley*") the Court of Appeal said (at [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* [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 a 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].

36 That was a case of failure to speak to correct a statement made to the alleged representor; it was held that a reasonable person would not have understood that, by remaining silent, the alleged representor assented to the correctness of the statement. In a case of failure to disclose facts, silence can produce a false representation that a previous statement is true if there is a duty to disclose facts which, if disclosed, would materially affect the truth of the previous statement; or if there is no previous statement, if there is a duty to disclose the facts, failure to disclose them can produce a false representation that the facts do not exist.

37 The consideration in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 ("*Audi Construction*") was in the context of estoppel or waiver by election. The Court said, at [61], that whether there is a duty to speak must be decided "having regard to the facts at hand and the legal context in which the case arises", and:

> … The expression 'duty to speak' does not refer to a legal duty as such, but to circumstances in which a failure to speak would lead a reasonable party to think that the other party has elected between two inconsistent rights or will forbear to enforce a particular right in the future, as the case may be. We emphasise that this is not the subjective assessment of the other party but an objective assessment made by reference to how a reasonable person apprised of the relevant facts would view the silence in the circumstances, though unsurprisingly, the parties'

> relationship and the applicable law which governs it will be a critical focus of the court's assessment of whether those circumstances exist.

38 In similar vein, in the context of estoppel by silence, in *The Lutetian* [1982] 2 Lloyd's Rep 140 at 157 Bingham J (as his Lordship then was) said that "the duty necessary to found" such an estoppel "arises where a reasonable man would expect the person against whom the estoppel is raised, acting honestly and responsibly, to bring the true facts to the attention of the other party known by him to be under a mistake as to their respective rights and obligations". That the other party was known to be under a mistake came from the facts of that case; the expectation of the reasonable man can also arise where that is not known, although it is likely to be more difficult to conclude that there was a duty to speak.

39 Silence of itself conveys nothing, and the better expression is failure to speak, or failure to disclose. As noted in *Audi Construction*, a duty to speak or disclose is not a legal duty (such as the duty of care in tort). Where there is not a relationship which is accepted to call for disclosure, the finding of a duty to speak or disclose is conclusory, an expression of the court's assessment of whether the reasonable person would view the failure to speak or disclose as a representation. And ordinarily, if there is a representation by failure to disclose facts, it will be false, a misrepresentation, because the facts which should have been disclosed would falsify the previous statement or do exist. For representation by failure to disclose, representation and misrepresentation run together.

40 A recent summary in the High Court decision in *Fuji Xerox Singapore Pte Ltd v Mazzy Creations Pte Ltd and others* [2021] SGHC 193 at [52] includes that silence can constitute a misrepresentation when there is "active

concealment of a particular state of affairs", referring to *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 ("*Wee Chiaw*") at [65]. Where active concealment specifically the allegation in the plaintiffs' pleading of their case, it must be asked how it fits with finding a duty to disclose. That is best done in conjunction with consideration of *Wee Chiaw* in connection with dishonest intention to mislead.

Must active concealment be with dishonest intention to mislead?

41 In *Wee Chiaw* the husband said in correspondence leading to a separation agreement that he had the financial means to provide for the needs of the children. It was argued for the wife that this was a deliberate concealment of the husband's other assets, and a misrepresentation, because it implied that the husband had no other financial means beyond those required for the care of the children, but he omitted to reveal the existence of two agreements bringing substantial funds to him. The argument was rejected.

42 The Court of Appeal first said, at [65]:

> It is trite law that 'mere silence, however morally wrong, will not support an action of deceit' (see, for example, the House of Lords decision of *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All ER 205 at 211). There can be no misrepresentation by omission, although active concealment of a particular state of affairs may amount to misrepresentation (see, for example, the English Court of Appeal decision of *Gordon v Selico Co Ltd* [1986] 1 EGLR 71, where a landlord deliberately covered up an extensive outbreak of dry rot in his flat, intending to deceive long-term lessees of the flat). …

43 The Court said, however, that the correspondence related specifically to provision for the needs of the children, and (also at [65]) that:

> The [husband] was merely answering the [wife's] question of 30 June 1999; an omission to mention his financial means outside that context was not an active concealment and could not thus have been a false statement of fact amounting to a misrepresentation. There is no evidence that the [husband] deliberately and dishonestly concealed the truth from the [wife] *with the intention* to mislead her into thinking that he had no assets to divide. [emphasis in original]

44 The defendants submitted, citing this passage, that any misrepresentation said to arise from active concealment required proof of "a fraudulent and dishonest intention". The language in *Wee Chiaw* was that the concealment had to be deliberate and dishonest with the intention of misleading the other party, which I shorten to dishonest intention. The defendants referred also to *Trans-World (Aluminium) Ltd v Cornelder China (Singapore)* [2003] 3 SLR(R) 501, which the plaintiffs had cited as a basis for the misrepresentations (see [31] above); the cited passage from that case at [66] is:

> Misrepresentation by silence entails more than mere silence. A mere silence could not, of itself, constitute wilful conduct designed to deceive or mislead. The misrepresentation of statements comes from a wilful suppression of material and important facts thereby rendering the statements untrue.

45 The plaintiffs did not submit otherwise. Having themselves cited *Wee Chiaw* at [65], they said that the focus was on intention and that "the relevant question in finding whether there is any active concealment is to ask whether there is any intention to mislead the victim". They submitted that the principal issue to be determined in relation to the question of active concealment was whether the defendants intended to mislead the plaintiffs into thinking that the 8 November, 14 November and 15 November representations were true. Their submission then was that (for reasons they gave) there was concealment of the Material Facts and the Further Material Facts, and dishonesty in that the defendants "could not have honestly believed that the various representations

they had made were true" so that it was clear that "there was active concealment by the Defendants, to make out a case of misrepresentation by omission".

46 The defendants had submitted that s 2 of the MA, being concerned with non-fraudulent misrepresentation, was therefore of no relevance in the proceedings. The plaintiffs went on to agree: they submitted that it followed that "the reliefs sought under Section 2 of the Misrepresentation Act… do not arise in the present case". In short, the plaintiffs stuck to their pleaded case of representation by active concealment, and appeared to accept that for active concealment it was necessary that the defendants dishonestly concealed the truth with the intention to mislead the plaintiffs. Consistently with this, they disclaimed any relevance of s 2 of the MA – although not spelled out, because the dishonest intention found as part of the representations would mean that the representations were not made innocently. While fraud in the traditional sense of making a representation knowingly or believing that it is untrue, or recklessly, not caring whether it is true or false, is conceptually distinct from dishonest intention, it is not easy to see that there could be deliberate and dishonest concealment with the intention to mislead unless the representor knew, believed, or at least suspected that what was being conveyed was false.

47 Despite the common ground between the parties, I have some difficulty with dishonest intention as a necessary ingredient in finding representation by failure to disclose in these proceedings.

48 The point of a representation is what is conveyed to the representee, and ordinarily whether a representation was made is determined objectively from what was said, written or done; the alleged representor's intention has no relevance, although it may come in at the later stage of whether the representation was made with the intention that it be acted upon by the

representee, or as part of whether it was made fraudulently. When the question is whether a representation was made by failure to disclose, it remains to be determined objectively, as was said in *Audi Construction* (see [35] above) according to how a reasonable person apprised of the relevant facts would view the silence in the circumstances. The alleged representor's intention still does not make or unmake whether the representation is made.

49 Further, there may be failure to disclose material facts where the alleged representor is forgetful, misguided, or obtuse; whether there was a representation is nonetheless judged according to the understanding of a reasonable person in the position of the alleged representee (see for example *Property Alliance Group Ltd v Royal Bank of Scotland plc* [2018] 1 WLR 3529 at [122]–[132] in connection with implied representations). There can be estoppel by negligence, and Handley, *Estoppel by Conduct and Election* (2nd ed, 2016) at para 3-007 points out that it is not the negligence that estops, but "the representation implied from the negligence, where there is a duty to speak".

50 What is meant by active concealment, so as to make a difference? The expression as taken up in *Wee Chiaw* was exemplified by *Gordon v Selico Co Ltd* [1986] 1 EGLR 71 ("*Selico*"), described as a case in which the landlord deliberately covered up an extensive outbreak of dry rot in his flat, intending to deceive long-term lessees of the flat. In that case it was said at first instance that the concealment of the dry rot was a false representation by conduct, and that appears to have been taken as a given on appeal. Such positive action may be described as active concealment, but in the present case there is nothing like the covering up of dry rot in *Selico,* but rather simple failure to disclose the Material Facts and the Further Material Facts. That indeed was the situation in *Wee Chiaw*: the discussion in terms of active concealment may have been provoked by the wife's submission, as recorded at [64], that there had been deliberate

concealment by the former husband, but in fact there was no more than his failure to disclose the additional sources of funds.

51 A true case of active concealment of the *Selico* kind may be seen as giving rise to a duty to speak or disclose because the reasonable person would regard failure to disclose dry rot which the landlord had deliberately covered up as a representation, in the circumstances, that there was no dry rot; or it may be regarded as a particular class of misrepresentation by conduct. But I do not think that *Wee Chiaw* requires that all cases of misrepresentation by failure to speak or disclose be cast in the mould of active concealment, or that (whatever may be the position in a true case of active concealment) dishonest intention is a necessary ingredient in all cases where representation by failure to speak or disclose is alleged. The representor's state of mind may be a relevant matter in the reasonable person's assessment of a duty to speak or disclose, as in *The Lutetian* (above, at [38]), but there can be representation without dishonest intention.

52 The root cause of my difficulty in the present case is that the plaintiffs have chosen to put their case as one of misrepresentation by active concealment – not just that there *was* active concealment, but specifically that the representations were made *by* actively concealing the Material Facts or the Further Material Facts – and appear to have accepted in consequence that dishonest intention is necessary in order to find the representations. But they also cited *Broadley* for the test of a duty to disclose, in which dishonest intention has no necessary part.

53 The parties, or at least the plaintiffs, may have misunderstood *Wee Chiaw*; I do not think it requires that "misrepresentation by omission" (see [42] above) must in all cases be by active concealment. It may be better understood

to say that the husband's non-disclosure was not a case of active concealment at all, with the additional observation about dishonest intention meaning that it also could not have been fraudulent; that there was some running together appears from the further discussion at [66], in which it was said that the husband could not have intended to mislead the wife if he did not even realise that the other funds were matrimonial assets to begin with and that the wife must prove that he "had the requisite fraudulent intent". The plaintiffs should be held to their pleaded case, but in the circumstances I propose to address whether representations of fact were made by considering, apart from dishonest intention, whether representations were conveyed by failure to disclose facts which the defendants were under a duty to disclose, and separately to address dishonest intention.

Were representations of fact made?

54 I will deal in turn with the 8 November Representations, the 14 November Representations and the 15 November Representations. Because the representations are alleged as representations by active concealment, in order to decide whether they were made it is necessary to give a full account of the circumstances in which there was the non-disclosure in order to determine whether there was a duty to disclose the Material Facts or the Further Material Facts, and to address the question of dishonest intention. I will first give an account of the circumstances, then describe each of the representations as pleaded, and then consider whether it was made including whether it was a representation of fact.

The 8 November Representations

Events to 9 November 2017

55 In the pleadings, it was alleged and admitted that the Reservation Agreement was executed on 8 November 2017. It bore that date. In evidence, it emerged that it was executed on 9 November 2017. It was not suggested that anything turned on this.

56 Mr Meury and Mr Lew were well known to each other. In early September 2017, Mr Lew asked Mr Meury for information on the Villa, and for his assistance in a potential purchase of the Villa. On 7 September 2017, he emailed Mr Meury setting out an offer of US$5m for an immediate cash settlement. The offer was said to be on "a walk in walk out basis", and to be open for seven days only.

57 The Nargolwalas said that the first they heard anything from Mr Meury about the possibility of selling the Villa for US$5m was on 6 October 2017, when Mr Nargolwala received an email from Mr Meury. From the terms of the email, which referred as if already known to "the Australian potential Buyer" having booked the Villa again and suggested that "we come back with another offer for him", that may not be correct. Mr Meury said in his affidavit only that he "kept the Nargolwalas informed of this", that is, the Lew offer, "but they were expecting more for the Villa", and that he sent the emails of 6 and 9 October 2017 next mentioned. It is not clear what, if anything, happened in the period from 7 September 2017.

58 Taking matters up at 6 October 2017, there was a follow-up telephone discussion between Mr Meury and the Nargolwalas on that day, after receipt of the email. Mr Nargolwala said that Mr Meury mentioned that an Australian

individual might be interested in purchasing the Villa and that his budget was US$5m; he did not mention the individual's name, but said that the individual was looking at other properties in Phuket and asked if the Nargolwalas "would be keen to put forward an offer to sell the Villa for USD 5 million". Mr Nargolwala responded that he believed that the Villa could fetch a substantially higher price and was not prepared to sell it for the US$5m.

59 Mr Meury emailed again on 9 October 2017. He wrote that he had spoken to the potential purchaser, who had reiterated that his offer was US$5m and funds could be paid with seven days, and that the potential purchaser was looking at other villas but he believed they liked the Villa a great deal and "we possibly could still make a deal with them". He suggested that the potential purchaser "would possible [sic] accept an asking price of US 5.5 Mio".

60 Again there was a follow-up telephone call from Mr Meury, taken by Mrs Nargolwala. Mr Meury said that he believed that the Australian individual would be prepared to "up his budget to USD 5.5 million to purchase the Villa". Mrs Nargolwala said that she was prepared to discuss this with Mr Nargolwala, but only if there was a clear indication of the price being offered for the Villa.

61 Mr Meury spoke again with Mr Lew, and by a WhatsApp message Mr Lew told him he would offer US$5.25m. On 11 October 2017 Mr Meury emailed the Nargolwalas with "the latest answer and offer from our guests", that "he would agree today to split the difference on walk in, walk out basis – and offer US 5,250,000 – in your account, with a settlement within 14 days". He said that "[h]e will need an answer today as he likes to leave back to Melbourne tomorrow, with a closed deal".

62 Mr Nargolwala was in New York, and did not see the email until later. Again there was a follow-up telephone call from Mr Meury, taken by Mrs Nargolwala. She was in the midst of leaving Singapore to be with her seriously ill mother in India. Mr Meury said that the potential purchaser (again, not identified) was prepared to pay US$5.25m "net" for the Villa on a walk in walk out basis, that the money would be deposited within 14 days, and that the potential purchaser wanted to complete the deal in 14 days. Mrs Nargolwala told Mr Meury that she needed an offer letter in writing, with detail.

63 According to Mr Meury in his affidavit, in this conversation Mrs Nargolwala said that they were in principle agreeable. Mrs Nargolwala denied this, and Mr Daniel for the plaintiffs said that that was not an issue before me and the plaintiffs did not say that she said there was an agreement in principle.

64 According to Mrs Nargolwala in her evidence, she told Mr Meury that she needed the offer letter because the offer lacked clarity. It was not clear to her what was meant by US$5.25m "net", that is, whether inclusive of other costs that would have to be incurred in transferring the property; or what was meant by walk in walk out, that is, whether the Nargolwalas would be responsible for repairs or rectification subsequently found to be necessary. She also "wanted clarity on the process and date for completion and what would happen if the completion date could not be met", particularly because with the illness of her mother she could not be sure whether the Nargolwalas would be in a position to do what was necessary within the timeframe.

65 Following the conversation with Mr Meury, as Mrs Nargolwala left for the airport she sent a brief email to Mr Nargolwala which included, "Daniel [Mr Meury] called to say that the buyer has agreed to the sale. I asked for an offer letter with details including name and contact details of the buyer. Also steps

for proceeding. Apparently Solomon? Has a lawyer in Singapore but maybe best to use Anurag in BKK." Anurag was Mr Anurag Ramanat, a Thai lawyer.

66 Later on 11 October 2017, Mr Meury again emailed the Nargolwalas, but not with the clarification. The email included:

> This is to confirm that our return guest, Mr Solomon Lew, has agreed on the offer for US 5,250,000 – in your accounts, On the walk in – walk out basis – and he confirms that the funds can be in your account within the next 14 days.
>
> We will pass him a copy of the BVI and all other documents later today.
>
> At the same time we will introduce him to Khun Anurag's law firm – and suggest strongly that he will use his services.
>
> As you [are] aware, Allan [Mr Zeman] knows him very well too over many years, and we trust that this can be a very smooth transaction.
>
> Do pls advise us on your Bank account details, so we can forward that to him. …

67 The reference to passing documents was understood by the Nargolwalas as a reference to documents held by the Resort, relating to the establishment and operation of the villas. In fact, Mr Meury entered the Villa and collected documents held there by the Nargolwalas, which he gave to Mr Lew. This was not known to the Nargolwalas at the time.

68 Mr and Mrs Nargolwala spoke by telephone between New York and Delhi, Mr Nargolwala having by then seen the second 11 October 2017 email from Mr Meury. From the email, they knew that the name of the potential purchaser was Solomon Lew. According to them, in their discussion they considered the amount of US$5.25m was in principle acceptable if net of all costs and without any deductions whatsoever, for example legal costs, but wanted to ensure that they would not need to provide any representations or warranties as regards the condition of the Villa. They wanted the transaction to

be governed by Singapore law, and to have their lawyers in Singapore review the relevant documents "before [they] confirmed any deal in connection with the sale of the Villa". Mr Nargolwala said that he would follow up with Mr Meury when he was back in Singapore, and that Mrs Nargolwala should focus on her mother in India.

69 The hesitancy is evident in Mr Nargolwala's reply to Mr Meury, on 12 October 2017: "I will be back in Singapore and will call you then. Hopefully by then we will have a better idea on progress. I can then pass the bank details to you." It is also evident in an exchange of emails with Mr Zeman.

70 Late on 11 October 2017, Mr Zeman emailed to Mr Nargolwala, "Congratulations! I hear you sold Villa 29 to my friend. He is definitely not an easy guy but at least it's done".

71 Mr Nargolwala's reply on 12 October 2017 was, after a greeting:

> … I am not sure congratulations are in order yet. It will be interesting to see if he comes through as promised.
>
> Still some details to be worked out. I will be back this weekend and then will speak to Daniel to see how things are progressing.
>
> The price is significantly below what I think is reasonable but I have agreed on the basis that I am not into owning and managing multiple properties. So if he can do a clean and swift deal it will be good. Daniel has been great but as you say the buyer is not the most easy guy so let's see how serious he is.

72 Mr Zeman responded to this last email:

> The buyer called me last night to tell me he bought the villa at 6 million so I can congratulate him. This is already a great sign if you know this guy. I suggest you can google him to understand who he is. I think it will be okay!

73 According to Mr Nargolwala, this email gave him some cause for concern. Mr Lew had apparently told Mr Zeman that he had offered US$6m, and Mr Nargolwala wondered whether Mr Meury was being truthful about the price offered by Mr Lew, and entertained doubts about whether Mr Lew was a serious buyer. He said in evidence that he told himself that he would find out in due course, and was going to be speaking with Mr Meury when back in Singapore.

74 Mr Meury had emailed a short reply to Mr Nargolwala's email of 12 October 2017, saying that the purchaser had just left the Resort, would pass on the copy of the documents to his lawyer in Singapore and they would be in touch with Kuhn Anurag for any queries, and "aimes [sic] to have all settled soonest". On his return to Singapore, on 14 October 2017 Mr Nargolwala telephoned Mr Meury. His account of the conversation, which was not challenged in cross-examination, was:

> During this call, Meury confirmed that the price on offer was USD 5.25 million and I told Meury that the price of USD 5.25 million was in principle acceptable to Aparna and me, subject to all other terms for the sale and purchase of the Villa being acceptable to both sides. I also told Meury that Aparna and I wanted our lawyers in Singapore to act for us and that they would be preparing the relevant transaction documents after there was more clarity on the terms Lew had in mind (which I hoped to obtain from the offer document I was expecting from Lew), and said that Lew's lawyers in Singapore should get in touch with me so that I could connect his lawyers with our lawyers. Before the call ended, I asked Meury when I might expect to receive the offer document (setting out the detailed terms of the offer) from Lew, and Meury said something along the lines that Lew had just returned to Australia and would soon be passing the documents to the lawyers in Singapore, as (apparently) Lew wanted the sale to be completed quickly and in any event by 25 October 2017. I understood this to mean that I could expect to hear from Lew's lawyers on the offer document sometime the following week.

75 There was then a few days silence. Probably following a telephone call from Mr Nargolwala, on 17 October 2017 Mr Meury emailed to say that he had not heard back from Mr Lew "but he assured me yesterday that he will contact his lawyer right away once he is back in Melbourne". Mr Meury asked whether Mr Nargolwala would like to pass on his bank account details and his lawyer contact details so that they could be sent to Mr Lew since he would be travelling to India soon. Mr Nargolwala replied, also on 17 October 2017, "I would rather not pass any details to him until we know he is serious and has put us in touch with his lawyer. After that, the details can be passed through his lawyer." Mr Meury replied in turn, that he understood and "will keep you informed once I hear back from them".

76 Mrs Nargolwala's mother passed away, and Mr Nargolwala travelled to India for the obsequies. While he was there, probably early in the week of 23 October 2017, there was a WhatsApp message exchange with Mr Meury:

> Mr Nargolwala: We are still in India. Has there been any news on villa 29 or is the deal dead now. I will be in London next week so would like to know if there is any action needed on my part next week.
>
> Mr Meury: … I spoke to him yesterday and he told me that he passed on the copy of documents to his lawyer, and he will get back to us shortly x Sunday I spoke to Allan too, and he said that He heard from him and that he was looking forward to spend more time in his new Phuket andara home. Will keep u posted soonest xx thank u for your patience x …
>
> Mr Nargolwala: Ok. Thanks. It would be good to get his Lawyers name so that we can start the process in Singapore.

77 Matters stood thus when Mr Larpin first entered the scene.

78 Mr Larpin had been interested in purchasing a property in Phuket for some time. On 24 October 2017, in an online search while in Thailand, he became aware that Villa 11 at the Resort was on the market through Mr Martin

Phillips' agency. He contacted Mr Martin Phillips, and arranged to view it and other villas on the next day. The viewing included meeting Mr Lyndon Phillips, the brother of Mr Martin Phillips and the General Sales Manager at the Resort, and ended with interest in purchasing both Villa 11 and the Villa. Mr Larpin was told that the asking price for the Villa was US$8.5m. (Hereafter I will refer to Mr Martin Phillips as Mr Phillips, and to his brother as Mr Lyndon Phillips).

79 In the course of the viewing, Mr Lyndon Phillips told Mr Larpin that he had heard about another party being interested in purchasing the Villa, and making an offer. The name of the other party was not mentioned, nor was it said that the owner of the Villa had accepted the offer or that there was a concluded agreement for the sale of the Villa. Mr Larpin said that he did not pay much attention to the "offer" because if he was being shown the property, he considered that it must still be for sale, and it "also sounded like the usual real estate agent pressure tactic of referring to multiple 'offers'"; therefore he did not ask any follow-up questions about the offer.

80 On 26 October 2017, Mr Larpin emailed Mr Phillips that he was "prepared to make a firm offer shortly" for the two villas "and close a deal as soon as next month", subject to receiving information on a number of matters including confirmation of the asking prices. Mr Phillips contacted Mr Nargolwala on the same day. He emailed that he "[had] a client who viewed V29 yesterday and seems prepared to make a very favourable offer and complete, subject to DD, quite quickly".

81 That led to arranging a telephone call, before which Mr Phillips also forwarded the content of Mr Larpin's email (but without disclosing his identity) and said that the client "has been quoted US$8.5 million". In the subsequent telephone conversation, Mr Phillips said that he was in touch with someone who

might be interested in purchasing the Villa, although he did not give details of the person or the price the person might be willing to offer for the Villa, and asked about documents and information; Mr Nargolwala told him to liaise with Mr Meury to get the documents and information. A tentative arrangement was made for Mr Phillips to meet the Nargolwalas in Singapore on 29 October 2017. Mr Nargolwala emailed Mr Phillips, copied to Mr Meury, confirming that Mr Meury should provide the documents and information. This was done.

82 A purchase of the Villa by Mr Lew re-emerged. On 27 October 2017, Mr Meury emailed to the Nargolwalas:

> We just heard from Mr Lew, and he is ready to settle – he has already transferred the Funds to our account in Hong Kong –
>
> And once the shares are transferred the funds can go over to you right away.
>
> He will send us his Lawyers details once he is back from a meeting which he is attending now.
>
> Today is just 2 weeks since we agreed on the price, whilst he was staying at Villa 29.
>
> I have not heard anything directly from Martin Phillips today.
>
> Will send you the Lawyers Info as soon as we have them.

83 Later on the same day, Mr Meury's assistant sent contact details for Mr Lew's lawyers to the Nargolwalas, being Thai lawyers not Singapore lawyers.

84 In fact, no funds had been transferred by Mr Lew as stated in the email of 27 October 2017, although it is not clear that at the time the Nargolwalas knew this. Whether or not they did, they said in their evidence that in discussions returning from India or when arriving back in Singapore on 28 October 2017, they concluded that Mr Lew was not a serious buyer. They decided (in Mr Nargolwala's words) that they were not going to waste any more time in relation to Mr Lew or (in Mrs Nargolwala's words) that Mr Lew was someone that they

no longer wished to transact with. Mr Lew was supposed to have appointed Singapore lawyers, but had appointed Thai lawyers, and Mr Nargolwala said that he thought that Mr Lew had been lackadaisical and that upon his own 14 day timeline having expired (that is, settlement by 25 October 2017), and having got wind of another potential buyer, Mr Lew had simply acted in haste; he said that they thought that, as had happened with expressions of interest on some earlier occasions, Mr Lew was simply testing the market without a serious or specific interest in purchasing the Villa.

85 The Nargolwalas did not respond to Mr Meury's email. In Mr Meury's affidavit, he says that in the evening of 5 November 2017 Mrs Nargolwala "informed me that as Mr Lew had failed to proceed within his own timeline of 2 weeks, they were no longer interested, as the deadline had already passed". Mrs Nargolwala's account, which I accept, is more detailed. Mr Meury called her on 5 November 2017 to ask if the Nargolwalas "would still be interested in selling the Villa to Lew, even though Lew had failed to act diligently". She told him that they were no longer interested in dealing with Mr Lew. She said also that they had received another offer for the Villa and that matters were at quite an advanced stage; Mr Meury "did not say anything much in response, and simply said something to the effect that he understood and the call ended quite quickly".

86 Mr Zeman made a similar inquiry. On about 7 November 2017 he called Mrs Nargolwala, asking about the Villa and suggesting that they consider selling it to Mr Lew; according to Mrs Nargolwala, he "even asked how much would Lew need to offer so that Kai and I would be prepared to sell to Lew". She replied to Mr Zeman "pretty much what [she] had said to Meury".

87 So far as the evidence shows, there was otherwise no further contact between Mr Meury and the Nargolwalas concerning a purchase by Mr Lew, or with the Nargolwalas concerning a purchase by Mr Lew in any other way, until after 8 November 2017. The next contacts were an enquiry from Mr Zeman on 9 November 2017, and then on 14 November 2017, see [126] and [135] below.

88 The purchase of the Villa by Mr Larpin proceeded. The events can be told in summary, for this part of this judgment ending with the execution of the Reservation Agreement on 9 November 2017.

89 Mr Phillips and the Nargolwalas met in Singapore on 29 October 2017. An arrangement was made for Mr Phillips' agency fees. Mr Larpin's offer of US$7.9m was acceptable to the Nargolwalas. In the course of the meeting, the Nargolwalas told Mr Phillips that another potential buyer had made an offer to purchase the Villa but had failed to follow up, referring to the failure to produce an offer document and his Singapore lawyers information, and that they had concluded that he was not a serious buyer.

90 A draft Reservation Agreement was proposed by Mr Phillips. There was disagreement over its terms between the Nargolwalas' lawyers and Mrs Te Lagger, to whom Mr Larpin had left following through the purchase, including the Nargolwalas' continued wishes that Singapore law should govern the transaction and that they should not warrant the physical condition of the Villa. This caused discontent on Mr Larpin's part at the delay and what he considered lawyers' rigidity, to the point that Mr Larpin withdrew his offer. Mr Phillips brought about direct contact between the Nargolwalas and Mrs Te Lagger, and the purchase came back on track. The Reservation Agreement was signed on 9 November 2017.

91 The Reservation Agreement was entered into between the Nargolwalas as Sellers and Quo Vadis as Reservation Holder. It recites the Sellers' shareholdings and directorships in Querencia (called "the Company") and the interest thereby indirectly held in the Villa (called "the Property"); the Reservation Holder's wish to acquire all issued shares in Querencia (called "the Sale Shares") and the Sellers' wish to sell them to it; and that the parties:

> … would like to formalise the ongoing discussions, confirming their mutual intent to proceed with the sale and purchase of the Sale Shares (the '**Transaction**') on the below agreed key terms in order to enter into a definitive share sale and purchase agreement and other transaction documents (the '**Transaction Documents'**) at a later stage.

92 Clause 1 of the Reservation Agreement is the basis of the Reservation Agreement Representation. The clause provides:

> 1. Consideration
>
> 1.1 Parties agree that the total consideration for the Transaction shall be 7,900,000.00 USD (Seven Million Nine Hundred Thousand United States Dollars) (the '**Consideration**'). The Property shall be sold on and as-is where-is. The Consideration is based on assumption that the Company is to be acquired from the Sellers by the Reservation Holder a debt free basis, and free from any encumbrance.
>
> 1.2 Fees and expenses related to the transfer of Sale Shares from Sellers to the Reservation Holder shall be borne by the Reservation Holder.

93 Clause 2 provides for the holding of a "reservation deposit" of US$790,000 by a stakeholder. The substance of cl 3 is that the Sellers will not offer or sell the Sale Shares to anyone else for the period until 30 November 2017, and the substance of cl 4 is that the parties will use their best endeavours to agree on fair and reasonable terms and conditions of the Transaction Documents, which are to include certain stated matters. Three of the matters are that completion will occur by no later than 30 November 2017, or such other

date as the parties may agree; that if completion does not occur by 30 November 2017 or such other agreed date, the balance of the reservation deposit will be released to the Reservation Holder; and:

> Warranties and representations to be provided by the Sellers that:
>
> (a) all assets and liabilities of the Company are accurately stated;
>
> (b) the Company is of good standing;
>
> (c) the Company is debt-free; and
>
> (d) there is no material defect in the title of the Sale Shares and the Property.

94 Clause 6 includes that, where the Transaction Documents have been entered into, the reservation deposit will be applied as part of the Consideration. By cl 7.1, the governing law is Singapore law. The substance of cl 10 is that the agreement is legally binding until terminated pursued to its terms or the Transaction Documents have been signed, and that it will automatically terminate if the parties cannot agree on the Transaction Documents by 30 November 2017.

The pleaded representations

95 I have set out the 8 November Representations as pleaded at [28] above; for convenience, I repeat them:

> 17. By actively concealing the Material Facts from the Plaintiffs, read with the Reservation Agreement Representation, the Defendants represented to the Plaintiffs that the following were true as at 8 November 2017, and continue to be so:
>
> (1) there were no issues in relation to them selling the Villa, through the Querencia Shares, to the Plaintiffs, and that there were no possible adverse claims in respect of the Villa, and the Querencia Shares, by any third party; and
>
> (2) The Reservation Agreement Representation was true.

96 The Reservation Agreement Representation was part of the earlier pleading:

> 9. By executing the Reservation Agreement, the Defendants represented that the matters detailed in the clause outlined at paragraph 9(1) below, were true as at 8 November 2017, and continue to be so:
>
> (1) Pursuant to Clause 1.1 of the Reservation Agreement, the Villa, through the Querencia Shares could be sold to the 2nd Plaintiff, on, amongst others, an as-is where-is basis, and that the consideration of US$7,900,000/- is based on assumption that the Villa, through the Querencia Shares would be acquired from the Defendants by the 2nd Plaintiff on a debt-free basis, free from any encumbrance.

97 When the terms of the Reservation Agreement Representation are written into the 8 November Representations, and there is some simplification of the grammar, there are two representations, each with more than one element in its content. They are, with the common introduction, that by actively concealing the Material Facts from the plaintiffs, read with the Reservation Agreement Representation, the defendants represented:

> (a) that as at 8 November 2017 there were no issues in relation to them selling the Villa, through the Querencia Shares, to the plaintiffs, and there were no possible adverse claims in respect of the Villa, and the Querencia Shares, by any third party ("Representation 1"); and
>
> (b) that as at 8 November 2017 pursuant to cl 1.1 of the Reservation Agreement, the Villa through the Querencia Shares could be sold to Quo Vadis on an as-is where-is basis, and the consideration of US$7.9m was based on the assumption that the Villa, through the Querencia Shares, could be acquired from the defendants on a debt-free basis, free from any encumbrance ("Representation 2").

Were the representations conveyed?

98 For this, it is necessary to have regard to the Material Facts, which were pleaded at some length. They fell under two heads.

99 First, it was said that "from early September to November 2017" Mr Meury "had been communicating with Mr Lew, and the Defendants, in respect of Mr Lew's intention to purchase, and the Defendants' intention to sell, the Villa, through the Querencia Shares". Particulars were given, involving reference to Mr Lew's email of 7 September 2017 to Mr Meury with a US$5m offer; Mr Meury's email to Mr Nargolwala of 6 October 2017; the telephone conversation between Mr Meury and the Nargolwalas on 6 October 2017; and Mr Meury's email of 9 October 2017 to the Nargolwalas and the ensuing telephone conversation.

100 Secondly, it was said that on or around 11 October 2017 the defendants:

> … knew that there was a possibility that an alleged agreement had concluded between Mr Lew, on the one part, and the Defendants, on the other, through Mr Meury, who was allegedly acting as an agent, for and on behalf of the Defendants, in respect of the sale of the Villa, through the Querencia Shares, and on the following terms… [the terms were, in summary, US$5.25m, an "as is" basis, and completion by 25 October 2017].

101 This was described as the "Alleged Agreement". Again particulars were given, involving reference to Mr Lew's WhatsApp message to Mr Meury of 11 October 2017 with a US$5.25m offer; Mr Meury's email to the Nargolwalas of 11 October 2017 and the ensuing telephone conversation with Mrs Nargolwala; Mrs Nargolwala's email to Mr Nargolwala of 11 October 2017, said to show that the Nargolwalas knew of Mr Lew's "involvement, and identity"; a meeting between Mr Meury and Mr Lew in which Mr Meury said that the Nargolwalas

were in principle agreeable to the offer at US$5.25m "but wanted it in writing to consider further"; Mr Meury's email to the Nargolwalas of 11 October 2017; Mr Nargolwala's email to Mr Meury of 12 October 2017; and Mr Meury giving Mr Lew the package of documents on 12 October 2017.

102 These Material Facts include some matters not known to the Nargolwalas, which cannot be the subject of non-disclosure. In submissions, the thrust was that they showed that Mr Lew had done more than expressed an interest, that there was more than a negotiation in that there was a "deal" at least in communication of an in principle acceptable price and discussion of lawyers, and that there was arguably an agreement to sell to Mr Lew.

103 I deal in turn with Representation 1 and Representation 2. But first, there must be explored the part played by "read with the Reservation Agreement Representation".

104 The Reservation Agreement Representation has two limbs, essentially that the Villa could be sold to Quo Vadis on an as is where is basis, and that the consideration was "based on the assumption" that it would be purchased by Quo Vadis free from any encumbrance. It appears that these were intended to be previous statements, on the explanation in *Broadley*, and that it must be asked whether there was a duty to disclose the Material Facts as facts that would materially affect their truth: if there was, the failure to disclose brought a representation that the previous statements were true. Representation 2 fits that mould. Representation 1 does not. To say that pursuant to cl 1.1 of the Reservation Agreement the Villa could be sold to Quo Vadis on an as is where is basis, or that the consideration for the sale was based on the assumption of a purchase free from any encumbrance, is very different from saying that there were no issues in relation to the defendants selling the Villa and no possible

adverse claims in respect of the Villa by any third party. At least for Representation 1, the part played by the words "read with the Reservation Agreement Representations" is not clear, other than as general background, and Representation 1 is in the category of a representation that facts do not exist produced by silence or failure to disclose them – that is, a representation that there were no issues in relation to the defendants selling the Villa to Quo Vadis through the Querencia shares and there were no possible adverse claims in respect of the Villa or the shares by any third party.

105 There is an immediate difficulty with Representation 1. It is in generous and uncertain terms: what is meant by "no issues in relation to" selling the Villa, and how wide is "no possible adverse in respect of 'the Villa' from any third party"? The representation as pleaded is far wider than could come on any view from failure to disclose the Material Facts, which are concerned with the "issue" or "possible adverse claim" of an arguable agreement to sell to Mr Lew, not with any and every "issue" that could arise in relation to selling the Villa or any and every possible adverse claim by any third party. If the defendants had said to Mr Larpin that there was an arguable agreement to sell to Mr Lew, and given chapter and verse, that would have told him nothing about other "issues" or "possible adverse claims", and they would have been entitled to say that they made no representation as to other issues or possible adverse claims.

106 Even if the representation is taken as limited to the issue or possible adverse claim of an arguable agreement to sell to Mr Lew, I do not think it was conveyed. In order that the defendants be under a duty to disclose the Material Facts, so that their failure to disclose them was a (mis)representation that there was no arguable agreement to sell to Mr Lew, it must be asked whether a reasonable person apprised of the relevant facts would understand the defendants to have represented that there was not an arguable agreement to sell

to Mr Lew. The relevant facts are more than the Material Facts, or the Material Facts known to the defendants, and the answer is no.

107 This was not an established relationship giving rise to a duty to disclose. It is common for a seller of real property, which the Villa functionally was, to negotiate with more than one potential purchaser concurrently. The seller need not inform one potential purchaser of the state of negotiations with another potential purchaser (although the seller may choose to do so in order to ratchet up the sale price). The seller and the potential purchasers have conflicting interests, and as a broad proposition the common law eschews a duty to look after the interests of the opposite negotiating party: see *Davies v London and Provincial Marine Insurance Co* [1878] 8 Ch D 469 at 474:

> Where parties are contracting with one another each may, unless there be a duty to disclose, observe silence even in regard to facts which he believes would be operative upon the mind of the other, and it rests upon those who say that there is a duty to disclose, to shew that the duty existed.

108 The understanding of the reasonable person apprised of the relevant facts is formed against this background and, to repeat, takes account of all the circumstances and not just those put forward as the Material Facts. The circumstances include that Mr Larpin and Mr Nargolwala were well qualified and successful in their respective fields of business, and not novices in property transactions.

109 Until 11 October 2017 there was undoubtedly nothing more than offers by Mr Lew. Mr Meury's second email of 11 October 2017 was still no more than confirmation that Mr Lew offered the increased price of US$5.25m, and in the conversation between Mr Meury and Mr Nargolwala on 14 October 2017 the detailed offer letter was still required and other terms and conditions remained to be agreed. Neither happened. No offer letter was received despite

request, and Mr Lew was indeed lackadaisical in comparison with his holding out of immediate payment and settlement within 14 days, at least until Mr Meury said on 27 October 2017 that Mr Lew was ready to settle and even then it was still without terms and conditions other than price. The plaintiffs placed weight on Mr Nargolwala's reference to a "deal" in the WhatsApp message to Mr Meury, submitting that this meant that there was more than a negotiation; however, that places unjustified weight on his use of the word, the "deal" was to him a stage in the negotiation and, as Mr Nargolwala said when cross-examined, "nothing was concluded". It may be observed that in his evidence, Mr Larpin also referred to his agreement with the Nargolwalas on price as a "deal", at the time when there was still disagreement on the terms of the draft Reservation Agreement, and he said of withdrawing his offer "that the conditions were not met to conclude the deal, so I said let's forget it". Pots and kettles come to mind.

110 After Mr Meury's email of 27 October 2017, to which the Nargolwalas did not respond having decided that they did not wish to deal further with Mr Lew, nothing further was heard from Mr Meury until after 8 November 2017 except the inquiry on 5 November 2017 asking whether the Nargolwalas would still be interested in selling the Villa to Mr Lew. This was quite inconsistent with Mr Lew asserting an existing agreement to sell the Villa to him. Aside from Mr Meury, Mr Zeman's inquiry on 7 November 2017 was also inconsistent with Mr Lew asserting an existing agreement to sell the Villa to him – even asking how much more Mr Lew would need to offer to persuade the Nargolwalas to sell. It would be inferred that Mr Meury and Mr Zeman made their inquiries after speaking with Mr Lew, and their inquiries reflected that Mr Lew did not tell them that he thought he had an existing agreement to purchase the Villa, but wanted to revive the negotiations. The answer to both inquiries was negative,

and at least by the time the Reservation Agreement was executed there were no complaints or other approaches. To a reasonable person in the position of the Nargolwalas, or assessing their position, as at 8 November 2017 there was no more than failed negotiations with a potential purchaser.

111 In the midst of this, on 11 October 2017 Mr Nargolwala was told by Mr Zeman that he had heard, and had been told by Mr Lew, that the Villa had been sold to Mr Lew, and on 27 October 2017 he was told by Mr Meury that Mr Lew said he was ready to settle and had transferred the purchase money (which he had not). Taken alone, these matters could arguably convey that Mr Lew thought he had an agreement to purchase the Villa, although perhaps subject to doubt because the price was not that discussed. But they were not alone. They were accompanied by Mr Lew's failure to provide the offer letter, by his delay in giving his lawyer details so that transaction documents with other terms and conditions could be settled, and of particular significance by the tame enquiries by Mr Meury on 5 November 2017 and Mr Zeman on 7 November 2017 on whether the Nargolwalas would still be interested in selling the Villa to Mr Lew. These enquiries were of particular significance, representing the position as it had come to be whatever had passed beforehand. The circumstances were not such that as at 8 November 2017 a reasonable person would say that there was an issue in relation to selling the Villa or a possible adverse claim to the Villa, or an arguable agreement to sell the Villa to Mr Lew, which should be disclosed to Mr Larpin lest he be misled in his own negotiations towards purchasing the Villa; or that it was represented by failure to disclose the Material Facts that there was no such arguable agreement.

112 I move to Representation 2. An exploration of its meaning is also necessary. It begins with "Pursuant to clause 1.1 of the Reservation Agreement…". What part do those words play? Do they mean a representation

that cl 1.1 of the Reservation Agreement has the wording or wording to the effect then stated? I do not think that was intended – cl 1.1 does not have the words "could be sold", and that would be meaningless in the plaintiffs' case. Rather, unless they are meaningless they must be intended to state the effect of cl 1.1, being (in short) that the Villa could be sold to Querencia and the consideration was based on the particular assumption.

113 If that be so, the representation is not a representation of fact; it is a representation as to the effect in law of cl 1.1. Even then, the words expressing the assumption cannot readily be seen as stating an effect in law beyond that the consideration is agreed to be based on the assumption – the falsity of which was not alleged.

114 The way the plaintiffs put it in closing submissions was in the more concise form that by entering into the Reservation Agreement and failing to disclose the Material Facts, the defendants represented that the Villa could be acquired free from any encumbrance; and they went on to say that it could not, because it was "arguable that Mr Lew had an interest in, or a right to acquire the shares", which they said was an encumbrance. But cl 1.1 does not say that, or have that effect. It says that the Villa "shall be sold on an as-is where-is basis", but that is an expression of a term of the proposed sale, neither a statement of fact nor a statement of what would occur – the sale might never come about, if the Transaction Documents were not agreed by 30 November 2017. It says that the consideration is based on an assumption, relevantly that the Villa would be acquired free from any encumbrance, but the *assumption* of no encumbrance is the antithesis of the *fact* of no encumbrance – it means that if in fact there is an encumbrance, there will be legal consequences. At best, there were contractual promises by the defendants, and the effect of cl 1.1 was promissory.

115 The plaintiffs submitted that a promissory statement can be a representation of fact, because there can be inherent in it the implied factual statement that the promisor has the honest belief in, or the expectation based on reasonable grounds, of performance of the promise. A statement of honest belief that something will happen in the future, or that there are reasonable grounds for saying that it will, can be found in a statement as to a future state of affairs, see for example *Forum Development Pte Ltd v Global Accent Trading Pte Ltd* [1994] 3 SLR(R) 1097; *Tan Chin Seng v Raffles Town Club Pte Ltd* [2003] 3 SLR (R) 307; *Deutsche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310; and generally Andrew Phang Boon Leong, *The Law of Contract in Singapore* (Academy Publishing, 2012) at para 11.034. But caution must be exercised in finding similar representations of fact in a promissory statement, because a contractual promise carries its own consequences if it is not fulfilled – a promisor may undertake a contractual obligation in hope, rather than belief or expectation, that he will be able to fulfil it, he and the opposite party both relying on the contractual obligation as the measure of their relationship and on their contractual remedies.

116 It is difficult to find these implied factual statements in Representation 2 when it begins with "Pursuant to Clause 1.1 of the Reservation Agreement….", and so is an assertion of the effect of the clause. In any event, that was not the case run by the plaintiffs, and their appeal to implied statements of belief or expectation was an afterthought. As stated above, in closing submissions their case was that by entering into the Reservation Agreement and failing to disclose the Material Facts, the defendants represented that the Villa could be acquired free from any encumbrance. The submission abovementioned (at [115]) was in a subsequent written submission concerning promissory statements provided at my request. The plaintiffs did not plead representations

of belief in or expectation of an encumbrance-free sale, despite the requirement in O 18 r 12(1)(*a*) of the Rules of Court (2014 Rev Ed) that particulars of any misrepresentation must be given; in *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others* [2020] 2 SLR 1256 at [116] it was said that allegations of fraud or misrepresentation must be pleaded with "utmost particularity". Nothing was asked of the Nargolwalas as to their understanding of cl 1.1 (including, for example, their understanding of "encumbrance"), or their belief in or expectation of its fulfilment by an encumbrance-free sale.

117 Even if Representation 2 was made by failure to disclose the Material Facts, it was not made as an actionable representation of fact. But I go to the substance of the matter, taking the representation as put in closing submissions as a representation that the Villa could be acquired free from any encumbrance. Was there a duty to disclose the Material Facts, such that failure to do so brought that representation? The answer again is no, for at least two reasons.

118 The first is because there was no real significance of the Material Facts to the representation. In short form, on the plaintiffs' case the Material Facts meant that there was an arguable agreement to sell to Mr Lew. Making that assumption, that did not mean that the Villa could not be acquired by Quo Vadis – it could, as in due course, was held by Simon Thorley IJ and the Court of Appeal. Nor did it mean that the acquisition could not be free from any encumbrance, if for no other reason because as next considered the assumed arguable agreement to sell to Mr Lew was not an encumbrance as referred to in cl 1.1 of the Reservation Agreement. "Encumbrance" was not defined in the Reservation Agreement. Its ordinary meaning in the sale of property is an interest in the nature of a charge. In cl 1.1 it is said that "the Company", that is, Querencia, is assumed to be acquired debt-free and free from any encumbrance. The reference to the Company is repeated in cl 4 of the Reservation Agreement

and its proposed warranty that the Company is debt-free; it is Querencia that is to be free from any encumbrance, and the sensible meaning is that its assets are not to be subject to any interest in the nature of a charge. Just what interest need not be explored; the point is that any encumbrance must be an encumbrance over Querencia meaning its assets. An arguable agreement to sell the shares in Querencia to Mr Lew, a claim not against Querencia but against the Nargolwalas, is not such an encumbrance.

119 In submissions, the plaintiffs relied on the definition of "encumbrance" in the Share Purchase Agreement, being that it:

> includes any interest or equity of any person (including without prejudice to the generality of the foregoing, any right to acquire, option or right of pre-emption) or any mortgage, charge, pledge, lien, assignment, hypothecation, security interest, title retention or any other security, claim, agreement or arrangement of similar nature.

120 The reliance is misplaced. The extremely wide definition, in a *subsequent* agreement, cannot be used for an earlier agreement in which the term is not defined. And within the Share Purchase Agreement, the term is used both in relation to the Sale Shares being unencumbered (cll 1.1, 4.2.1, 4.2.2 at [132]–[133] below) and in relation to the Company's assets being unencumbered (cl 4.2.9 at [133] below), giving point to its use in relation to the Company and not in relation to the shares in Querencia in the Reservation Agreement: even if it could be used, the wide definition does not overcome that in the Reservation Agreement the encumbrance must be an encumbrance over Querencia meaning its assets.

121 The second reason returns to whether there was a duty to disclose the Material Facts as facts indicating an arguable agreement to sell to Mr Lew, considered in relation to Representation 1. I have concluded that there was not.

Where the arguable agreement is the encumbrance in question, it follows that there was not a duty to disclose the encumbrance lest Mr Larpin be misled into thinking that he could acquire the Villa free from any encumbrance.

122 For both reasons, by non-disclosure of the Material Facts the defendants did not represent that the Villa could be acquired free from any encumbrance.

Was there dishonest intention?

123 I am satisfied that as at 8 November 2017, and despite in particular what Mr Zeman had said on 11 October 2017 and Mr Meury had emailed on 27 October 2017, the Nargolwalas believed that Mr Lew was not a serious purchaser, and that at no time did they believe that he had or might have had an agreement for the purchase of the Villa. Their belief is evident from their continued (and unsatisfied) request for an offer letter, from Mr Nargolwala's refusal to provide bank details until there was progress and his response to Mr Zeman that he was not sure that congratulations were yet in order. Their evidence that they did not regard Mr Lew as a serious purchaser is supported by their saying that to Mr Phillips, as Mr Phillips said in his affidavit as well as the Nargolwalas saying it. Their view could only be confirmed by what I have called the tame enquiries by Mr Meury and Mr Zeman on 5 and 7 November 2017, quite inconsistent with a concluded agreement or with any "deal" carrying with it an arguable concluded agreement. I accept their evidence in this respect. Even if I am wrong in my earlier conclusion that a reasonable person in the position of the Nargolwalas would consider that there were no more than failed negotiations with a potential purchaser, that was the Nargolwala's belief. There was in their mind no reason to disclose the dealings with Mr Lew, and in not disclosing the Material Facts to Mr Larpin they were not acting with the

dishonest intention to mislead him into thinking that the Material Facts had not happened or that there was no arguable agreement to sell to Mr Lew.

124 I bear in mind the plaintiffs' submission, made in relation to the conversation on 15 November 2017 (see [171] below) but also applicable to earlier times, that the Nargolwalas did not disclose their dealings with Mr Lew because it would have revealed to Mr Larpin that they had been prepared to accept a significantly lower price for the Villa than Mr Larpin had offered. The submission was made without the benefit of putting to the Nargolwalas that that was in their minds. It is perhaps a curious submission; underlying it appears to be that a seller should tell a prospective purchaser that the prospective purchaser is paying too much, because the seller would be prepared to take less. It is a submission leading nowhere, because not wanting to disclose preparedness to accept a lower price does not translate to not wanting to disclose the dealings with Mr Lew with the dishonest intention of misleading Mr Larpin into thinking that there was no arguable agreement to sell to Mr Lew. The submission does not alter my conclusion.

Conclusion as to representations of fact

125 Neither Representation 1 nor Representation 2, in the case of Representation 2 as pleaded or as a representation that the Villa could be acquired free from any encumbrance, was made as an actionable representation; including, if it be necessary, that the non-disclosure of the Material Facts was not with dishonest intent.

The 14 November representations

Events from 9 November 2017 to 14 November 2017

126 The Nargolwalas received an email from Mr Zeman on 9 November 2017, saying that he was "getting calls [from Mr Lew] to see if you have made any further decisions", with the explanation that he was "only trying to help the parties if possible to create a win-win situation". Mr Nargolwala replied on the same day, relevantly:

> As the previous offer had seen no progress in the timeframe advised to us, we initiated discussions with other interested parties. These discussions are now at an advanced stage. As such we will not be in a position to consider any other decisions until the end of this month at the earliest. After that time, we can regroup and decide if we want to take things further.

127 Mr Zeman responded, "Okay thanks! I hope things work out! If they don't I'll try to broker the deal myself!".

128 It was suggested to Mr Nargolwala in cross-examination that he should have told Mrs Te Lagger of the email as part of her due diligence process. He did not agree, and I am unable to see why he should have done so.

129 During this period, there was no contact between Mr Meury and the Nargolwalas concerning a purchase by Mr Lew, and no other contact with the Nargolwalas concerning a purchase by Mr Lew, prior to the afternoon/evening of 14 November 2017. The purchase of the Villa by Mr Larpin proceeded, for this part of the judgment ending with the execution of the Share Purchase Agreement late in the afternoon of 14 November 2017.

130 A draft Share Purchase Agreement had been provided to Mrs Te Lagger prior to 8 November 2017. In communications with Mr Nargolwala and

otherwise, she went through a due diligence process, and the terms of the Share Purchase Agreement were finalised. It was arranged that Mrs Nargolwala would travel to Phuket with a copy signed by Mr Nargolwala, who had commitments in Singapore, and there meet Mr Larpin and Mrs Te Lagger for completion of its execution. They met at about 5pm Phuket time, the Share Purchase Agreement was executed, and they then re-gathered for dinner together. Mrs Nargolwala emailed Mr Nargolwala to tell him that the Share Purchase Agreement had been executed.

131 Little of the detail of the Share Purchase Agreement need be explained. It provided for the purchase by Quo Vadis (called the Purchaser) of the Nargolwala's (called the Sellers) shares in Querencia (called the Company) for US$7.9m, with completion two days after its execution or on such other day as was mutually agreed in writing. However, some of its clauses were the basis of the Share Purchase Agreement Representations.

132 One clause is cl 1.1, under the heading "Sale of the Sale Shares":

> 1.1 The Sellers shall, in accordance with the terms and conditions of this Agreement, on Completion sell to the Purchaser (and/or its nominee(s)) the Sale Shares and the Purchaser shall purchase and/or procure the purchase from the Sellers the Sale Shares on Completion, free from all liens, charges and encumbrances.

133 The other clauses are cll 4.2.1, 4.2.2, 4.2.8 and 4.2.11, all under the heading "Representations, Warranties and Undertakings":

> 4.2 The Sellers represent and warrant to the Purchaser that the following representations and warranties are true and accurate as at the Completion Date:
>
> …
>
> 4.2.1 The Sellers will, on Completion, be entitled to sell and transfer to the Purchaser the full legal and beneficial ownership of the Sale Shares free from all liens, charges and other

> encumbrances in accordance with the terms herein and with all rights, benefits and entitlements attaching and accruing thereto as at the date of this Agreement and thereafter (including, without limitation, the right to any dividends, or other distributions declared or payable thereon and any rights or bonus shares issued in respect of the Sale Shares, on or after the date of this Agreement).
>
> 4.2.2 The Sale Shares have been properly and validly issued and allotted and each are fully paid or credited as fully paid, there are no encumbrances on the Sale Shares, and all consents for the transfer of the Sale Shares have been obtained or will be obtained by Completion Date.
>
> …
>
> 4.2.8 There is no action, petition, investigation, appeal, suit, litigation, or other legal proceeding pending or threatened against or involving the Company or the business of the Company, and there are no investigations, disciplinary proceedings or other circumstances likely to lead to any such action, petition, investigation, appeal, suit, litigation, or other legal proceeding.
>
> …
>
> 4.2.11 All information relating to the Company which would materially affect the sale and purchase of the Sale Shares has been disclosed to the Purchaser.

134 The Nargolwalas were then made aware of a claim asserted by Mr Lew in relation to the Villa, in two ways: an email from Mr Zeman, and an email directly from Mr Lew. I put it in terms of being made aware because, as will appear, the email from Mr Zeman was sent prior to the execution of the Share Purchase Agreement, but was not read until after its execution. As will also appear, it is important that they became aware only after the execution of the Share Purchase Agreement.

135 The email from Mr Zeman was sent to Mr Nargolwala at 2.46pm Singapore time on 14 November 2017, before the Share Purchase Agreement was executed, but Mr Nargolwala had been occupied and did not read it until

between 6pm and 7pm Singapore time, after the Share Purchase Agreement had been executed. The email read:

> … I just tried to call you in Singapore but no answer. I understand congratulations are in order for the sale of Villa 29 and I am very happy for you. On the other hand, I was trying to call you to tell you there is a very unhappy buyer in Australia who has sent me an email that he intends to have his lawyers send you a letter claiming misleading and deceptive conduct for not delivering a contract to him as well as costs and compensation for his guests who intend to spend their December/January vacations with him as well as all legal costs. I have tried to talk him out of it but he is a very forceful individual and I cannot change his mind. Please call me when you have a chance and hopefully things will die down. On the other hand, I am very happy for you. It's been a long time.

136 Mr Zeman referred to an email from Mr Lew. The email from Mr Lew was also received by Mr Nargolwala as part of the email chain, but I do not think it relevantly adds to the notice given by Mr Zeman of Mr Lew's unhappiness and intention.

137 I have said that Mr Nargolwala did not read Mr Zeman's email until between 6pm and 7pm. That was his evidence. The plaintiffs submitted that it should not be accepted, because during the afternoon of 14 November 2017 Mr Nargolwala was exchanging emails with Mrs Te Lagger about the Share Purchase Agreement, and previous emails from Mr Zeman had concerned the Villa so the email from him would have caught Mr Nargolwala's attention. Mr Nargolwala explained how he was occupied but had intermittent emails with Mrs Te Lagger, I consider that he was a careful and truthful witness, and I accept his evidence.

138 After reading the email, Mr Nargolwala telephoned Mr Zeman. His account of the conversation, not questioned in cross-examination, was:

> During this call, Zeman assured me that he will speak with Lew to 'manage' him and that Lew was just making threats to try and get his way. I told Zeman that Lew's claims of 'misleading and deceptive conduct' and his claims for 'compensation' and 'costs' were wholly without merit and that Lew should really be looking to blame himself for failing to act with sufficient diligence instead of trying to level baseless accusations at Aparna or me, and I asked Zeman to communicate that to Lew. Zeman said that he would do so, and reiterated to me that Lew was just making threats. Zeman also said that he was confident that he will be able to get Lew to drop the matter.

139 The email from Mr Lew was sent to Mr Nargolwala at 7.46pm Singapore time on 14 November 2017, also after the Share Purchase Agreement had been executed. It was in unfortunate terms and in some respects factually inaccurate. It is unnecessary to go to those aspects. In the email, Mr Lew said that there was "potentially … a major dispute" between he and Mr Nargolwala; that Mrs Nargolwala had "via the Andara group sold Villa 29 to [him] under specific terms and conditions" and he had agreed to buy the Villa on a walk in walk out basis for US$5,250,000; that they were "now faced with a major impass [sic] where you and your Cayman Island company is potentially going to reneg [sic] on an agreed transaction"; that for Mr Lew it was now a point of principle and he would "pursue rectification and performance of our agreement regardless of costs in all three jurisdictions"; and that if a response was not received in the next 24 hours Mr Lew would "immediately notify [his] legal department to take action in three jurisdictions namely thailand [sic], singapore [sic] and Cayman Islands".

140 It appears that other emails passing between Mr Lew and Mr Zeman on 13 November 2017 were attached to Mr Lew's email, in substance asking Mr Zeman to intervene with the Nargolwalas. The important email, however, was Mr Lew's direct assertion of an agreement to purchase the Villla.

141 Mr Nargolwala read the email at about 10pm Singapore time on the night of 14 November 2017. He discussed it with Mrs Nargolwala, and it was agreed that they should speak to Mr Larpin and Mrs Te Lagger the following day. I will take this up when considering the 15 November Representations.

The pleaded representations

142 The 14 November Representations were pleaded:

> 18. By actively concealing the Material Facts and the Further Material Facts from the Plaintiffs, read with the Reservation Agreement Representation, and the Share Purchase Agreement Representations, the Defendants represented to the Plaintiffs that the following were true as at 14 November 2017, and continue to be so:
>
> (1) There were no issues in relation to them selling the Villa, through the Querencia Shares, to the Plaintiffs, and that there were no possible adverse claims in respect of the Villa, and the Querencia Shares, by any third parties;
>
> (2) The Reservation Agreement Representation was true; and
>
> (3) The Share Purchase Agreement Representations were true.

143 The Reservation Agreement Representation has been set out above, at [96]. The Share Purchase Agreement Representations were again part of the earlier pleading:

> 12. By executing the Share Purchase Agreement, the Defendants represented to the Plaintiffs that the matters detailed in at [sic] paragraphs 12 (1), to (3) below, were true as at 14 November 2017, and continue to be so:
>
> (1) Pursuant to Clause 1.1, 4.2.1, and 4.2.2 of the Share Purchase Agreement, the Villa, through the Querencia Shares could be sold to the 2nd Plaintiff free from all liens, charges and encumbrances;
>
> (2) Pursuant to Clause 4.2.8 of the Share Purchase Agreement, there was, amongst others, no other legal proceedings pending, or threatened, against, or involving Querencia, or the business of Querencia;

> (3) Pursuant to clause 4.2.11 of the Share Purchase Agreement, all information relating to Querencia which would materially affect the sale and purchase of the Villa, through the Querencia Shares had been disclosed to the 2nd Plaintiff."

144 Again writing in the terms of the Reservation Agreement Representation and the Share Purchase Agreement Representations, and with some simplification of the grammar, there are five representations, some with more than one element in its content. They are, with the common introduction, that by actively concealing the Material Facts and the Further Material Facts from the plaintiffs, read with the Reservation Agreement Representation and the Share Purchase Agreement Representations, the defendants represented:

(a) that as at 14 November 2017 there were no issues in relation to them selling the Villa, through the Querencia Shares, to the plaintiffs, and there were no possible adverse claims in respect of the Villa, and the Querencia Shares, by any third party ("Representation 3");

(b) that as at 14 November 2017, pursuant to cl 1.1 of the Reservation Agreement, the Villa through the Querencia Shares could be sold to Quo Vadis on and as-is where-is basis, and the consideration of US$7.9m was based on the assumption that the Villa, through the Querencia Shares, could be acquired from the defendants on a debt-free basis, free from any encumbrance ("Representation 4");

(c) that as at 14 November 2017, pursuant to cll 1.1, 4.2.1 and 4.2.2 of the Share Purchase Agreement, the Villa, through the Querencia Shares could be sold to Quo Vadis free from all liens, charges and encumbrances ("Representation 5");

(d) that as at 14 November 2017, pursuant to cl 4.2.8 of the Share Purchase Agreement, there was, amongst others, no other legal

proceedings pending, or threatened, against, or involving Querencia, or the business of Querencia ("Representation 6");

(e) that as at 14 November 2017, pursuant to cl 4.2.11 of the Share Purchase Agreement, all information relating to Querencia which would materially affect the sale and purchase of the Villa, through the Querencia Shares, had been disclosed to Quo Vadis ("Representation 7").

Were the representations conveyed?

145 Again, regard must be had to the Material Facts and the Further Material Facts. The Material Facts are as before. The Further Material Facts are Mr Nargolwala's receipt of Mr Zeman's email about the "unhappy buyer" on 14 November 2017, said to have included Mr Lew's email in the email chain, and Mr Nargolwala's receipt also on 14 November 2017 of Mr Lew's email asserting an agreement to purchase; and as something of a cover-all, it is said that the defendants knew on 14 November 2017 "that there was a possibility that Mr Lew's claim in respect of the Alleged Agreement was sustainable".

146 It is necessary, however, to take account of *when* the Nargolwalas became aware of the Further Material Facts, because any entitlement to rescission of the Share Purchase Agreement comes from entry into it misled by one or more of the representations. On my findings, they became aware of the emails after the Share Purchase Agreement had been executed, and since the cover-all refers to the claim in Mr Lew's email, they became aware of it also after the Share Purchase Agreement had been executed (it may in any event the ignored, because it was not a fact – the Nargolwalas did not know on 14 November 2017, prior to the execution of the Share Purchase Agreement, that there was a possibility that Mr Lew's claim to have an agreement to purchase

the Villa was sustainable). Where the alleged representation is by failure to disclose, the Nargolwalas cannot have failed to disclose that which they did not know, and so they cannot have made any of the 14 November Representations prior to execution of the Share Purchase Agreement through active concealment of the emails or of a belief in the sustainability of the claim therein. If there were representations thereafter made by active concealment of the emails, and they were made fraudulently, that may give an entitlement to damages, but that is another matter.

147 For rescission of the Share Purchase Agreement, then, it must be asked whether any of Representations 3, 4, 5, 6 or 7 was made prior to the execution of the Share Purchase Agreement by active concealment of the Material Facts alone.

148 Representations 3 and 4 differ from Representations 1 and 2 in the dates as at which they are placed – 14 November 2017 rather than 8 November 2017. There was nothing between those dates, prior to the execution of the Share Purchase Agreement, to alter the discussion earlier in this judgment of the representations as actionable representations, to give any further significance to the Material Facts (or to found a dishonest intention). Representations 3 and 4 were not made as actionable representations prior to the execution of the Share Purchase Agreement. Mr Zeman's email of 9 November 2017 could only be confirmatory – it was again inconsistent with the assertion of an agreement to sell the Villa.

149 For Representations 5, 6, and 7, there is again a question of the part played by "read with the Reservation Agreement Representation and the Share Purchase Agreement Representations". Each of Representations 5, 6 and 7 takes up a clause or clauses in the Share Purchase Agreement, and it appears that the

clauses were intended to be previous statements which, by the failure to disclose, were represented to be true. It is difficult to see that the Reservation Agreement Representation has any part to play, beyond possibly the fact that it was (allegedly) made as one of the circumstances in which it is to be determined whether there was a duty to disclose.

150 There is also again the question of the part played by the various "pursuant to clause xx of the Share Purchase Agreement". As before, unless the words are meaningless they must be intended to state the effect of the clauses. But that leads to whether the clauses can bring representations of fact.

151 The plaintiffs submitted that the clauses in the Share Purchase Agreement were statements made to them "which relate to matters of fact". This is equivocal. It is clear, in my view, that the clauses are promissory statements as to the future. Clause 1.1 states the promises of sale and purchase, and as part of them the promise that on completion, which will be in the future, the Sale Shares will be free from all liens, charges and encumbrances. All of cll 4.2.1, 4.2.2, 4.2.8 and 4.2.11 are governed by their chapeau which, while using the word "represent", states a promise of what will be so "as at the Completion Date", again in the future. None of these can be transformed into a representation of (present) fact by failure to disclose something which, let it be assumed, may mean that on completion the promise will be broken. As an example, take Representation 7 founded on a clause providing that *on completion* all information which would materially affect the sale and purchase of the Sales Shares has been disclosed to Quo Vadis; it cannot be transformed into a representation that all such information *now* has been disclosed to Quo Vadis.

152 As with Representation 2, it is difficult to find any implied factual statement as to honest belief in, or expectation based on reasonable grounds of, performance of these promises when the representations were said to be "pursuant to clause xx of the Share Purchase Agreement". But again that was not the plaintiffs' case. The representations were pleaded with the care revealed by their complexity, and were not pleaded as the implied factual statements; in closing submissions the case was that the Share Purchase Agreement Representations were statements to the plaintiffs "which relate to matters of fact", no more; and the Nargolwalas were not asked anything about their understanding of the effect of the clauses in the Share Purchase Agreement or their belief in or expectation of the promises being fulfilled.

153 For these reasons, even if Representations 5, 6 and 7 were conveyed by failure to disclose the Material Facts, they were not made as actionable representations of fact. But again I will go to the substance of the matter, taking the representations as at 14 November 2017 put forward in the plaintiffs' closing submissions. It was there said that the "suppression" of the Material Facts and the Further Material Facts:

> … made the following statements to the Plaintiffs, untrue:
>
> (1) …
>
> (2) That the Villa (through the Querencia Shares) could be acquired free from all liens, charges and encumbrances,
>
> (3) That there were no legal proceedings pending, or threatened, against, or involving Querencia, or the business of Querencia,
>
> (4) That all information relating to Querencia which would materially affect the sale and purchase of the villa, through the Querencia Shares, had been disclosed to the plaintiffs.

154 These representations were not made by failure in a duty to disclose the Material Facts. Prior to the execution of the Share Purchase Agreement, nothing in the defendants' dealings with Mr Lew had changed from 8 November 2017.

As early as discussed, the encumbrance in question, on the plaintiffs' case, is an arguable agreement to sell to Mr Lew, and the position is the same as for Representation 2. The circumstances were not such that a reasonable person would say that there were pending or threatened legal proceedings against or involving Querencia or its business, or information which would materially affect the sale and purchase of the Villa through the Querencia shares, which should be disclosed to Mr Larpin lest he be misled in himself purchasing the Villa, or that it was represented by a failure to disclose the Material Facts that there were no such matters. Although, unlike the Reservation Agreement, the Share Purchase Agreement contained the wide definition of "encumbrance", there was still nothing within it to disclose as a possible qualification to sale of the Querencia shares free from encumbrances.

155 It should then be asked whether any of Representations 3, 4, 5, 6 or 7 was made after the execution of the Share Purchase Agreement by active concealment of the Material Facts and the Further Material Facts. However, since any misrepresentation could not lead to rescission of the Reservation agreement or the Share Purchase Agreement, but (if fraudulent) could lead to an award of damages, that is best addressed together with the consideration of the 15 November Representations below which, if established as fraudulent misrepresentations, could lead to an award of damages.

Was there dishonest intention?

156 The relevant time, for the present, is prior to the execution of the Share Purchase Agreement. Nothing had changed, or brought occasion to change, since 8 November 2017. My earlier finding, that in not disclosing the Material Facts to Mr Larpin the Nargolwalas were not acting with the intention to mislead him into thinking that they had not happened, remains good. For reasons given

earlier, any failure to disclose was not with the dishonest intention to lead Mr Larpin into thinking that the representations were true.

Conclusion as representations of fact

157 None of Representations 3, 4, 5, 6 and 7, as pleaded or in substance, was made prior to the execution of the Share Purchase Agreement as an actionable representation; including, if it be necessary, that the non-disclosure of the Material Facts was not with dishonest intent. Representations after the execution of the Share Purchase Agreement are further considered together with consideration of the 15 November Representations.

The 15 November Representations

Events on 15 November 2017

158 What happened on this day is on the one hand, relied on by the plaintiffs for representations as an additional basis for relief; and on the other hand, relied on by the defendants for affirmation as an answer to rescission. For the present, however, only the representations are under consideration.

159 Mr Nargolwala said that they decided to speak to Mr Larpin and Mrs Te Lagger because, although they thought Mr Lew's claims were baseless, he thought it was the right thing to do so that Mr Larpin and Mrs Te Lagger could decide for themselves whether they wanted to proceed to complete the deal, or to walk away from it in view of the threats made by Mr Lew "to avoid any and all possibility of later becoming embroiled in controversy". From his evidence, the key point was putting Mr Larpin on notice of potential litigation.

160 Mrs Nargolwala, Mr Larpin and Mrs Te Lagger were still in Phuket. On the morning of 15 November 2017, while at breakfast with Mr Larpin and Mrs

Te Lagger, Mrs Nargolwala said that "an issue" had arisen that they should know about before going ahead to completion of the Share Purchase Agreement, and that Mr Nargolwala would explain later in the day. In the afternoon, Mr Nargolwala telephoned Mrs Nargolwala and there was a conversation with all of them on speakerphone.

161 Mr Nargolwala's account of the conversation in his witness statement was:

> 87. During this telephone conversation, I told Larpin that I had received a threatening email the night before from an Australian individual by the name of Solomon Lew, who had made an offer to purchase the Villa and was claiming to have a right to buy the Villa. I also shared that Lew was threatening to commence legal proceedings to enforce rights which he claimed to have. Larpin asked whether I accepted Lew's offer and whether any agreement was concluded, to which my response was that I have not even met Lew, and there was no agreement concluded with him. I also told Larpin that neither Aparna nor I had signed any document concerning a sale of the Villa to Lew. In this regard, I shared with Larpin and Dao my view that Lew's claim was unsustainable and vexatious, and that I viewed the email as a bullying tactic.
>
> 88. I then explained to Larpin and Dao that even though Aparna and I were of the view that Lew's claim was unsustainable, we thought it appropriate to notify them so that they could decide whether to: (i) proceed with completion under the SPA; (ii) abort and unwind the transaction; or (iii) defer proceeding with completion until there was a clearer picture as to what Lew was going to do. In response, Larpin assured me that he was comfortable proceeding to complete the transaction under the SPA, and that he saw no reason for him to abort the transaction on account of a 'bullying' email.

162 Mr Larpin's account in his witness statement was shorter:

> 65 … I set out below, a summary of this conversation over the telephone:
>
> (1) Mr Nargolwala informed us that he had, on 14 November 2017, received a threatening and unpleasant email containing allegations that an offer to purchase the Villa had been made…. The email itself was not shown to us.

> (2) I asked Mr Nargolwala if he had accepted this offer, and whether there was a concluded agreement. Mr Nargolwala said that he had not even met the sender of the email, and did not receive any written offer from this person. Further, Mr Nargolwala confirmed that he had not received any offer letter, and nor did he sign any contract with this individual. Consequently, Mr Nargolwala said that he could not, and had not, accepted any offer whatsoever in relation to the Villa from this individual, and the person's claim in respect of the Villa was unsustainable.

163 Mrs Nargolwala gave a rather truncated account consistent with that of Mr Nargolwala, although it did not include the threat to commence legal proceedings; Mrs Te Lagger "confirm(ed)" Mr Larpin's account.

164 There are differences between these accounts. One is that, according to Mr Nargolwala, he said that Mr Lew was threatening to commence legal proceedings to enforce his claimed rights, while that is absent from Mr Larpin's account. And importantly, according to Mr Nargolwala he said that he and Mrs Nargolwala were *of the view that Mr Lew's claim was unsustainable*; but according to Mr Larpin, Mr Nargolwala said that Mr Lew's claim *was unsustainable.* Mr Larpin's account seems scantier than must have occurred. The emails received by Mr Nargolwala had brought discussion with Mrs Nargolwala and the decision to speak to Mr Larpin, which must have included what to say, and Mr Nargolwala's recollection is likely to be better than that of Mr Larpin, for whom the conversation came out of the blue. On the first point of difference, I accept that Mr Nargolwala was concerned to warn Mr Larpin of potential litigation, so that it is likely he would have referred to Mr Lew's threats to commence legal proceedings. On both points of difference, Mr Nargolwala's account is also supported by what he wrote in the email next mentioned. I accept the account given by Mr Nargolwala in preference to that given by Mr Larpin, including the threat to commence legal proceedings, as Mr Lew had indeed threatened.

165 Following this conversation, Mr Nargolwala sent Mr Larpin an email reading:

> I refer to our phone conversation this afternoon when I informed you that we received an email yesterday from a party claiming that they have a right to buy the Villa.
>
> My wife and I believe the claim to be unsustainable. We have never personally met at the party nor has he sent an offer letter or signed a contract with us.
>
> However, I thought best to notify you of this claim by way of disclosure, and give you the option to proceed, abort, or defer the purchase until we have a clearer picture on the actions from the other party so as not to get you embroiled in a dispute that you are not currently a party to. Please let me know how you wish to proceed.

166 Mr Larpin promptly replied:

> Many thanks for the immediate disclosure of this minor yet utterly unpleasant incident. Unfortunately you and I are old enough to know that one can't refrain [sic] awkward customers from acting unreasonably.
>
> As we have concluded and executed a very straight forward transaction with professionalism and in good faith, please be assured and Aparna [sic] that I'd stay on your side whatever the circumstances. I take this unfortunate opportunity to tell you both how my family and I are delighted to be your successors at "29"!
>
> Looking forward to seeing you hopefully both on Sunday.

167 Mr Nargolwala responded, "Many thanks for your thoughtful and kind email. I can confirm that we will move on to complete the sale and transfer expeditiously".

168 In their discussion in which they decided to speak to Mr Larpin and Mrs Te Lagger about Mr Lew's email, the Nargolwalas also decided to make some enquiries of Mr Meury; as they put it, to try to get to the bottom of what had transpired between Mr Lew and Mr Meury. Mrs Nargolwala spoke to him in the

morning of 15 November 2017. Mr Meury said that he had communicated with Mr Lew mainly via text messages, and that he would share with her relevant text messages. Late on that day an envelope was received from Mr Meury, containing two pieces of paper. One was a copy of the messages between Mr Nargolwala and Mr Meury earlier referred to concerning whether the deal was dead. The other as in evidence is only partly legible, a number of messages between 23 and 27 October 2017 which Mr Nargolwala said, with justification, reinforced his view that Mr Lew's claims were without merit.

The pleaded representations

169 The 15 November Representations were pleaded:

> 19. By actively concealing the Material Facts, and the Further Material Facts from the Plaintiffs, read with the Reservation Agreement Representation, the Share Purchase Agreement Representations, and the Oral Representations, the Defendants represented to the Plaintiffs that the following were true as at 15 November 2017, and continue to be so:
>
> (1) There were no issues in relation to them selling the Villa, through the Querencia Shares, to the Plaintiffs, and that there were no possible adverse claims in respect of the Villa, and the Querencia Shares, by any third party;
>
> (2) The Reservation Agreement Representation was true;
>
> (3) The Share Purchase Agreement Representations were true; and
>
> (4) The Oral Representations were true.

170 The Reservation Agreement Representation and the Share Purchase Agreement Representations have been set out above, at [96] and [143]. The Oral Representations were part of the earlier pleading:

> 14. By way of a telephone conversation at about 2 pm, on 15 November 2017, between the 1st Defendant, and the 1st Plaintiff, during which the 2nd Defendant was also present, the 1st Defendant represented to the 1st Plaintiff that:

> (1) The 1st Defendant had received a threatening email from someone on 14 November 2017 ("**14 November E-mail**") who was alleging that this person had seen the Villa, and made an offer to purchase it; and
>
> (2) The Defendants had (a) never met this person, (b) consequently, not accepted any offer whatsoever in relation to the Villa from this person, (c) not signed any contract with this person, and (d) that this person's claim in respect of the Villa was unsustainable.
>
> (Collectively, '**Oral Representations**')".

171 Once again writing in the terms of the Reservation Agreement Representation, the Share Purchase Agreement Representations and the Oral Representations, and adjusting the grammar, there are seven representations, some with more than one element in their content. They are, with the common introduction, that by actively concealing the Material Facts and the Further Material Facts from the plaintiffs, read with the Reservation Agreement Representation, the Share Purchase Agreement Representations and the Oral Representations, the defendants represented to the plaintiffs

(a) that as at 15 November 2017 there were no issues in relation to them selling the Villa, through the Querencia Shares, to the plaintiffs, and there were no possible adverse claims in respect of the Villa, and the Querencia Shares, by any third party ("Representation 8");

(b) that as at 15 November 2017, pursuant to cl 1.1 of the Reservation Agreement, the Villa through the Querencia Shares could be sold to Quo Vadis on an as-is where-is basis, and the consideration of US$7.9m was based on the assumption that the Villa, through the Querencia Shares, could be acquired from the defendants on a debt-free basis, free from any encumbrance ("Representation 9");

(c) that as at 15 November 2017, pursuant to cll 1.1, 4.2.1, and 4.2.2 of the Share Purchase Agreement, the Villa, through the Querencia Shares could be sold to Quo Vadis free from all liens, charges and encumbrances ("Representation 10");

(d) that as at 15 November 2017, pursuant to cl 4.2.8 of the Share Purchase Agreement, there was, amongst others, no other legal proceedings pending, or threatened, against, or involving Querencia, or the business of Querencia ("Representation 11");

(e) that as at 15 November 2017, pursuant to cl 4.2.11 of the Share Purchase Agreement, all information relating to Querencia which would materially affect the sale and purchase of the Villa, through the Querencia Shares had been disclosed to Quo Vadis ("Representation 12");

(f) that as at 15 November 2017 Mr Nargolwala had received a threatening email from someone on 14 November 2017, who was alleging that he had seen the Villa, and made an offer to purchase it ("Representation 13"); and

(g) that as at 15 November 2017 the defendants had never met the person, had not accepted any offer whatsoever in relation to the Villa from the person, and had not signed any contract with the person, and the person's claim in respect of the Villa was unsustainable ("Representation 14").

Were the representatives conveyed?

172 The relevant time is the time of the speakerphone conversation. Although an actionable misrepresentation could not bring rescission of the

Share Purchase Agreement, nor the claimed "rescission of … the completion of the transfer of the Querencia Shares", it could found a claim to damages to compensate for loss suffered by inducement not to accept the offer to abort and unwind the transaction, including to recover the amount of costs in excess of the party and party costs. In considering whether the representations were made, the plaintiffs' case rested on the failure to disclose the Material Facts and the Further Material Facts. They have been described above. The complexity has reached new heights, or lows, and some of the pleaded representations become puzzlingly inappropriate. However, at least in form, in closing submissions all representations were maintained.

173 For Representations 8 and 9, the difference from Representations 1 and 2 is once more in the dates as at which they are placed – 15 November 2017 rather than 8 November 2017. There has been significant development, in summary Mr Lew's assertion of an agreement to buy the Villa and the threat of litigation in his emails on 14 November 2017.

174 Going to Representation 8, Mr Lew's assertion of an agreement to buy the Villa was an issue in relation to selling the Villa, through the Querencia shares, to the plaintiffs, as was recognised in Mr Nargolwala's offer to abort and unwind the transaction or defer completion until there was a clearer picture as to what Mr Lew was going to do. There was also a possible adverse claim, indeed an actual one, in respect of the Villa and the Querencia shares. But it does not follow that failure to disclose the full extent of the Nargolwalas' dealings with Mr Lew and the full detail of the assertion of an agreement to buy the Villa and the threat of litigation in the email makes out the pleaded representation of fact. There may be the same difficulty of the width of the representation, but apart from that there has come an air of unreality.

175 The representation has the two elements of representation that there were no issues in relation to sale of the Villa and representation that there were no possible adverse claims. On 15 November 2017, Mr Nargolwala told Mr Larpin that there was an issue in relation to the sale of the Villa, and that there was an adverse claim. At the time of the speakerphone conversation on 15 November 2017, or thereafter, Representation 8 as pleaded was not made by active concealment, or at all – quite the reverse. I do not think it warrants further consideration.

176 Going to Representation 9, nothing in the Further Material Facts or reading with the Oral Representations alters the conclusion earlier expressed that the representation was not made as an actionable representation of fact. Again, however, I go to the substance of the matter, taking the representation as put in closing submissions as a representation that the Villa could be acquired free from any encumbrance. As at 15 November 2017, there was disclosure that Mr Lew asserted an agreement to buy the Villa and threatened litigation to enforce his claim. By what Mr Nargolwala said and wrote to Mr Larpin, he clearly conveyed an issue and an adverse claim. If that was not an encumbrance, failure to disclose more did not matter, and more was not required lest Mr Larpin be misled about acquisition free from any encumbrance. If that was an encumbrance, it could not sensibly be said that failure to disclose more represented that the Villa could be acquired free from any encumbrance, because Mr Larpin was told that there was an encumbrance.

177 Representations 10, 11 and 12 can be dealt with together. They are the same as Representations 5, 6 and 7, but as at 15 November 2017 rather than 14 November 2017. Nothing in the Further Material Facts or reading with the Oral Representations alters the conclusion as to the earlier date, that the clauses in the Share Purchase Agreement are promissory and cannot be transformed by

failure to disclose into representations of fact. But as with Representation 9, I do not think that further disclosure of the dealings with Mr Lew and of his assertion of an agreement to buy the Villa and his threats of litigation, as found in the Material Facts and the Further Material Facts, should have been expected or required of the defendants. A representation of sale to Quo Vadis free from all liens, charges and encumbrances is in the same position as Representation 9, and on the same reasoning a representation that there *were no* legal proceedings threatened against or involving Querencia or its business could not sensibly be found from silence or failure to disclose the Material Facts and the Further Material Facts, when Mr Larpin was told that there *were* legal proceedings threatened against or involving Querencia.

178 That leaves Representations 13 and 14. Again, there is unreality. I have accepted Mr Nargolwala's account of the conversation with Mr Larpin on 15 November 2017, in preference to the account given by Mr Larpin, so that there is not complete correspondence in language, but it may be accepted that the defendants (through Mr Nargolwala) said or wrote to the general effect of both representations. These were straightforward statements, not needing and nothing to do with active concealment or non-disclosure of the Material Facts and the Further Material Facts or reading with other pleaded representations. It was correct that, as Representation 13 asserted, Mr Nargolwala had received a threatening email from someone on 14 November 2017, who was alleging that he had seen the Villa, and made an offer to purchase it. It was correct that, as Representation 14 asserted, the defendants had never met the person, they had not accepted an offer in relation to the Villa from the person, and they had not signed a contract with the person.

179 In implicit recognition of this unreality, the aspect seriously taken up in the plaintiffs' case was the representation that the person's claim in respect of

the Villa was unsustainable. Representation 13 can be ignored, and as to Representation 14 on my acceptance of Mr Nargolwala's account of the conversation (and as is in terms in his email on 15 November 2017), the relevant statement was that the defendants were of the view, or believed, that Mr Lew's claim was unsustainable. That representation was made, and as the plaintiffs' case developed they sought to establish that it was a misrepresentation because the Nargolwalas did not believe that Mr Lew's claim was unsustainable.

180 Again, I seek to go to the substance of the matter, although departing considerably from the complexity of the pleading. From the conduct of the plaintiffs' case, the essence of Mr Larpin's complaint is that he was not told of the dealings with Mr Lew, or of the detail of the assertion to have an agreement to purchase the Villa and the threat of litigation in the email, as in the Material Facts and the emails constituting the Further Material Facts. Was there a duty to disclose those facts? That is to be determined in all the circumstances, the circumstances including what was said in the conversation on 15 November 2017. What was said should have been disturbing to anyone who had just signed an agreement to purchase the Villa: someone else claimed to have a right to buy it, and was threatening to commence legal proceedings to enforce his claimed right. Mr Larpin asked questions, which were correctly answered; he was also told that the Nargolwalas believed that the claim was unsustainable. He was given the ability to "abort and unwind the transaction", then or after deferral of completion. I do not think that a reasonable person would consider that, provided that they did believe that the claim was unsustainable, the Nargolwalas should have themselves volunteered and explained to Mr Larpin their dealings with Mr Lew, or volunteered the email, or that there had been the telling of a half-truth such that it was represented that the Material Facts did not exist or

that there were no relevant details in the email of the asserted agreement and the threat of litigation.

Was there dishonest intention?

181 Some of the representations do not involve active concealment or non-disclosure, as to some there was disclosure commensurate with the representation. Of the Further Material Facts, the receipt on 14 November 2017 of Mr Lew's email asserting an agreement to purchase was disclosed, although the detail of its content was not; Mr Zeman's email about the "unhappy buyer" on 14 November 2017 was not disclosed, but added nothing of substance to Mr Lew's email. Whether, to the extent there was non-disclosure as at 15 November 2017, it was with dishonest intention becomes tied up with whether the Nargolwalas did believe that Mr Lew's claim was unsustainable. As shortly explained in this judgment, they did. In my view it remained their belief that Mr Lew neither had nor might have had an agreement for the purchase of the Villa, and to the extent that there was not disclosure to Mr Larpin they were still not acting with the intention to mislead him into thinking that the Material Facts had not happened, or acting with the intention to hide from him Mr Zeman's email or the details of Mr Lew's email or otherwise mislead him as to an arguable agreement to sell to Mr Lew.

Conclusion as to representations of fact

182 Of the pleaded 15 November Representations, only Representation 14 was made as a representation of fact, so far as relevant that the defendants believed that Mr Lew's claim was unsustainable; including that, to the extent that there was non-disclosure and if it be necessary, the non-disclosure was not with dishonest intent. I will call the surviving representation "the belief representation".

Overall conclusion

183 Of the pleaded representations, the only representatives made as an actionable representation was the belief representation.

Was the belief representation false?

184 Whether the belief representation was a false representation is an inquiry into the defendants' belief. The plaintiffs submitted that it should be found that they did not believe that Mr Lew's claims were unsustainable.

185 The plaintiffs submitted that the Nargolwalas read Mr Lew's email against the background of the negotiations towards a sale since early October 2017, with the in-principle acceptance of a sale at US$5.25m and the information that Mr Lew had told Mr Zeman that he had bought the Villa and had advised through Mr Meury that he was ready to settle. Then, notwithstanding Mr Lew's clear claim to have an agreement to purchase the Villa, when Mrs Nargolwala met Mr Larpin and Mrs Te Lagger on the morning of 15 November 2017, all she said was that an "issue" had arisen, and when Mr Nargolwala rang he did not tell them any detail of the email from Mr Lew or disclose the email itself. This was half-truth, it was submitted, because the defendants were concerned for what full disclosure would reveal: the plaintiffs rather retreated from concern for disclosure that the Nargolwalas had been prepared to accept a lower price, and said only that the concern was for "complications". Nor, it was said, did the defendants tell Mr Larpin of getting in touch with Mr Meury in order to "get to the bottom of" what had happened, and it was submitted that Mrs Nargolwala had accepted that this showed that they were "not so sure of" their view that what Mr Lew was alleging was unsustainable:

> Q. So my question to you is: while you were disclosing to them this potential problem, you were concurrently conducting your own investigations as to how the problem arose with Mr Meury. Correct?
>
> A. I was trying to find out what could possibly have been said that would make this – Mr Solomon Lew –
>
> Q. So in your mind, there was a possibility that Mr Lew may have something, which is why he thinks he's got an agreement. Correct?
>
> A. Yes.
>
> Q. And you didn't see fit to inform the plaintiffs that, 'Look, we've got this thing, there's nothing to it, but we're checking with this guy who was helping us with this alleged buyer and we'll let you know'. You didn't say anything like that, correct?
>
> A. I did not.
>
> …
>
> Q. Right. When you tell someone there's no problem or he's got no claim – I know you say you said it's your belief, your view. I think your words used here is its your view that there is no sustainable claim. Right? Alright. When you tell someone that, but you are separately, unbeknownst to them, investigating, doesn't it show that you are actually not so sure of your view? That's why you are checking concurrently whether something might have happened?
>
> A. That is correct, I am checking to see if something had happened.

186 Further, the plaintiffs submitted, the defendants' conduct thereafter reflected that they could not have believed that Mr Lew's claim was unsustainable. On 23 November 2017, they said, the Nargolwala's solicitors spoke to Mrs Te Lagger about urgency in registering the transfer of the shares, and asked her to arrange for a registration that day or alternatively offered to register the transfer themselves. The urgency, it was submitted, was of the defendants' making, and was because they wished to divest themselves of the Querencia shares so that they would not be embroiled in any litigation with Mr Lew; and, the plaintiffs said, in their solicitors' substantive response on 27 November 2017 to a letter from Mr Lew's solicitors demanding transfer of the

Querencia shares to Mr Lew, while rejecting the demand it was pointedly said that the Nargolwalas had already sold the Villa and the sale had been completed.

187 There is nothing in the submission as to urgency. For their part, the defendants submitted in connection with inducement to enter into the Share Purchase Agreement that the urgency in completion and registration of the transfer of the shares was of Mr Larpin's making, as part of their submission that (if there were representations) there was no inducement. Anticipating some of what I say in that connection, I do not think the urgency operates against either side in the proceedings. Mr Larpin came through as a man firm in his views, accustomed to having his way and expecting his wishes to be dealt with promptly, and I think that he, through Mrs Te Lagger, set the tone of prompt completion and registration; but not, as was in substance submitted for the defendants, for fear of action by Mr Lew which might hinder finalisation of his purchase of the Villa, but because that was the sort of man he was. The defendants went along with and helped in prompt completion and registration. They also wanted the transaction to proceed expeditiously, because they wanted to have it completed by the end of November so that there was no risk that it would linger and perhaps not be completed by the Christmas rental season. I do not see in that any recognition that Mr Lew may indeed have a good claim.

188 Nor do I see in the enquiry of Mr Meury any recognition that Mr Lew may have a good claim. Mrs Nargolwala said that she was perplexed as to why Mr Lew would think he had a claim on the Villa, that she wanted to find out if Mr Meury had misrepresented them, what had gone on: "If you thought that somebody had done something behind your back that embroiled you, you would like to… Well, let me put it this way. We wanted to get that information. We wanted to know what had happened, what could have happened…". I do not think that their minds were any more than puzzlement as to how Mr Lew might

have come to think that he had an agreement to purchase the Villa, together with the belief that he did not have a sustainable claim. For reasons earlier explained in connection with dishonest intention, I am satisfied that that was their belief, and was their belief as at 15 November 2017.

Other matters

189 The plaintiffs' claims fall at the hurdle of misrepresentation. However, in case the matter goes further and I am wrong in declining to find actionable representations other than the belief representation, I should make findings and express views on some further matters. I do so on the assumption that dishonest intention is not necessary for the representations.

Inducement

190 Inducement is explained in *Raffeisen Zentralbank Osterreich AG v Archer Daniels Midland Co and others* [2007] 1 SLR(R) 196 at [53]–[57]. The plaintiff must establish an intention in the representor to induce, which is presumed once materiality is proved and the evidential burden then shifts to the representee to displace it. The representee must have altered his position as a result of receiving the representation, although it is not necessary for the plaintiff to show that he entered into the transaction solely in reliance upon the misrepresentation. Reliance maybe inferred from materiality, if the tendency or natural and probable result of the representation is to induce the representee to alter his position in the manner he did.

191 When I have found that most of the pleaded representations were not made, there are some difficulties in addressing actual intention and inducement. However, I do not think that the defendants mounted a case, outside absence of dishonest intention, that any representation made was without the intention that

it be acted upon. They did submit that there was no reliance on the representations in entering into the Reservation Agreement and the Share Purchase Agreement, while accepting that "it might well have been the case" that the plaintiffs relied on the defendants' statement that they believed Mr Lew's claim was unsustainable in deciding to proceed to completion of the Share Purchase Agreement. The defendants' submission had two elements. The first was that Mr Larpin was told that there was an issue and an actual adverse claim in relation to the Villa, in the conversation on 15 November 2017, yet went ahead with the transaction. The second (which was rather supplementary) I have already mentioned, to the effect that Mr Larpin directed urgency for fear of action by Mr Lew which might hinder finalisation of his purchase of the Villa, showing a desire for it notwithstanding Mr Lew's claim.

192 In his affidavit, Mr Larpin set out the various pleaded representations and said that Quo Vadis and he "were acting in reliance on, and induced by" the representations when entering into the Reservation Agreement and the Share Purchase Agreement and completing the purchase of the Villa. I think it necessary to go further than these rather pro forma assertions.

193 Mr Larpin was the decision-maker for Quo Vadis, and Mrs Te Lagger carried out his decisions. In his evidence he was inclined to be verbose and argumentative, and was plainly (and admittedly) upset that he was caught up in Mr Lew's proceedings in the BVI and Singapore. He showed a firm belief that he had been misled, which I think brought a degree of advocacy of the plaintiffs' case and makes regard to the probabilities an important guide on the question of reliance.

194 As a practical matter, the Reservation Agreement did not compel entry into the Share Purchase Agreement, and it is sufficient to consider inducement

to enter into the Share Purchase Agreement. For Mr Larpin, the Villa was an investment, so far as appears without any particular attraction. He accepted that the price of US$7.9m was a proper price, and it was not suggested that it was a bargain price such that he would want to acquire it as a bargain. He had withdrawn his offer when not content with progress, again indicating that the Villa had no particular attraction to him. On the other hand, it must be remembered that the representations relevant to entry into the Share Purchase Agreement are the 14 November Representations prior to execution of the Share Purchase Agreement, the non-disclosure of the Material Facts in substance being of facts said to indicate an arguable agreement to sell the Villa to Mr Lew and also that Mr Lew was acting as if the Villa was his; yet Mr Larpin went ahead although informed of the more definite and serious facts that Mr Lew actually claimed an agreement to sell the Villa to him and threatened legal proceedings to enforce his claim.

195 Mr Larpin's reaction to this information is instructive. He regarded it as a minor albeit unpleasant incident, one in which an awkward customer was acting unreasonably. He asked whether any agreement was concluded, not what had occurred which may arguably have founded an agreement. He was not deterred by the claim to have an agreement to purchase the Villa and threat to bring legal proceedings to enforce the claim. Had he been informed of the Material Facts, and even taking account of perhaps being comforted by the belief representation when he in fact proceeded undeterred, I consider the probability is that he would have regarded them as no more significant, as a possible complication by which he was not deterred. As I have earlier said, I think he is a man firm in his views and accustomed to having his way, and I find as the more probable course that he would still have entered into the Share Purchase Agreement.

196 I accept, however, that the belief representation was material in Mr Larpin continuing with the transaction, rather than taking the offered opportunity to abort and unwind it. The advice of an actual claim to an agreement to sell the Villa to Mr Lew and threatened legal proceedings to enforce the claim may have commanded more attention if not accompanied by the comfort of the Nargolwalas' belief that the claim was not sustainable, and on the probabilities may have led to agreement to abort and unwind the transaction, or perhaps (as Mr Larpin mentioned at one point in his evidence) some form of protective provision added to the transaction. But this would lead nowhere unless the belief representation was false, and only to damages.

Fraud

197 There is also some difficulty in addressing the actual states of mind of the Nargolwalas in relation to representations I have found were not made. What matters is their subjective states of mind: see *Wee Chiaw* at [35]–[37]. If they made a representation (and for present purposes it is assumed that dishonest intention was not necessary), did they know or believe that it was false, or were they reckless, not caring whether it was true or false? I think however, that their states of mind can be satisfactorily found; although a different question from whether there was dishonest intention, what I have said in that regard largely answers it.

198 Going first to the position is at 8 November 2017, I have earlier stated and explained satisfaction that the Nargolwalas genuinely believed that Mr Lew was not a serious purchaser, and did not believe that he had or might have had an agreement for the purchase of the Villa. There was a sound basis for their dismissal of Mr Lew as a serious purchaser, let alone as someone with an agreement to purchase, and I accept that they did. Any representation that there

were no issues in relation to the sale of the Villa, or no possible adverse claims in respect of the Villa, or that the Querencia shares could be acquired free from any encumbrance, would not have been made fraudulently.

199 Going then to the position is at 14 November 2017, prior to execution of the Share Purchase Agreement, there had been no material change and the position is the same; I do not think further explanation is necessary.

200 Going finally to the position after execution of the Share Purchase Agreement, the key is that I have found that the defendants believed that Mr Lew's claim was unsustainable. It follows that there is no question of fraudulent misrepresentation as to their belief, and it follows also that if any of the assumed representations as at 14 November (after the execution of the Share Purchase Agreement) was made, their falsity was not known or believed by the defendants, nor were they reckless as to its truth or falsity.

Affirmation

201 An entitlement to rescission of a contract may be lost by a clear and unequivocal election to affirm it. The defendants submitted that the plaintiffs (or more precisely Quo Vadis) had affirmed the Reservation Agreement and the Share Purchase Agreement by proceeding to completion after being informed that Mr Lew claimed an agreement to sell the Villa to him and threatened legal proceedings to enforce his claim, and being given the option to abort and unwind the transaction.

202 Affirmation as a legal principle is distinct from not relying on a representation. For effective affirmation, the affirming party must know the facts giving rise to the entitlement to rescind: see *Chai Cher Watt (trading as Chuang Aik Engineering Works) v SDL Technologies Pte Ltd and another*

appeal [2012] 1 SLR 152 ("*Chai Cher*") at [33], adopting the observations of Lord Goff of Chieveley in *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The* "*Kanchenjunga*") [1990] 1 Lloyd's Rep 391 at 397–399 which included (as set out in *Chai Cher*):

> … Here we are concerned with waiver in the sense of abandonment of a right which arises by virtue of a party making an election… . In all cases he [the innocent party] has in the end to make his election not as a matter of obligation, but in the sense that, if he does not do so, the time may come when the law takes the decision out of his hands, either by holding him to have elected not to exercise the right … or sometimes by holding him to have elected to exercise it. … generally, … it is a pre-requisite of election that the party making the election must be aware of the facts which have given rise to the existence of his new right … In the context of a contract, the principle of election applies when a state of affairs comes into existence in which one party becomes entitled to exercise a right, and has to choose whether to exercise the right or not. His election has generally to be an informed choice, made with knowledge of the fact giving rise to the right.

203 The Court of Appeal referred also to the decision of the High Court of Australia in *Sargent v ASL Developments Ltd* [1974] 131 CLR 634 especially at 641–642, where the judgment of Stephen J includes (at [19]) that an elector must at least know of the facts which give rise to the rights as between which an election must be made, that the extent of knowledge of relevant facts necessary for the doctrine of election to apply has been described as "full knowledge of the material facts", and that knowledge of circumstances such as will provide information from which the decisive fact giving rise to the legal right is "a clear if not a necessary inference" has been held to be sufficient.

204 If by non-disclosure of the Material Facts the defendants made the 14 November Representations as actionable representations, and the plaintiffs were in consequence entitled to rescind the Share Purchase Agreement, in order that proceeding to completion be an affirmation of the Share Purchase Agreement

the plaintiffs would have to have been aware of the facts giving them their entitlement to rescind. They were not. It is true that they were made aware of an actual claimed agreement and threat of legal proceedings, more than the arguable agreement which, on their case, the Material Facts would have brought to their notice. But the disclosure was accompanied by the Nargolwalas' expressed belief that Mr Lew's claim was unsustainable, and the plaintiffs did not know the underlying facts so that they could make a properly informed choice. I do not think that, on the assumption of the 14 November Representations, there was affirmation of the Share Purchase Agreement.

Relief

205 If there were actionable representations because of non-disclosure despite a duty to disclose, and still assuming that dishonest intention is unnecessary, on my findings concerning fraud they would be innocent misrepresentations. If the misrepresentations induced entry into the Share Purchase Agreement, rescission of that agreement would be available, subject to damages in lieu of rescission pursuant to s 2(2) of the MA; and damages to compensate for loss suffered as a result of entry into the Share Purchase Agreement would be available pursuant to s 2(1) of the MA, subject to the proviso that the defendants had reasonable grounds to believe, and believed up to the time of entry into the Share Purchase Agreement, that the facts represented were true. But damages to compensate for loss otherwise suffered as a result of the misrepresentations would not be available.

206 Because of the common ground concerning dishonest intention, relief in the event of innocent misrepresentation fell away. It was fraudulent misrepresentation or no representation, and s 2 of the MA was not relevant. The following remarks are therefore made without the benefit of submissions on

relief in the event of innocent misrepresentation, but as a glimpse of what may have arisen if there were innocent actionable misrepresentations on which the plaintiffs relied, inducing entry into the Share Purchase Agreement by Quo Vadis.

207 The costs in excess of party and party costs, if recoverable at all (see at [209]–[217] below), would not be recoverable as damages for the tort of fraudulent misrepresentation. Assuming that, if incurred by Quo Vadis, they are a loss suffered as a result of entry into the Share Purchase Agreement after misrepresentation within that phrase in s 2(1) of the MA, and in any event on my findings concerning fraud it could be open to conclude that the proviso in s 2(1) is satisfied. The price paid for the Villa was a proper price, with no claim to damages for purchase at over-value, and while the plaintiffs no doubt incurred costs in the purchase, there was no proof of those costs or claim to recover them as damages. As to rescission, since the purchase was at a proper price it could not be said that refusing rescission would leave Quo Vadis with a purchase at over-value; the defendants would also have incurred costs in the sale (and there was evidence of a commission payable to Mr Phillips), which would be wasted if there was rescission for no reason other than that Mr Larpin considered that he had been misled. There is authority in relation to the equivalent Misrepresentation Act 1967 (UK) that the power to award damages in lieu of rescission may be exercised even if damages are not awarded (*UCB Corporate Services Ltd v Thomason* [2005] 1 All ER 601; *Huyton SA v Distribuidora Internacional de Productos Agricolas SA* [2003] 2 Lloyd's Rep 780), and it might be thought open to hold that this is a case in which it would be equitable to do so.

208 In short, success in the claims to rescission and to damages would not be assured.

The costs in excess of party and party costs

209 There was no evidence to quantify these costs, neither evidence of the costs incurred by the plaintiffs nor evidence of the costs awarded in the proceedings in the BVI and in Singapore. The plaintiffs explained, and the defendants agreed, that Simon Thorley IJ had not yet assessed the costs to be awarded in the Lew proceedings at first instance; hence, the plaintiffs said, the claimed costs could not be quantified. The defendants were inclined to take the point, noting that there had been no order for bifurcation. However, the plaintiffs had claimed damages to be assessed, and I would if necessary have left the assessment of the costs for a subsequent inquiry – see leaving damages for subsequent assessment, despite no bifurcation order, in *Lee Chee Wei v Tan Hor Victor and others and another appeal* [2007] 3 SLR(R) 537 and *Chew Ai Hua Sandra v Woo Kah Wai and another (Chesney Real Estate Pte Ltd, third party)* [2013] 3 SLR 1088, to which the plaintiffs referred.

210 The plaintiffs' submissions stated a figure for the costs awarded in the Lew proceedings on appeal. Whilst judgment was reserved, I was informed by letter from the plaintiffs' solicitors that Simon Thorley IJ had assessed costs, and was given figures for the plaintiffs' incurred costs and the costs awarded in the Lew proceedings at first instance. I was not given figures for the proceedings in the BVI. By their responsive letter, the defendants' solicitors indicated an intention to dispute proof of costs incurred. On any view, quantification requires an inquiry. Subject to any appeal, and the matter next mentioned, the quantification is moot, but the present position should be recorded.

211 However, as previously mentioned the defendants contended that as a matter of law there cannot be recovery of the costs in excess of the party and

party costs. If that be correct, there is no question of quantification, and I should address the matter.

212 The defendants relied on the decision of the Court of Appeal in *Maryani Sadeli v Arjun Permanand Samtani and another and other appeals* [2015] 1 SLR 496 ("*Maryani*"). It was there affirmed that the general rule was that the unrecovered costs of legal proceedings could not be recovered in a subsequent claim for damages against a party to the earlier proceedings (a "same-party case"). This was on the public policy grounds of promoting finality of litigation and enhancing access to justice, that a litigant did not gain full recovery of costs incurred being "part and parcel of resolving disputes by seeking recourse to *our* legal system" (at [34], see generally at [20]–[34]). It was held that the general rule was the same for a subsequent claim for damages against a defendant not a party to the earlier proceedings (a "third-party case"), the Court of Appeal saying at [45]–[46]:

> 45 … As mentioned above, if the law relating to the recovery of legal costs was such that the successful party would obtain a *full* indemnity for his or her legal costs, the plaintiffs would not suffer any loss for which they could make a claim against the defendants. Indeed, the plaintiffs would be satisfied that their losses have been compensated for. But our law on costs (informed by our policy considerations of enhancing social justice) is simply such that the successful party to litigation will *not* generally get full recovery for his legal expenses.
>
> 46 If we take that as the starting point, there is no reason why a third-party case should be treated any differently from a same-party case simply because the plaintiff can point to another party who was ultimately responsible for the state of affairs which resulted in litigation. The indemnity principle's objective of enhancing access to justice does not differentiate between litigation in that manner. Indeed, there is *no logical basis for making such a differentiation. Everyone* who is subject to the law simply takes the risk of becoming embroiled in legal proceedings, and that involves incurring legal costs which are unrecoverable in full. Take, for example, a defendant who is wrongly sued for breach of contract. The defendant will ordinarily be put out of pocket as regards the recovery of legal

> costs, even though but for the plaintiff who wrongly alleged the breach of contract, the defendant would not have had to incur those legal expenses in the first place. Another example would be the plaintiff who is successful in bringing a claim in tort. Notwithstanding the fact that it was the wrongful act of the tortfeasor in the first place that led to the litigation (and the consequent incurring of legal costs), the plaintiff will be left out of pocket for unrecovered legal costs. Yet, we accept these outcomes as a necessary incidence of using our legal system as a method of dispute resolution *only* because we recognise at the same time that this shortfall in the recovery of legal costs incurred by the successful litigant is part of the wider policy objective of enhancing access to justice. Looked at in this light, the policy considerations regarding the recovery of costs *must apply in equal measure* to a third-party case as to a same-party case. [emphasis in original]

213 There was a caveat. After pointing out that it was the *measure* of damages that was subject to the policy considerations, the Court said at [53] that:

> … the law on costs or, more accurately, the policy considerations underlying the law on costs, *informs* the law on damages in the following manner. Where the plaintiff would *only* have been able to claim *costs* based on *the indemnity principle in the previous proceedings, it appears to us to be correct in principle that the plaintiff ought not, in subsequent proceedings, to be able to claim for the unrecovered costs of the previous proceedings – albeit with at least one possible caveat.* Given the myriad of possible fact circumstances, we would not rule out the possibility of situations where the measure of damages awarded by the court might consist of the full costs (*ie*, costs that go beyond the measure of awardable pursuant to the indemnity principle). In the nature of things (and given the need to give effect to the policy considerations underlying the law on costs), we would think that such instances *would be exceptionally rare (if they in fact exist at all).* … [emphasis in original]

214 *Maryani* was more recently referred to by Court of Appeal in *Michael Vaz Lorrain v Singapore Rifle Association* [2021] 1 SLR 513, referring in turn to the court's decision in *Singapore Shooting Association and others v*

Singapore Rifle Association [2020] 1 SLR 395 ("*Singapore Shooting Association*") and saying at [32]–[33]:

> 32 Among other reasons, we noted [in *Singapore Shooting Association*] that allowing legal fees that were recoverable as costs to be recovered as damages instead 'would subvert the costs regime put in place to regulate the recoverability of such fees'. This Court explained as follows (at [94]):
>
> > Our second reason is that allowing solicitors' fees that are recoverable as costs to be recovered as damages instead would subvert the costs regime put in place to regulate the recoverability of such fees. We observed in [*Maryani*] that a legal system's rules on costs (which include how legal costs should be recovered in litigation) are necessarily a matter of social policy: at [29] and [33]. This includes the important policy of 'enhancing access to justice for all': at [34]. The costs regime achieves this objective by requiring, amongst other things, the costs awarded to be reasonable and proportional…. The application of such principles involves a different assessment, and will likely lead to a different result, from that involved in an inquiry into damages, which is instead subject to rules on causation, remoteness and mitigation…. It will often, although not invariably, be the case that the former will result in a figure lower than the latter. Thus, the courts have been careful to distinguish between those expenses which properly fall to be recovered as the costs of the action and those which can constitute actionable loss or damage in the tort of conspiracy.
>
> 33 Although the relevant cause of action in *Singapore Shooting Association* was the tort of unlawful means conspiracy, the aforesaid rationale applies with equal force to any cause of action, including claims for breach of contract and breach of confidence.

215 The costs awarded by Simon Thorley IJ and the costs awarded by the Court of Appeal were costs in accordance with the Singapore law on costs, in accordance with Singaporean policy considerations as to proper recovery although less than the recovery of actual costs. The plaintiffs submitted that *Maryani* nonetheless did not apply, because there the costs claimed as damages were claimed against defendants who were opposite parties in the earlier

proceedings, although in a different capacity from their capacity as defendants, whereas in the present case the costs could not have been claimed against the Nargolwalas in the Lew proceedings because Mr Larpin, Quo Vadis and the Nargolwalas were co-defendants. I do not think that, on the *Maryani* reasoning, that is a material distinction. The claim to recover the costs in these proceedings is within the class of third-party cases; that the plaintiffs are out-of-pocket for unrecovered costs incurred as co-defendants is an outcome still to be accepted as a necessary incidence of the legal system and the policy considerations underlying Singapore law on costs, and they cannot claim the unrecovered costs against a co-defendant any more than against a stranger to the Lew proceedings.

216 On the authority of *Maryani*, the costs of the Lew proceedings, at both levels, in excess of the party and party costs would not be recoverable as damages, even if there were a successful cause of action for the tort of fraudulent misrepresentation, and I do not see why it would be any different if the costs in excess of the party and party costs were, contrary to the tentative view expressed above, regarded as a loss suffered as a result of entry into the Share Purchase Agreement. The plaintiffs did not suggest that the BVI costs should be viewed differently because they were outside the Singapore cost regime, but in the absence of argument I prefer to express no view in relation to the BVI costs.

217 Accordingly, subject possibly to the BVI costs, quantification of the costs is also moot for this overarching reason.

Orders

218 I order that the proceedings be dismissed. It is not easy to see any disposition of costs other than that the plaintiffs pay the defendants' costs, and I also make that order, but with liberty to apply within 21 days if either party

seeks a different or additional order; the application may be made by letter to the Registry. I invite the parties, if they are unable to agree on the amount of costs, to propose directions for their determination.

Roger Giles IJ
International Judge

Christopher Anand Daniel, Harjean Kaur, Keith Valentine Lee Jia Jin (Advocatus Law LLP) for the first and second plaintiffs;
Ramesh Kumar s/o Ramasamy, Natalie Ng and Edmond Lim Tian Zhong (Allen & Gledhill LLP) for the first and second defendants.