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

[2024] SGHC(A) 15

Appellate Division / Civil Appeal No 107 of 2023

Between

(1) Axis Megalink Sdn Bhd
(2) Lee Kien Han

… *Appellants*

And

Far East Mining Pte Ltd

… *Respondent*

In the matter of Suit No 342 of 2021

Between

Axis Megalink Sdn Bhd

… *Plaintiff*

And

Far East Mining Pte Ltd

… *Defendant*

And

Far East Mining Pte Ltd

… *Plaintiff in counterclaim*

And

(1) Lee Kien Han
(2) Lim Eng Hoe
(3) Chong Wan Ling
(4) Axis Megalink Sdn Bhd

… Defendants in counterclaim

JUDGMENT

[Contract — Mistake — Unilateral mistake as to identity of contracting counterparty — Whether doctrine of mistaken identity extends to attributes of contracting counterparty]
[Contract — Misrepresentation — Rescission — Whether rescission is available in respect of contract for services where services have been rendered thereunder]
[Contract — Misrepresentation — Inducement — Whether representee was induced to enter into contract]

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Axis Megalink Sdn Bhd and another
v
Far East Mining Pte Ltd

[2024] SGHC(A) 15

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Belinda Ang Saw Ean JCA, Kannan Ramesh JAD and Philip Jeyaretnam J
2 April 2024

10 May 2024 Judgment reserved.

Philip Jeyaretnam J (delivering the judgment of the court):

Introduction

1 This appeal concerns a contract entered into between an arranger and an acquirer. The arranger was engaged to assist with a hoped-for reverse takeover of an identified publicly listed target in return for shares in that entity once the acquirer had injected its assets into it. The relevant contracts between the acquirer and the target were entered into, and almost two years passed without complaint by the acquirer. However, when the arranger attempted to enforce its contract and have the shares issued to it, the acquirer, who by now owned the target, resisted enforcement. It pleaded among other things that the contract was void for unilateral mistake of identity or voidable for fraudulent misrepresentation. The two defences both rested on the factual claim that, unknown to the acquirer, the arranger was owned by a man who was said to be a representative of the target or its controlling shareholder.

2 The Judge found in favour of the acquirer in *Axis Megalink Sdn Bhd v Far East Mining Pte Ltd* [2023] SGHC 243 ("the Judgment"). He held that the contract was void by reason of the acquirer's unilateral mistake and the acquirer was also entitled to damages on the ground of fraudulent misrepresentation (see Judgment at [2]–[3], [113], [131] and [148]). These are the holdings challenged in AD/CA 107/2023 ("AD 107").

3 Having considered parties' submissions, we allow AD 107 in part, for the reasons which follow.

Relevant background

The parties

4 The first appellant, Axis Megalink Sdn Bhd (whom we have thus far referred to as the 'arranger' and will hereafter refer to as "Axis"), is a Malaysian company, while the respondent, Far East Mining Pte Ltd (whom we have thus far referred to as the 'acquirer' and will hereafter refer to as "FEM"), is a private Singapore company.[1] At all material times, Mr Syed Abdel Nasser bin Syed Hassan Aljunied ("Mr Aljunied") and Mr Hong Kah Ing ("Mr Hong") were directors and shareholders of FEM.[2]

5 FEM and Axis entered into a contract (or a putative contract) dated 16 August 2016 ("the Engagement Letter") for the former to engage the latter as an introducer and arranger for a reverse takeover of a then-listed Singaporean company, China Bearing (Singapore) Ltd (later renamed to Silkroad Nickel Ltd)

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1 Statement of Claim (Amendment No 2) dated 31 August 2021 in HC/S 342/2021 ("SOC (A2)") at paras 1–2 (Record of Appeal ("RA") Vol II (Part B) at p 57).

2 Defence and Counterclaim (Amendment No 2) dated 10 March 2022 in HC/S 342/2021 ("D&CC (A2)") at para 2A (RA Vol II (Part B) at p 127).

(whom we have thus far referred to as the 'target' and will hereafter refer to as "CBL"). In exchange, Axis was to receive a fee of US$2 million to be paid in the form of new ordinary shares in CBL ("the Consideration Sum") to be issued only after the injection by FEM of its nickel mine, located in Sulawesi, Indonesia, into CBL.[3]

6 Axis brought its claim for the Consideration Sum against FEM in HC/S 342/2023 ("Suit 342").[4] FEM then counterclaimed against Axis, the second appellant, Mr Lee Kien Han ("Mr Lee"), along with two other defendants in counterclaim (against whom the claims were either dismissed or discontinued and in respect of which there has been no appeal, see Judgment at [128] and [132]), for among other things fraudulent misrepresentation.[5]

7 Mr Lee has been the beneficial owner of Axis since 22 July 2016.[6] He had a close working relationship as a lawyer and advisor to Datuk Lim Kean Tin ("Datuk Lim"),[7] former non-executive Chairman of the Board and controlling shareholder of CBL (prior to the completion of the reverse

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3 RA Vol V (Part G) at p 4.

4 SOC (A2) at prayers 1–3 (RA Vol II (Part B) at p 65).

5 D&CC (A2) at paras 2D–2E and 22.2 (RA Vol II (Part B) at pp 128 and 156).

6 Affidavit of Evidence-in-Chief of Lee Kien Han affirmed on 30 August 2022 in HC/S 342/2021 ("LKH") at para 35 and Exhibit LKH-10 (RA Vol III (Part K) at pp 21–22 and RA Vol III (Part L) at pp 394–397).

7 LKH at paras 15 and 30.1 (RA Vol III (Part K) at pp 10 and 16); Affidavit of Evidence-in-Chief of Syed Abdel Nasser bin Syed Hassan Aljunied affirmed on 30 August 2022 in HC/S 342/2021 ("SAN") at paras 15, 25 and 29–31 (RA Vol III (Part S) at pp 9, 12 and 14); Affidavit of Evidence-in-Chief of Hong Kah Ing affirmed on 30 August 2022 in HC/S 342/2021 ("HKI") at paras 10 and 19–21 (RA Vol III (Part W) at pp 7 and 9–10).

takeover),[8] although it was a matter of dispute whether Mr Lee acted as Datuk Lim's lawyer in the transaction at issue.[9]

Factual background to dispute

The identification of CBL as a potential counterparty for the RTO Transaction by FEM on 28 June 2016

8 Sometime in 2015–2016, Mr Aljunied and Mr Hong were interested in FEM acquiring a controlling stake in a listed company through a reverse takeover transaction ("the RTO Transaction").[10]

9 FEM's Chief Financial Officer, Mr Lim Eng Hoe ("Mr Lim"),[11] was tasked with structuring the RTO Transaction for FEM.[12] So he sought to identify a suitable listed company.[13]

10 On 28 June 2016, Mr Lim sent an email to Mr Aljunied and Mr Hong, proposing CBL as a counterparty for the RTO Transaction with FEM.[14]

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8 LKH at para 18 (RA Vol III (Part K) at p 11); SAN at paras 15 and 31 (RA Vol III (Part S) at pp 9 and 14); HKI at para 10 (RA Vol III (Part W) at p 7).

9 LEH at para 53 (RA Vol III (Part A) at p 37).

10 SAN at paras 7 and 18 (RA Vol III (Part S) at pp 6 and 10); HKI at para 7 (RA Vol III (Part W) at p 6).

11 Affidavit of Evidence-in-Chief of Lim Eng Hoe affirmed on 29 August 2022 in HC/S 342/2021 ("LEH") at paras 26–27 and Exhibit LEH-11 (RA Vol III (Part A) at pp 14–16 and RA Vol III (Part D) at pp 110–113).

12 SAN at para 9 (RA Vol III (Part S) at p 7); HKI at paras 7–8 (RA Vol III (Part W) at p 6).

13 LEH at paras 33–34 (RA Vol III (Part A) at pp 23–24).

14 SAN at para 19 and Tab 11 of Exhibit SAN-26 (RA Vol III (Part S) at pp 10 and pp 178–179); HKI at para 15 and Tab 3 of Exhibit HKI-3 (RA Vol III (Part W) at pp 8–9 and 50).

Mr Aljunied and Mr Hong gave Mr Lim the go-ahead to negotiate with CBL for the RTO Transaction.[15]

The introduction of Mr Aljunied and Mr Hong to Datuk Lim of CBL on 20 July 2016

11 On 12 July 2016, Mr Lim asked Mr Aljunied and Mr Hong (over WhatsApp) if they were able to meet the representatives of CBL to discuss the terms of the draft term sheet for the proposed RTO Transaction. Both replied that they could.[16]

12 On 14 July 2016, Mr Lim sent an email to Mr Aljunied and Mr Hong with a draft term sheet to be executed between FEM, its Indonesian subsidiary, and CBL.[17]

13 The draft term sheet (at cl 3) included a provision for the payment of an 'arranger fee' to CBL's arranger by CBL.[18] Mr Lim's email also stated: "The revised draft Term Sheet with arranger fee payable by CBL for your review. Please take note that there will also be arranger fee of 2% payable by the Vendor [defined therein as FEM] to another party. These 2 arrangers are separate and independent of each other".[19]

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15 SAN at paras 24–25 (RA Vol III (Part S) at p 12); HKI at para 18 (RA Vol III (Part W) at p 9).

16 SAN at para 26 and Tab 12 of Exhibit SAN-26 (RA Vol III (Part S) at pp 12–13 and 265–266).

17 SAN at para 27 (RA Vol III (Part S) at p 13); LEH at para 54 and Exhibit LEH-29 (RA Vol III (Part A) at p 37 and RA Vol III (Part E) at pp 215–231).

18 LEH at Exhibit LEH-29 (RA Vol III (Part E) at p 219).

19 LEH at Exhibit LEH-29 (RA Vol III (Part E) at p 215).

14 On 15 July 2016, Mr Lim informed Mr Aljunied and Mr Hong (over WhatsApp) that they would be meeting "CB [*ie*, CBL] owner" and "his lawyer and his lieutenant" – Datuk Lim and Mr Lee respectively – for dinner next Wednesday.[20]

15 That dinner took place on 20 July 2016 ("the Introductory Dinner"). Present were Mr Aljunied, Mr Hong, Mr Lim, Mr Lee, and Datuk Lim.[21] The attendees discussed the proposed RTO Transaction and agreed to take steps to move forward with the proposal, including by arranging a due diligence visit to FEM's nickel mine in Sulawesi, Indonesia.[22]

The presentation of the proposed RTO Transaction to CBL's board of directors on 8 August 2016

16 From 2–5 August 2016, Mr Lim corresponded with Mr Lee on the draft term sheet and the presentation of the proposal for the RTO Transaction to be placed before CBL's board of directors.[23]

17 On 5 August 2016, Mr Lim sent an email to Mr Aljunied and Mr Hong enclosing the board presentation and updating them that that proposal would be placed before CBL's board the next Monday.[24]

18 That board meeting took place on 8 August 2016 ("the CBL Board Meeting"). Present among others were Datuk Lim, Mr Lee, Mr Lim, and

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20 LEH at Exhibit LEH-28 (RA Vol III (Part E) at p 213).

21 SAN at para 31 (RA Vol III (Part S) at p 14); HKI at para 21 (RA Vol III (Part W) at p 10).

22 SAN at para 34 (RA Vol III (Part S) at p 15); HKI at para 22 (RA Vol III (Part W) at p 10).

23 RA Vol V (Part E) at p 280; RA Vol V (Part F) at pp 25 and 112–113.

24 RA Vol V (Part F) at p 48.

Mr Aljunied.[25] CBL's board considered the proposal but did not approve it at the meeting itself. The issue price for consideration shares and the draft term sheet had yet to be decided or reviewed.[26]

The execution of the Engagement Letter between FEM and Axis on 16 August 2016

19 On 10 August 2016, Mr Lim sent an email to Mr Aljunied and Mr Hong with a revised draft term sheet for the RTO Transaction.[27]

20 On 11 August 2016, Mr Lim sent a copy of the paper presented to CBL's board to Mr Lee's law firm (copying Mr Lee), with a note on the upper limit for the issue price (for CBL's shares) which was approved by CBL's board.[28]

21 On 12 August 2016, Mr Lim sent an email to Mr Aljunied and Mr Hong with another revised version of the draft term sheet for the RTO Transaction. The email stated: "If there are no further comments, we shall proceed to print out the clean copy for execution".[29]

22 On 15 August 2016, Mr Lee's law firm sent an email to Mr Lim (copying Mr Lee),[30] attaching three documents:

(a) a draft of the Engagement Letter;[31]

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25 RA Vol V (Part F) at pp 72–77.

26 RA Vol V (Part F) at pp 76 and 84.

27 RA Vol V (Part F) at p 88.

28 RA Vol V (Part F) at p 124.

29 RA Vol V (Part F) at p 145.

30 RA Vol V (Part F) at p 217.

31 RA Vol V (Part F) at pp 244–246.

(b) a draft memorandum of understanding (to be signed by Mr Aljunied, Mr Hong, and Datuk Lim), stating that the arranger for the RTO Transaction would be Axis;[32] and

(c) a draft letter of undertaking (to be signed by Mr Aljunied, Mr Hong, and Mr Lee's law firm), undertaking to transfer shares in CBL to Mr Lee's law firm upon the completion of the RTO Transaction, "in consideration of you [*ie*, Mr Lee's law firm] introducing Datuk Lim Kean Tin and the Listed Company to us [*ie*, Mr Hong, Mr Aljunied, and FEM]" as "introducer fees".[33]

23 On 16 August 2016, Mr Lee's law firm sent an email to Mr Lim (copying Mr Lee) with a copy of the Engagement Letter, signed by one of the nominee directors of Axis.[34] That same day, Mr Lim presented the Engagement Letter to Mr Aljunied, who signed it on behalf of FEM (with Mr Lim as the witness).[35] The signed Engagement Letter was sent by Mr Lim to Mr Lee's law firm that same day.[36]

24 Also on the same day, FEM's group financial controller ("Ms Chong") sent an email to Mr Lim, with the subject line: "Final term sheet with signature and initial". Appended was a copy of the draft term sheet for the RTO Transaction, signed only by Mr Aljunied (with Mr Lim as the witness thereof).[37]

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32 RA Vol V (Part F) at p 237.

33 RA Vol V (Part F) at pp 230–232.

34 RA Vol V (Part F) at pp 267–270.

35 SAN at paras 49–55 (RA Vol III (Part S) at pp 21–23); RA Vol V (Part F) at pp 283–285.

36 RA Vol V (Part G) at pp 30–46.

37 RA Vol V (Part G) at pp 47–64.

25 On 22 August 2016, at the request of Ms Chong, a second copy of the Engagement Letter was signed by both Mr Aljunied and Mr Hong.[38] The two copies were otherwise the same.[39] After that second copy of the Engagement Letter was signed, Ms Chong then sent it by email to Mr Lim.[40]

The execution of the Term Sheet for the RTO Transaction between CBL and FEM on 24 August 2016

26 On 22 August 2016, a draft term sheet for the RTO Transaction (bearing the signatures of Datuk Lim and Mr Lee) was sent from Mr Lee to Mr Lim, who sent it to Mr Aljunied and Mr Hong on the same day. The email described it as "signed copy from China Bearing [*ie*, CBL] as attached for your reference".[41]

27 On 24 August 2016, CBL and FEM (as well as its Indonesian subsidiary) executed a term sheet for the RTO Transaction ("the Term Sheet").[42] The Term Sheet set out the terms for the RTO Transaction.[43] It was signed for CBL by Datuk Lim, witnessed by Mr Lee, for FEM by Mr Aljunied, witnessed by Mr Lim, and for its Indonesian subsidiary by Mr Hong.[44]

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38 SAN at para 56 (RA Vol III (Part S) at p 23); HKI at paras 29–30 (RA Vol III (Part W) at pp 12–13).

39 HKI at paras 29–31 (RA Vol III (Part W) at pp 12–13); RA Vol V (Part G) at pp 149–153 and 172–176.

40 RA Vol III (Part G) at pp 159–163.

41 RA Vol V (Part G) at p 165.

42 RA Vol V (Part G) at pp 217–233.

43 RA Vol V (Part G) at pp 219 and 234.

44 LEH at paras 100–101 and Exhibit LEH-52 (RA Vol III (Part A) at p 54 and RA Vol III (Part G) at pp 165–167).

The execution of the SPA for the RTO Transaction between CBL and FEM on 27 October 2016

28 On 27 October 2016, FEM and CBL executed a share and purchase agreement for the RTO Transaction ("the SPA").[45] FEM had incorporated a special purpose vehicle to hold the shareholding of its Indonesian subsidiary that held the nickel mine following a contemplated group restructuring exercise.

29 The material terms of the SPA were as follows:

(a) FEM would sell its shareholding in the special purpose vehicle to CBL;[46]

(b) as purchase consideration, CBL would issue a maximum of US$50 million worth of CBL shares to FEM, subject to pre-conditions such as the nickel mine attaining a minimum valuation;[47]

(c) further conditions precedent were prescribed for the parties to complete the sale and purchase transaction, including due diligence and relevant consents in general meeting;[48]

(d) following such completion, FEM may be entitled to further earn-out consideration of US$70 million worth of CBL shares, subject to the Sulawesian nickel mine attaining a second and higher minimum valuation post-completion;[49] and

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45 RA Vol V (Part K) at pp 4–32.

46 RA Vol V (Part K) at pp 11–12.

47 RA Vol V (Part K) at pp 12–13.

48 RA Vol V (Part K) at pp 12–14.

49 RA Vol V (Part K) at pp 17–18.

(e) the intended commercial effect of allotting CBL consideration shares to FEM was to effect a 'reverse takeover' of CBL by FEM,[50] with control of the shareholding of CBL shifting in favour of FEM following the issuance of the consideration shares pursuant to the terms of the SPA.[51]

The execution of the Letter of Undertaking between Mr Aljunied, Mr Hong, FEM and Mr Lee's law firm on 7 October 2017

30 On 7 October 2017, Mr Aljunied, Mr Hong, FEM, and Mr Lee's law firm (signed by Mr Lee as managing partner) signed a letter of undertaking between them ("the Letter of Undertaking").[52]

31 In the Letter of Undertaking, Mr Aljunied, Mr Hong, and FEM undertook to issue consideration shares in CBL to Mr Lee's law firm upon the completion of the RTO Transaction in "consideration of you [*ie*, Mr Lee's law firm] introducing the Listed Company [*ie*, CBL] to us [*ie*, Mr Aljunied, Mr Hong, and FEM] … as introducer fees".[53]

The completion of the RTO Transaction on 5 July 2018 and requests for issue of the Consideration Shares

32 On or around 25 June 2018, Mr Lim sent a WhatsApp message in a group comprising Mr Aljunied, Mr Hong, and himself ("the FEM Group").[54] That message included a breakdown of share certificates and read: "Dear Sirs,

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50 RA Vol V (Part K) at pp 6 and 95–112.

51 RA Vol V (Part K) at pp 95–97, 100–102 and 107–108.

52 RA Vol V (Part R) at pp 207–209.

53 RA Vol V (Part R) at p 207.

54 SAN at para 98(b)(i) (RA Vol III (Part S) at pp 45–46); RA Vol V (Part AN) at p 194.

KH has requested CB shares issued to FEM to be split in the following manner, pursuant to the agreements". Mr Aljunied replied with: "Ok sir see you" and Mr Hong replied: "Queue at immigration is long. Will rake [*sic*] at least 30 min to clear".

33 The RTO Transaction was completed on 5 July 2018, with the requisite shares in CBL being issued to FEM.[55]

34 Following completion, Mr Hong was appointed as Executive Director and Chief Executive Officer and Mr Aljunied was appointed as Executive Director of CBL with effect from 5 July 2018.[56] That same day, CBL's name was changed from "China Bearing (Singapore) Ltd" to "Silkroad Nickel Ltd", with effect from 10 July 2018.[57]

35 On 18 July 2018, Ms Chong sent an email to Mr Aljunied with a breakdown of CBL's shares to be split amongst several persons, including the shares to be allotted to Axis, earmarked as: "Payment of arranger fees to Axis to be shared by founder shareholders of FEM" and "Axis payment shared by Founders and Nickel Capital".[58]

36 On the same day, Mr Hong sent a WhatsApp message to the FEM Group, stating that "having gone through the latest shareholding I will have after the RTO, given all these, I am utterly surprise", "Looking at what I have put in and what I am getting now, seems like I have lost the war and am tired without motivation to close this deal", and "I will stand strong for the Indo TAS team,

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55 RA Vol V (Part AM) at pp 213–229.

56 RA Vol V (Part AM) at pp 275–278.

57 RA Vol V (Part AM) at p 277.

58 RA Vol V (Part AN) at pp 293–297.

but I am reaching out my hand for help to Sir Eng Hoe [Mr Lim] n Kien [Mr Lee] team (whom now are probably larger shareholder than me alone) n Sir Nass [Mr Aljunied], come help me out on Zana loan, I cant [*sic*] do it myself anymore. I have given it all with nothing left".[59]

37 On 31 July 2018, Mr Lim sent a WhatsApp message to the FEM Group, stating that "KH [Mr Lee] asking when the scrips for moratorised [*sic*] 24.52m shares can be passed to him, pursuant to the agreements". He sent a reminder on 2 August 2018.[60]

38 On 10 August 2018, Mr Lee sent a WhatsApp message to Mr Aljunied seeking the allotment of the consideration shares in CBL pursuant to both the Letter of Undertaking and Engagement Letter.[61] He sent emails to Mr Aljunied and Mr Hong to the same effect from 10–18 August 2018.[62]

The de-listing of CBL from the Singapore Exchange on 10 November 2022

39 On 10 November 2022, CBL ceased to be a listed company, following a privatisation exercise pursuant to a voluntary general offer made by a third-party company.[63] As of 17 February 2023, Mr Aljunied and Mr Hong remained on the board of CBL following its de-listing.[64]

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59 RA Vol V (Part AN) at pp 272–275.

60 RA Vol V (Part AO) at p 278.

61 RA Vol V (Part AP) at pp 121–122.

62 RA Vol V (Part AP) at pp 123–125.

63 Transcript of Hearing in HC/S 342/2021 dated 17 February 2023 at p 9 lines 12–24 (RA Vol III (Part AJ) at p 14); RA Vol V (Part AR) at pp 57–59.

64 Transcript of Hearing in HC/S 342/2021 dated 17 February 2023 at p 10 lines 5–8 (RA Vol III (Part AJ) at p 15).

Summary of the Judgment below

40 In his Judgment, the Judge found in favour of the respondent and held that the Engagement Letter was void. On that basis, he dismissed the first respondent's claim for the Consideration Sum (see Judgment at [113]).

41 The Judge held that FEM had been unilaterally mistaken about an important characteristic of the counterparty to the Engagement Letter, as it was not aware that Mr Lee was the beneficial owner of Axis (see Judgment at [111]).

42 He also found Axis and Mr Lee liable for fraudulent misrepresentation to FEM. He held that they misrepresented that Mr Lee was *not* the beneficial owner of Axis by failing to disclose that he was while giving the misleading impression that Mr Lee was only involved in the RTO Transaction in his capacity as a representative on the side of Datuk Lim and CBL (see Judgment at [61]–[96], [126]–[127] and [130]).

43 He found that this misrepresentation concerning Axis' beneficial ownership had materially induced FEM to enter into the Engagement Letter. The fact of Mr Lee acting as both introducer/arranger for FEM while also acting as a representative of Datuk Lim and CBL placed him in a position of a conflict of interest between FEM and CBL in relation to the terms of the RTO Transaction and Mr Aljunied and Mr Hong relied on this misrepresentation as they would not have entered into the Engagement Letter had they known that Mr Lee was behind Axis (see Judgment at [74] and [128]).

44 It was not relevant that Mr Aljunied and Mr Hong never inquired into Axis' beneficial ownership as they would not have discovered that Mr Lee was the beneficial owner, given his use of nominees. Regardless, fraudulent

misrepresentation did not require showing that the representees could not have ascertained the falsity (see Judgment at [98], [125] and [129]).

45 Accordingly, as the elements of fraudulent misrepresentation were made out, FEM was entitled to rescission of the Engagement Letter. This remedy was moot as the Engagement Letter was void for unilateral mistake (see Judgment at [131] and [148]).

46 In addition, as Mr Lee and Axis were both liable for fraudulent misrepresentation, they were also liable in damages for the losses flowing from their misrepresentation, amounting to S$10,210 in expenses that were incurred by FEM to investigate Axis' beneficial ownership (see Judgment at [131] and [148]).

47 In the alternative, the Judge also found that Axis was not entitled to the Consideration Sum as it had not performed the services under the Engagement Letter. All actions undertaken by Mr Lee in relation to the RTO Transaction were performed in his capacity as representative and advisor of Datuk Lim and CBL, not as FEM's introducer and arranger. Moreover, Axis could not have discharged its obligations at the Introductory Dinner because Mr Lee had yet to take over its beneficial ownership at that point (see Judgment at [115]–[119]).

Procedural history of appeal

48 The Judgment was given on 31 August 2023. On 11 October 2023, Axis and Mr Lee both lodged their appeal in AD 107 against the following parts of the Judgment –

(a) the invalidation of the Engagement Letter as void *ab initio* (see Judgment at [105], [110] and [113]);

(b) the award of damages payable by Axis and Mr Lee to FEM for fraudulent misrepresentation (see Judgment at [131] and [148]);

(c) the dismissal of Axis' claim for the Consideration Sum in its Suit 342 (see Judgment at [113], [119] and [148]); and

(d) the award of costs to FEM payable by Axis and Mr Lee (fixed at $393,287.02 on a standard basis).[65]

49 On 28 March 2024, we informed parties that we wished to hear their submissions on the question of whether the Engagement Letter was capable of being rescinded between Axis and FEM given the difficulty of effecting *restitutio in integrum*. We heard parties' submissions on 2 April 2024 – including on the issue of *restitutio in integrum* – and reserved our judgment.

The parties' cases on appeal

Case for Axis and Mr Lee

The Engagement Letter was not void ab initio *as a unilateral mistake over a quality of the contracting counterparty – such as the identity of their beneficial owner – does not negate the formation of a contract*

50 The appellants submit that the Judge erred in law in finding the Engagement Letter void *ab initio* at common law. They argue that a contract is only void if a party was mistaken on a fundamental term of the contract and not merely an attribute or quality of the subject-matter that induces a party into so contracting.[66]

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65 HC/JUD 391/2023 in HC/S 342/2021 filed 13 October 2023 dated 29 September 2023 (RA Vol I at pp 122–123).

66 Appellants' Case dated 11 January 2024 ("AC") at paras 27, 29 and 32–34.

51 Here, FEM was not mistaken about the identity of the other contracting party, *ie*, Axis.[67] At most, FEM was mistaken about a quality or attribute of the counterparty, *ie*, its beneficial ownership. Even if FEM mistakenly believed that Axis was controlled by an independent third party with no relation to CBL, that did not concern any term or condition of the Engagement Letter, let alone a fundamental term which would render the contract void *ab initio*.[68]

The Engagement Letter cannot be rescinded as it is not possible to achieve restitutio in integrum *since Axis has already performed its services*

52 The appellants submit that *restitutio in integrum* cannot be achieved.[69] While exact *restitutio in integrum* is not necessary, it must be possible to *at least* substantially place parties in their pre-contracting positions.[70]

53 Here, where Axis has rendered services under the Engagement Letter by introducing FEM to Datuk Lim, facilitating his approval of the RTO Transaction, facilitating communications between the parties, and contributing to the completion of the RTO Transaction, these are services which cannot be reversed or undone. Thus, the remedy of rescission is no longer available.[71]

54 As the Engagement Letter remains valid, Axis is entitled to receive the Consideration Sum from FEM. It performed its service obligations under that contract by introducing FEM to CBL in a series of meetings, namely, the

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67 AC at para 37.

68 AC at paras 29–31, 36 and 38–39.

69 Appellants' Submissions on Rescission dated 1 April 2024 ("ASR") at paras 2–4.

70 ASR at paras 5–7.

71 ASR at paras 8–10.

Introductory Dinner of 20 July 2016 and CBL Board Meeting of 8 August 2016.[72]

FEM was not induced into entering into the Engagement Letter by any false representation as to Axis' beneficial ownership as that fact was never material to FEM's decision to enter thereinto

55 The appellants argue that the contracting parties never considered the independence of the introducer or arranger to be an important or relevant part of the underlying commercial transaction.[73] The commercial reality of the matter is that FEM just wanted the RTO Transaction to go through with CBL. They simply needed an introducer or arranger who could link them with CBL so the RTO Transaction could be successfully negotiated with them. The independence of the arranger was never material to FEM.[74]

56 This is corroborated by the fact that Mr Aljunied and Mr Hong signed the Engagement Letter without knowing the identity of Axis' owner or inquiring then or thereafter.[75] The necessary inference of fact is that they did not care *who* the owner was. They were only interested in successfully completing the RTO Transaction and were not at all concerned with who was going to receive the Consideration Sum.[76]

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72 AC at paras 85–92.

73 AC at para 31.

74 AC at paras 40–42.

75 AC at paras 43 and 45–46.

76 AC at para 48.

Case for FEM

The Engagement Letter was void ab initio *as the unilateral mistake over Axis' beneficial owner concerned a fundamental characteristic of FEM's contractual counterparty*

57 FEM submits that the Judge's finding that the Engagement Letter was void *ab initio* should not be disturbed. Its mistake concerning the independence of the beneficial owner of Axis was a mistake as to its characteristics which went to a fundamental term of the contract.[77]

58 As Axis was to assist in the preparation and finalisation of the RTO Transaction for FEM, it could not owe competing duties to both sides of the same transaction, *ie*, CBL and FEM. Thus, the independence of Axis as introducer/arranger under the Engagement Letter was a fundamental part of that contract,[78] and FEM's mistake was as to a fundamental characteristic of its counterparty, *ie*, as an independent third party, rendering the contract void *ab initio* as the parties' offer and acceptance were at cross-purposes throughout.[79]

The Engagement Letter can be rescinded as restitutio in integrum *remains possible given that Axis did not perform any services in favour of FEM pursuant to that contract*

59 FEM relied on the High Court decision in *CDX and another v CDZ and another* [2021] 5 SLR 405 ("*CDX v CDZ*") at [55] in support of the proposition that equitable rescission is a flexible remedy which is available if it is possible to effect substantial *restitutio in integrum* to achieve practical justice.

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77 Respondent's Case dated 8 February 2024 ("RC") at para 54.

78 RC at paras 59–64.

79 RC at paras 67–74.

60 Moreover, FEM argues that it is possible to restore the parties to their pre-contracting position – which it characterises as their 16 August 2016 positions. By that point, FEM was already acquainted with CBL and Datuk Lim after the Introductory Dinner of 20 July 2016 and they had already made their presentation to CBL's board on 8 August 2016. Axis did not render any services that would make *restitutio in integrum* impossible. The fact that the RTO Transaction was completed on 5 July 2018 does not alter that conclusion since that transaction was the product of the efforts of many different actors. It cannot be said that, if not for the Engagement Letter, the transaction would never have been completed.

61 In any event, the appellants did not plead the impossibility of *restitutio in integrum* at the trial below and they should not be permitted to raise that fresh argument on appeal now that the trial has concluded.

62 Furthermore, Axis could not have performed any services as Mr Lee undertook all his actions *solely* in his capacity as the representative of CBL and Datuk Lim and *not* as introducer/arranger for FEM, for example, at the Introductory Dinner and CBL Board Meeting. Thus, there were no services rendered which would prevent rescission from taking place. Since the requisite services were not performed, Axis is also not entitled to the Consideration Sum under the terms of the Engagement Letter.[80]

FEM was induced into entering into the Engagement Letter given that FEM would not have engaged Axis had it known Mr Lee was its owner

63 FEM was materially induced to consent to the Engagement Letter as the fraudulent concealment of Axis' beneficial owner being a representative of

[80] RC at paras 95–102.

Datuk Lim and CBL materially contributed to it agreeing to engage Axis as an introducer/arranger. It was important to FEM that the introducer/arranger it engaged was an independent third party with no ties to or interest in CBL.[81]

64 As the introducer/arranger's obligations under the Engagement Letter included its duties to assist FEM in preparing and presenting the RTO Transaction to CBL and in negotiating and finalising the terms, it would make no commercial sense to engage an introducer/arranger that owed any duty to further the interest of the opposing side across the bargaining table of the RTO Transaction (*ie*, CBL). The introducer/arranger would be in an obvious conflict of interest, operating to the detriment of FEM, as the introducer/arranger could no longer be relied upon to strike the best deal for it in relation to the RTO Transaction.[82]

Issues to be decided

65 Accordingly, five issues arise on appeal:

(a) whether the Engagement Letter is void *ab initio* on the grounds of a unilateral mistake on FEM's part concerning the identity of its contracting counterparty;

(b) whether Axis performed the Engagement Letter such that, absent the contract being void or otherwise avoided, it earned the Consideration Sum;

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81 RC at paras 62 and 64–65.

82 RC at paras 55–61 and 63.

(c) whether it is possible to effect *restitutio in integrum* between the contracting parties such that the Engagement Letter may be rescinded by FEM;

(d) whether damages should be awarded in place of rescission and if so how much; and

(e) finally, whether Mr Lee and Axis are liable to FEM for fraudulent misrepresentation.

66 We proceed to consider each of these five issues in turn.

Issue 1: Whether the Engagement Letter was void *ab initio* on the ground of unilateral mistake on FEM's part concerning the identity of its contracting counterparty

67 With respect, we do not agree with the Judge's finding that FEM's mistake concerning the independence of the beneficial owner of Axis rendered the Engagement Letter void *ab initio*. Such a mistake concerned only a quality or attribute of its contracting counterparty. It did not, however, amount to a mistake as to the *identity* of the counterparty or any other fundamental term of the contract itself.

68 The doctrine of unilateral mistake relates to the situation where offer and acceptance do not coincide and so parties do not reach consensus *ad idem*. Where the offeree is mistaken about a term of the contractual offer and purports to accept what is believed to be the offer, and the offeror knows of this mistake, then the offeree cannot be taken to have intended to contract on the terms that he purported to contract upon (see *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 ("*Quoine v B2C2*") at [81]). This principle applies to both sides of the bargain. Hence, where the non-mistaken party 'snaps up' a purported contractual offer,

which he knows to be mistaken concerning the *terms* of that offer, there is no true consensus between the parties' offer and acceptance (see *Hartog v Colin & Shields* [1939] 3 All ER 566 at 567–568 and *Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502 ("*Chwee Kin Keong*") at [30]–[37]).

69 Thus, where Party B purports to accept an offer made by Party A but believes it to come from Party C, there is no agreement. A unilateral mistake of identity arises from a confusion of one person with another. No such confusion happened here. The contract was in writing, and the persons signing on behalf of FEM both knew that the counterparty was Axis. They did not think that FEM was contracting with a different company. Even if they believed that Axis was not owned by Mr Lee when it was, this does not equate to a mistaken belief concerning the entity with whom FEM was contracting.

70 The leading case is the House of Lords decision in *Cundy v Lindsay* [1874–80] All ER Rep 1149 ("*Cundy v Lindsay*"), cited with approval by the Court of Appeal in *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 ("*Tribune Investment*") at [47]. There, a purported contract was formed for the sale of handkerchiefs between Alfred Blenkarn and Messrs Lindsay & Co. The latter, however, believed throughout that they were contracting with the firm, Messrs Blenkiron & Sons. No contract was ever formed between them, for "throughout this correspondence, and up to and after the time that the respondents had despatched their goods to London, they intended to deal, and believed they were dealing, with Blenkiron & Sons, and with nobody else" (see *Cundy v Lindsay* at 1150). This was demonstrated by the fact that all of Lindsay & Co's letters and invoices were addressed only to "Blenkiron & Sons" (see *Cundy v Lindsay* at 1150). Such a contractual offer was, on an objective construction, incapable of being validly accepted by any

other party *but* Blenkiron & Sons. This case exemplified a confusion in the mind of one contracting party, believing that the contract was with one person when in fact it was with a different person.

71 Likewise, in *Tribune Investment* at [46], Soosan wished only to contract with the dock owners, Dalzavod. On an objective construction of Soosan's contractual offer, they made an offer addressed only to Dalzavod and to no other party. When Tribune purported to accept that offer, there was no coincidence between the offer of Soosan and the acceptance of Tribune, "for when an offer meant for A is purportedly accepted by B, any apparent contract formed is void and cannot confer rights on anyone": *Tribune Investment* at [47].

72 In *Shogun Finance Limited v Hudson* [2003] UKHL 62 ("*Shogun Finance*") at [131]–[133], Lord Phillips of Worth Matravers held that the correct application of *Cundy v Lindsay*, where a contract is formed in writing, is that the intended parties to that contract are identified by reference to the written correspondence. Thus (applying the earlier Court of Appeal decision of *Hector v Lyons* (1989) 58 P & CR 156), he held that "the identity of the parties to a contract in writing fall to be determined by a process of construction of the contract" (see *Shogun Finance* at [166]). On the facts of that case, those were simply the parties who were *named* in the written hire purchase agreement at issue (see *Shogun Finance* at [170] and [178]).

73 In this case, FEM objectively intended to contract with Axis because Axis was the party named on the written Engagement Letter that it signed. Offer and acceptance matched. With respect, we do not agree with the Judge's analysis that: "Reduced to its essence, FEM and Axis were not *ad idem* as to the party that FEM was contracting with" (see Judgment at [111]). Unlike in *Cundy v Lindsay* and in *Tribune Investment*, where the offeror's intention to contract

with a different counterparty altogether was clear to an objective person observing that party's words and conduct, an objective person here would conclude on the face of the Engagement Letter that FEM's intention was to contract with Axis. Those were the intended contracting parties named on the face of the document that was executed.[83]

74 The Judge, however, took the view that that doctrine could be extended to mistakes regarding the fundamental *attributes* of a counterparty. In his words, "while FEM contracted with Axis and there was no mistake in the sense that Axis was the *identified entity* that FEM intended to contract with, there was a mistake as to the *characteristics* of that entity [emphasis in original]" (see Judgment at [111]). Since FEM's intentions all along were to contract *only* with an independent third party with no relationship with CBL, it had no intention to contract with Axis, given that it was *not* independent.

75 However, mistakes concerning characteristics or attributes of the counterparty would not ordinarily go to identity, unless this resulted in confusion concerning who the counterparty was. That much was made clear in *Cundy v Lindsay* itself. As Lord Hatherley explained in his concluding paragraph (see *Cundy v Lindsay* at 1150):

> … Or suppose he [the fraudster] had said: "I am as rich as that firm. I have transactions as large as those of that firm. I have a large balance at my bankers"; then the sale would have been a sale to a fraudulent purchaser on fraudulent representations, and a sale which would have been capable of being set aside, but still a sale would have been made to the person who made those false representations; and the parting with the goods in that case might possibly have passed the property. *But this case is an entirely different one.* The whole case, as represented here, is this: from beginning to end the respondents believed they were dealing with Blenkiron & Sons; and, therefore, Alfred Blenkarn cannot by so obtaining the goods have by any

[83] RA Vol V (Part G) at pp 5–6.

> possibility made a good title to a purchaser as against the owners of the goods, who had never in any shape or way parted with the property, nor with anything more than the possession of it.
>
> [emphasis added]

76 Hence, *Cundy v Lindsay* was not concerned with mere attributes or characteristics of the counterparty but only with mistakes concerning the *identity* of the counterparty itself. Offer and acceptance do not match only where there is a mistake concerning who the parties to the contract are, the nature of its subject-matter or other fundamental terms. It is not sufficient that the mistake concerns the quality of the subject-matter or circumstances of their contracting which may have motivated or induced one party to contract (see *Quoine v B2C2* at [82]). The "law looks at the objective facts to determine whether a contract has come into being. The real motive or intention of the parties is irrelevant … The *raison d'être* behind this rule is the promotion of commercial certainty": *Chwee Kin Keong* at [30]. Hence, not every mistake voids a contract *ab initio*; "It has to be a sufficiently important or fundamental mistake *as to a term* for that to happen [emphasis added]" (see *Chwee Kin Keong* at [34]).

77 The reference in the passage just quoted to "commercial certainty" nods to the point that, where unilateral mistake is made out, the contract is void and hence third parties dealing with a person who has obtained goods from another by virtue of that other's mistake do not obtain good title and would have to return them upon the suit of the mistaken seller. It is different when a contract is only voidable (as in the case of misrepresentation) where third parties could take good title unless and until the contract is rescinded (see *Chwee Kin Keong* at [46] and *Shogun Finance* at [178]).

78 We now consider the Judge's point that the independence of Axis' beneficial owner was a "fundamental term of the contract in the sense that

Mr Hong and [Mr Aljunied] would not have caused FEM to enter into the Engagement Letter had they known that Mr Lee was the beneficial owner of Axis" (see Judgment at [111]). Likewise, FEM argues that its mistake was not merely a mistake as to the quality of the counterparty but concerned a fundamental term as Axis' independence was crucial to its role as introducer/arranger, per the Engagement Letter.

79 The difficulty with this point is that the Letter of Engagement did not contain any term concerning Axis' independence nor did FEM mistakenly believe that there was such a term. Even if Axis had warranted that it was independent, and FEM mistakenly believed it was so when it was not, this would not mean the contract was void for mistake. It would only mean that Axis was in breach of a term of the contract. A mistake concerning the fundamental terms of a contract is not a mistake concerning whether such a term has been or will be complied with but rather a mistake about whether there is such a term or what that term's scope and effect are. The distinction between a mistake that *motivates* a party to enter into a contract and a mistake as to a *term* of that contract is critical. The principle is that "if one party has made a mistake about a fact on which he bases his decision to enter into the contract, but that fact does not form a term of the contract itself, then, even if the other party knows that the first is mistaken as to this fact, the contract will be binding" (see *Statoil ASA v Louis Dreyfus Energy Services LP* [2008] EWHC 2257 (Comm) at [88]; see also *Quoine v B2C2* at [88]).

80 Many an inducement that motivates a party to accept a contractual bargain may be of great importance to that party without forming a term or condition of the bargain itself. As Sir Alexander Cockburn CJ put it in the case of *Smith v Hughes* [1861–73] All ER Rep 632 at 636–637:

> … This argument proceeds on the fallacy of confounding what was merely a motive operating on the buyer to induce him to buy with one of the essential conditions of the contract. Both parties were agreed as to the sale and purchase of the particular parcel of oats. The defendant believed the oats to be old, and was thus induced to agree to buy them, but he omitted to make their age a condition of the contract. All that can be said is that the two minds were not ad idem as to the age of the oats; they certainly were ad idem as to the sale and purchase of them. …

81 Even if FEM mistakenly believed that Axis was not beneficially owned by Mr Lee, parties were agreed on the services to be rendered by Axis and the consideration to be paid by FEM under the Engagement Letter.

82 For completeness, we note FEM's alternative argument that the Engagement Letter is voidable in equity due to its unilateral mistake. This argument does not assist on the facts of this case. The difference between common law unilateral mistake and equitable unilateral mistake is that the former requires the other party to actually know of the mistake whereas equitable unilateral mistake may be said to be wider, in the sense that the non-mistaken party's constructive knowledge of the mistake might suffice, but subject to there being unconscionable conduct in relation to that mistake (see *Quoine v B2C2* at [80(b)] and *Chwee Kin Keong* at [77]–[78] and [80]). Nevertheless, in either case, the mistake must still relate to a *term* of the contract (see *Quoine v B2C2* at [82]), not merely a material fact that induced them to enter into it. The independence of Axis' beneficial owner was *never* a term of the Engagement Letter nor did FEM mistakenly believe there was such a term. Consequently, unilateral mistake in equity does not operate either.

83 We therefore set aside the Judge's holding that the Engagement Letter was void *ab initio*.

Issue 2: Whether Axis had otherwise earned the Consideration Sum

84 FEM ran the defence below that Axis did not in fact perform the services set out in the Engagement Letter. The Judge accepted this contention (see Judgment at [115], [118] and [119]). First, he held that the Introductory Dinner took place two days before Mr Lee took over Axis, which happened only on 22 July 2016, and so could not have been done on behalf of Axis (see Judgment at [118]). Secondly, the Judge held that "Axis could not have provided the other Services in the lead-up to the Transaction. This is because Mr Lee was acting in the conflicting roles of Datuk Lim's or CBL's lawyer and (supposedly) FEM's arranger through his beneficial ownership of Axis" (see Judgment at [118]).

85 Axis in turn criticised FEM's argument that services were not performed as an afterthought. It should be recalled that the Term Sheet was signed on 24 August 2016 and the SPA on 27 October 2016. This was within three months of the signing of the Engagement Letter. Thereafter, for almost two years until the RTO Transaction was completed on 5 July 2018, FEM not once complained that Axis had not provided any of the services it was obliged to perform under the Engagement Letter.

86 There were four items under Axis' scope of work in the Engagement Letter,[84] namely:

> (a) Introduce you to the ListCo [*ie*, CBL].
>
> (b) Act as liaison party between the ListCo and you.
>
> (c) Assist you in the preparation and presentation of the Proposed Transactions [*sic*] [*ie*, the RTO Transaction] to the ListCo . [*sic*]
>
> (d) Assist all parties in the negotiation and finalization of the terms and conditions of the Proposed Transaction.

[84] RA Vol V (Part G) at p 4.

87 None of these items were such that their performance would not have been known to FEM. FEM would have known if they had not been substantially performed by the date of the SPA, namely 27 October 2016. Thus, if Mr Aljunied or Mr Hong had believed that the services had not been performed, this point would have been raised then. They would not have waited until after the RTO Transaction was completed. One would expect them to have said that FEM had secured the RTO Transaction without any assistance from Axis and so there was no obligation to issue the Consideration Shares to Axis.

88 Moreover the evidence concerning Mr Aljunied's and Mr Hong's response when the issue of the allotment of the shares under the Engagement Letter and Letter of Undertaking was raised in July–August 2018 in the WhatsApp messages of Mr Lim in the FEM Group and the WhatsApp messages and emails of Mr Lee,[85] shows that neither Mr Hong nor Mr Aljunied considered then that Axis had not performed its part of the bargain, because neither of them made that point.

89 Further, in the intervening period, Axis continued to be involved in relation to the RTO Transaction. It even provided two loans to CBL,[86] to which FEM gave express consent.[87] Objectively, Mr Hong and Mr Aljunied must have understood that Axis' involvement as lender to CBL was connected to its stake in the success of the RTO Transaction, namely its right under the Engagement Letter to the Consideration Shares.

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85 RA Vol V (Part AO) at p 278; RA Vol V (Part AP) at pp 121–125.

86 RA Vol V (Part T) at pp 190–215; RA Vol V (Part AE) at pp 186–217.

87 RA Vol V (Part T) at p 169; RA Vol V (Part AD) at p 106.

90 The evidence that this contention is a mere afterthought is compelling, and, with respect, was not considered by the Judge. We now turn to FEM's specific arguments. First, they contend that Mr Lee had already made the contemplated introduction at the Introductory Dinner on 20 July 2016, two days before he became Axis' beneficial owner and about a month before the Engagement Letter was signed. But both Mr Hong and Mr Aljunied knew this at the time they signed the Engagement Letter. It is commonplace for services to be performed prior to signing of a contract in anticipation of that contract, and there is no difficulty posed by this: see *Pao On and others v Lau Yiu Long and others* [1980] AC 614 at 629–630.[88]

91 Nor is it an obstacle that Mr Lee did not yet own or control Axis at the time of the Introductory Dinner. The question is what the objective intention of the contracting parties was *at the time* that they signed the Engagement Letter on 16 August 2016. It is not credible to contend that when the Engagement Letter was signed the reference to the obligation to introduce related to anything other than the introduction that had already been made. An introduction, after all, can only occur once.

92 It is obvious that the service of 'introducing' FEM to Datuk Lim and CBL once done cannot be given back by FEM. It is not necessary for this conclusion that Axis prove that without its involvement the RTO Transaction would not have happened. It is enough that it performed its side of the bargain, and the RTO Transaction in fact happened.

93 FEM's second argument is that any acts performed by Mr Lee cannot be regarded as a discharge of Axis' obligations under the contract since everything

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[88] RA Vol IV (Part I) at pp 146 and 148; RA Vol IV (Part K) at pp 20–21.

he did was *solely* in his capacity as the advisor to, and representative of, Datuk Lim and CBL. The Judge held that "Axis could not have provided the other Services in the lead-up to the Transaction. This is because Mr Lee was acting in the conflicting roles of Datuk Lim's or CBL's lawyer and (supposedly) FEM's arranger through his beneficial ownership of Axis" (see Judgment at [118]).

94 This conclusion seems to rest on the view that an act done while in a conflict of interest is not an act at all. With respect, this is not correct. There may be legal consequences that follow when something is done in conflict of interest but that does not mean that the thing is not done at all pursuant to the contract.

95 By way of brief aside, we would, with respect, also not agree with the Judge's description of Axis' obligation under the Engagement Letter as being to "strike the best arrangement for FEM so as to maximise FEM's gains" (see Judgment at [74]). This phrasing connotes the role and obligations of an agent, but given the absence of a specific term to this effect Axis was not FEM's agent to negotiate or conclude the RTO Transaction. FEM itself did the negotiating and signed the resulting agreements. Axis' role was to introduce FEM to CBL, liaise between them, assist in the preparation and presentation of the RTO Transaction and assist all parties (*ie*, both FEM and CBL) in the negotiation and finalisation of the terms and conditions of the RTO Transaction. Axis was neither FEM's agent nor its adviser.

96 Moreover, Mr Lee's ability to introduce Datuk Lim to Mr Aljunied and Mr Hong was not impaired by his holding a prior working relationship with Datuk Lim. Nor was his ability to liaise with Mr Lim of FEM on such matters as the board presentation or draft term sheet in preparation for the CBL Board

Meeting prejudiced by his relationship with CBL. It cannot be said that he did not introduce, liaise, or assist with such presentations or preparations simply because he also owed duties to Datuk Lim.

97 FEM's contention boils down to an acknowledgement that there was an introduction made and arrangement carried out but that all this work was not attributable to Axis because it was done by Mr Lee. This contention is, to say the least, highly artificial when at the time the work was actually being performed FEM did not raise the point that it was not Axis doing this but Mr Lee.

98 For these reasons, we set aside the Judge's finding that Axis had not performed the services under the Engagement Letter. That finding is against the weight of the evidence, in particular the length of time that elapsed between FEM's entry into the SPA with CBL and FEM's first raising this point as well as the fact that during that period there were ample opportunities to raise it if it had indeed been FEM's position.

99 It follows that absent rescission of the Engagement Letter, Axis is entitled to the Consideration Sum. We now turn to the question of rescission.

Issue 3: Whether it is possible to achieve *restitutio in integrum* between the contracting parties such that FEM is entitled to rescind the Engagement Letter if fraudulent misrepresentation is made out

100 When a representee seeks rescission of an executed and not merely executory contract that it has been induced to enter into by reason of the other party's fraudulent misrepresentation, it must restore or offer to restore the benefit received by it from performance by the other party. It is not fair or just for a party to disclaim the burden of a contract without also giving up the benefit.

101 Where a representee seeking rescission does not offer restoration of benefits, then if the court holds that there were benefits that would have to be restored, the prayer would fail. That is an inherent requirement of the remedy of rescission. As held by the English Court of Appeal in *Dunbar Bank plc v Nadeem and another* [1998] 3 All ER 876 at 886 (cited by our High Court in *Loh Sze Ti Terence Peter v Gay Choon Ing* [2008] SGHC 31 ("*Peter Loh*") at [101]), it is "well established that it is a *condition of relief* that the party obtaining rescission should make restitutio in integrum or, in modern terminology, counter restitution to the other party. If counter restitution cannot be made the claim to rescission fails [emphasis added]".

102 The same point was made in the English Court of Appeal case of *Salt v Stratstone Specialist Ltd (t/a Stratstone Cadillac Newcastle*) [2015] EWCA Civ 745 ("*Salt v Stratstone*") (relied on by our High Court in the case cited by FEM on appeal, see *CDX v CDZ* at [55]) at [25], namely, that it is "obviously unjust" for a party seeking to rescind a contract to "throw that back on the other party's hands without accounting for any benefit he may have derived from" that contract (see also *Erlanger and others v New Sombrero Phosphate Co* [1874–80] All ER Rep 271 at 286). Thus, FEM cannot obtain the remedy of rescission without demonstrating to the court's satisfaction how *restitutio in integrum* may be achieved between the contracting parties. That is an intrinsic requirement of the relief sought by them.

103 In renewing its prayer for rescission, FEM raised the pleading point that Axis had only denied its entitlement to rescission in general terms without specifically pleading impossibility of *restitutio in integrum* as a bar to rescission.

104 We consider this pleading point before going on to the question of the impossibility of *restitutio in integrum* itself.

Axis and Mr Lee are permitted to argue the impossibility of restitutio in integrum *on appeal as it would serve the interests of justice and would not prejudice FEM*

105 The first question is whether it would occasion unfairness or prejudice to FEM if Axis and Mr Lee are permitted to run their arguments as to the impossibility of *restitutio in integrum* preventing the rescission of the Engagement Letter. We consider that it would *not* unfairly prejudice FEM. Hence, Axis and Mr Lee are permitted to make these arguments in resisting FEM's renewal of its prayer for rescission on appeal.

106 In our view, it follows from the legal position that the party seeking to avoid the contract must in principle return or account for benefits received, the representee when seeking rescission must itself plead its readiness to restore or account for the benefits received, specifying those benefits. In this case, it was only at the oral hearing that FEM identified what it proposed to restore. FEM's counsel contended that there was nothing to restore or account because Axis did not perform the services under the Engagement Letter. FEM was also not prepared to give up or provide substitute value for the benefit of the RTO Transaction, because, on FEM's view, the completion of the RTO Transaction was *not* a benefit accorded to it pursuant to that same contract.

107 In line with our view, the pleading precedent for rescission of an agreement for sale of property already transferred to the representee includes a prayer for rescission of the sale agreement, a prayer to set aside the transfer under the agreement (thus returning the property that had been sold to the representor) and an order for repayment of purchase monies to the representee

(see *Bullen & Leake & Jacob's Singapore Precedents of Pleadings* (Jeffrey Pinsler gen ed) (Sweet & Maxwell, 2016) ("*Singapore Precedents of Pleadings*") at P25.21). That a party seeking restitution should offer to restore or account for benefits received is the obverse of a party seeking specific performance, who, if he has unperformed obligations, must plead willingness and ability to perform its side of the bargain in return (see *Singapore Precedents of Pleadings* at para 25.100).

108 In passing, it is worth noting that if Axis had indeed not performed the services, that in itself would have been a complete answer to the claim for enforcement of the Engagement Letter against FEM. There would be no need for FEM to establish the defence of misrepresentation, or counterclaim for rescission of the Engagement Letter, so as to remove the obligation to issue the Consideration Shares to Axis.

109 However, if FEM had pleaded that it would not have to restore or account for benefits received because it had received none, it would have been incumbent on Axis to plead its disagreement with particulars. It is the case that "if a representor desires to contend that the representee is not entitled to the remedy of rescission, the representor should plead the impossibility of rescission and provide full particulars of why this is so" (see *Liberty Sky Investments Ltd v Aesthetic Medical Partners Pte Ltd and other appeals and another matter* [2020] 1 SLR 606 ("*Liberty Sky*") at [14]). Nonetheless, the court may, as was done in that case, permit the point to be made on appeal if it causes no prejudice, including where the relevant facts have already been addressed below (see *Liberty Sky* at [16]–[17]; see also *Fuji Xerox Singapore Pte Ltd v Mazzy Creations Pte Ltd and others* [2021] SGHC 193 at [81]–[82]).

110 Taking a practical and common-sensical view of the matter, the point of fact underlying Axis' argument that *restitutio in integrum* is impossible is that it has rendered services under the Engagement Letter which cannot be taken back or undone. That was *always* Axis' case at the trial below. Axis could not have sued for the Consideration Sum *without* showing that it had performed the requisite services in exchange.

111 Accordingly, Axis had pleaded that it performed all necessary services under the Engagement Letter.[89] More importantly, FEM had the opportunity of contesting that averment and pleading that the services had *not* been performed by Axis. They pleaded that Mr Lee had dealt with FEM on the RTO Transaction solely in his capacity as the representative of CBL and Datuk Lim and *not* as the introducer/arranger of FEM.[90]

112 FEM not only cross-examined Mr Lee and Mr Lim on its averment that Axis never performed the requisite services under the Engagement Letter,[91] but actually *prevailed* on this point before the Judge below (see Judgment at [118]).

113 Here, Axis and Mr Lee are not seeking to rely on any fresh evidence or new factual inferences never pleaded or argued at the trial below but now being raised for the first time on appeal. The *only* factual basis for its argument that *restitutio in integrum* is impossible is that services were rendered by Axis under the Engagement Letter. That is the same as the case run by them at the trial below, which FEM had ample opportunity to rebut, as evidenced by its

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89 SOC (A2) at para 8 (RA Vol II (Part B) at pp 60–63).

90 D&CC (A2) at para 13 (RA Vol II (Part B) at pp 74–75).

91 Transcript of Hearing in HC/S 342/2021 dated 20 October 2022 at p 35 line 4 to p 40 line 1 (RA Vol III (Part AC) at pp 40–45); Transcript of Hearing in HC/S 342/2021 dated 26 October 2022 at p 25 line 21 to p 28 line 2 (RA Vol III (Part AF) at pp 30–33).

questions in cross-examination. Thus, FEM is not being taken by surprise now, nor is it procedurally prejudiced in having been deprived of fair warning of its party-opponent's case such that it lost the ability to prepare its case, lead evidence, or ask questions in cross-examination to rebut the appellant's new allegations of fact. It had a fair chance to respond – and, indeed, did so respond – to the claim that services were rendered by Axis to FEM under the Engagement Letter.

114 Moreover, it would not be right to leave out of consideration a point so bound up with the grant of the remedy sought by FEM, one that is a "condition of relief" (see [84] above). As was noted by Lord Wrenbury in the House of Lords in the case of *Banbury v Bank of Montreal* [1918] AC 626 at 714:

> … The appellant has argued that, inasmuch as the point of law that there was no evidence of authority was not taken at the trial, the respondents could not raise in a Court of Appeal a question of law not raised in the Court of first instance. It would require a great deal to persuade me that a Court of Appeal is bound to adjudicate wrongly because it had not occurred to either judge or counsel to raise a point of law in the Court below. … The result of the contention, if it be correct, is that the Court of Appeal is bound to make an erroneous order because a point of law has been overlooked below. …

115 This proposition coheres with the principle expressed in *Liberty Sky* at [14], that the issue of pleadings should not be approached as "a hard and fast rule"; rather, a "balance has to be struck between, on the one hand, instilling procedural discipline in civil litigation and, on the other, permitting parties to present the substantive merits of their case notwithstanding a procedural irregularity".[92] Here, it cannot be overlooked that the effect of FEM's argument would be that the court may be compelled to order a remedy in FEM's favour *despite* the condition for that relief not being met. That cannot be right.

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92 RA Vol IV (Part D) at p 216; RA Vol IV (Part Y) at p 47.

116 Consequently, we hold that, upon FEM renewing its prayer for rescission, Axis is permitted to contend that *restitutio in integrum* is no longer possible as services have already been rendered pursuant to the Engagement Letter. We hence proceed to consider this issue on the merits.

It is impossible to accord restitutio in integrum *between the contracting parties to the Engagement Letter as Axis has rendered services thereunder to FEM*

117 We find on the evidentiary record before us that it is no longer possible to effect *restitutio in integrum* between the parties to the Engagement Letter as Axis has rendered the contracted services to FEM.

118 As has been noted, it is a condition for the granting of the remedy of rescission that the contracting parties must place each other back in their pre-contracting positions. A party cannot seek to rescind a contract without returning (or accounting for) whatever benefits were received by them (see *Salt v Stratstone* at [25]; see also *CDX v CDZ* at [51] and [55]).

119 Nonetheless, rescission in equity may be granted so long as there will be substantial *restitutio in integrum* so as to achieve practical justice between the contracting parties (see *Liberty Sky* at [30]).

120 Counsel for FEM before us contended for equitable rescission as an alternative to legal rescission. This contention did not fit with the successful claim made below for damages for losses flowing from the misrepresentation in the amount of S$10,210 (see Judgment at [131]). As we pointed out to FEM during oral submissions before us, equitable rescission cannot be ordered together with the common law remedy of damages. Damages may only accompany or substitute for common law rescission, which requires precise and

complete reversal of the benefits exchanged under a rescinded contract (see *CDX v CDZ* at [54]). Nevertheless, as FEM sought equitable rescission before us in oral submissions, and their prayer at the trial below for "Rescission of the Engagement Letter" is, at least on its face, broad enough to encompass either common law or equitable rescission (although damages for misrepresentation were also prayed for),[93] we consider whether either common law *or* equitable rescission is available in respect of the Engagement Letter here.

121 The first question is whether there can in principle be a restoration of benefits received from the performance of services. A contract for the sale of goods, for example, may be rescinded by the buyer upon returning the goods, even where the goods have deteriorated in quality or reduced in value.

122 A contract for services, as here, stands on a different footing. Once the services have been rendered, the service-provider cannot take them back and the recipient cannot 'return' the services, not even in a modified or deteriorated form. Accordingly, in *Boyd & Forrest v Glasgow and South-Western Railway Co.*, 1915 SC (HL) 20, Lord Atkinson remarked that a contract for the construction of a railway could not be undone and *restitutio in integrum* was not possible, because the "pursuers cannot take back what they gave, their work, … The work was done; the parties cannot in any sense be restored, in relation to this contract, to the position they occupied before the contract was entered into". Lord Parmoor observed, to similar effect, that "*restitutio in integrum* is impracticable in any form. After the execution of the works for the construction of the railway the respondents cannot restore the appellants to their former position".

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[93] D&CC (A2) at pp 38–39 (RA Vol II (Part B) at pp 163–164).

123 We agree with the proposition that "once a contract of services or for services has run its course it cannot be rescinded or set aside because it is impossible to undo the services which had been rendered": *O'Sullivan and another v Management Agency and Music Ltd and others* [1985] QB 428 at 437. That follows from a straightforward application of the principle in *Peter Loh* at [101] that *restitutio in integrum* from both contracting parties to the other is a condition to the grant of the relief of rescission.

124 We hold that it is impossible to effect *restitutio in integrum* between Axis and FEM. Thus, we find that the remedy of rescission of the Engagement Letter is not available to FEM, *even if* all the ingredients of fraudulent misrepresentation are made out in law.

Issue 4: Damages for fraudulent misrepresentation giving credit for benefits received

125 That is not the end of the inquiry. The Judge awarded damages of S$10,210 in investigation expenses as the consequential losses flowing from the appellants' misrepresentation (see Judgment at [131]).

126 In *Smith New Court Securities Ltd v Citibank NA* ("*Smith New Court*") [1974] AC 254 at 281–282, Lord Steyn noted that in respect of fraudulent misrepresentation: "The legal measure is to compare the position of the plaintiff as it was before the fraudulent statement was made to him with his position as it became as a result of his reliance on the fraudulent statement." This formulation was cited with approval in *Wishing Star Ltd v Jurong Town Corp* ("*Wishing Star*") [2008] 2 SLR(R) 909 at [22], which also reiterated the "cardinal requirement in the law of damages that the plaintiff must prove its loss before it may be awarded damages for the same" (see *Wishing Star* at [2]).

127 Again, in *Smith New Court* Lord Browne-Wilkinson at 266 noted that the plaintiff "must give credit for any benefits which he has received as a result of the transaction". This was similarly cited with approval in *Wishing Star* at [21].

128 At the trial below, FEM argued, in the alternative, that if the Engagement Letter was not void or voidable, then damages awarded in accordance with this measure as flowing from the appellants' misrepresentation would include, in addition to the S$10,210 investigation expenses, the sum of US$2 million which was the Consideration Sum sought by Axis.[94] FEM did not expressly renew this argument on appeal, instead resting on the finding that the Engagement Letter was void *ab initio* for unilateral mistake or, alternatively, renewing its claim for rescission based on Axis' misrepresentation. As we have held that the Engagement Letter was not void for unilateral mistake and that rescission is not an available remedy, we nonetheless consider the appropriate award of damages if Axis' liability for fraudulent misrepresentation is upheld. In doing so we revisit FEM's claim for damages quantified to off-set its liability to pay the Consideration Sum.

129 FEM's claim for damages of US$2 million in effect asserts either that it received no value from Axis or that even if it had not entered into the Engagement Letter it would still have received the benefit of the RTO Transaction. If either of these were the case, then its liability for US$2 million on the services of Axis would be a loss flowing from the misrepresentation.

130 We deal with each of these in turn. We have already held that Axis did perform the services under the Engagement Letter, even if it did so while being

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94 RA Vol IV (Part V) at p 49.

owned by Mr Lee who as Datuk Lim's lawyer owed duties to Datuk Lim. Thus, in comparing the position FEM is in now with the position it would have been in had the Engagement Letter not been entered into, one must bring into consideration the benefits that FEM has received.

131 FEM did not contend that if Axis had indeed performed the services under the Engagement Letter the value of those services would have been reduced by virtue of Mr Lee's undisclosed beneficial ownership of Axis. Further, at the hearing before us, FEM's counsel accepted that the terms of the contemplated deal did not change, let alone change to FEM's detriment, after the engagement of Axis as introducer and arranger.

132 As for the second assertion, the burden would lie on FEM to prove that even if it had not entered into the Engagement Letter it would still have received the benefits of the RTO Transaction. No such evidence was led.

133 For these reasons, we would not have awarded FEM damages of US$2 million to offset its liability to pay the Consideration Sum in addition to the S$10,210 investigation expenses if we upheld the finding of fraudulent misrepresentation.

134 We now turn to the final issue of whether the elements of fraudulent misrepresentation have been made out on the evidentiary record before us.

Issue 5: Whether FEM has shown that it was induced into executing the Engagement Letter by Axis' fraudulent misrepresentation

135 For an actionable fraudulent misrepresentation to be made out, it is not enough to show that a false representation of fact was made by a representor who knew it to be false or was reckless as to whether it was true or false. It must be shown that the representee acted on the representation – in other words, that

they were *induced* to act upon the representation, resulting in loss being sustained (see *Edgington v Fitzmaurice* (1884) 29 Ch.D 459 at 481–482).

136 As was explained by the Court of Appeal in *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 ("*Panatron*") at [23], while the false representation need not be the *sole* reason for the representee's decision to enter into the transaction, it had to have "played a real and substantial part and operated in their minds". Thus, the "representation will be actionable so long as it played a real and substantial part in inducing the representee to enter into the contract": *Liberty Sky* at [9].

137 The question is whether the matter of the identity of Axis' beneficial owner played a real and substantial part and operated in the minds of FEM's representatives when they signed the Engagement Letter.

138 Crucially, it is not enough to show that, if the true state of affairs had been known, the Engagement Letter would not have been signed.[95] Rather, it had to be shown that, at the time of contracting, the representation operated on the mind of the representee. It might be that if the representee had known the truth, they would not have signed the contract. However, it is also necessary that the representation played a "real and substantial part" in the mind of the representee, at the point in time when they made the decision to enter into the contract (see *Liberty Sky* at [9] and *Panatron* at [23]). An inducement requires the representation to have acted upon the mind and will of the induced person (see *Wee Chiaw Sek Anna v Ng Li-Ann Geneveive (sole executrix of the estate*

95 SAN at para 58 (RA Vol III (Part S) at pp 24–25).

of Ng Hock Seng, deceased) and another [2013] 3 SLR 801 ("*Anna Wee*") at [43]–[44]).[96]

139 The distinction between the counterfactual of what the representee would have done had he known the truth and the requirement that the representation in fact operated on the mind of the representee at the time of contracting has recently been elucidated by the English Commercial Court in *Loreley Financing (Jersey) No 30 Ltd v Credit Suisse Securities (Europe) Ltd and other companies* [2023] EWHC 2759 (Comm) ("*Loreley Financing*"). Cockerill J noted at [421] that "the law does require that a representation (however made) is received by the representee and that to satisfy the requirements of reliance the representee must be aware of it/have it actively present to their mind when they act on it". This helpfully illustrates the approach adopted by the Court of Appeal in *Anna Wee* at [51] and [53], in holding that liability for fraudulent misrepresentation there depended "on the [representee's] own subjective state of mind, *viz*, how she understood the alleged misrepresentation and whether she was acting in reliance on it or whether she had (instead) already closed her mind" to it. The reason the Court of Appeal emphasised the importance of considering the representee's "subjective state of mind" is because the test is whether the representation was active in the mind of the representee when they supposedly acted on it.

140 Thus, a representee must be induced by the false representation itself (as opposed to acting under background assumptions). There is a critical distinction between reliance upon a representation (including one contributed to by the representor's silence) and acting in the absence of disclosure. Liability for non-disclosure is much more circumscribed than liability for misrepresentation (see

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96 RA Vol IV (Part AF) at p 209.

at [144] above). This distinction should not be erased (see *Loreley Financing* at [422]).

141 First, it must be clearly ascertained *what* was the representation which is said to have operated on FEM's mind at the relevant time of contracting. The false representation pleaded by FEM below was that "Mr Lee was acting solely as [CBL]'s and/or Datuk Lim's legal advisor and/or representative at the material time" and that Axis "also deliberately refused to disclose to FEM that Mr Lee was Axis' beneficial owner and/or representative".[97]

142 The Judge found that "Mr Lee and Axis did not inform Mr Hong and Mr Aljunied that Mr Lee was the beneficial owner of Axis, despite knowing that this would be material to the Engagement Letter" (see Judgment at [127]). This was based on his findings of fact that Mr Lee was held out and presented throughout as *only* the legal advisor or representative on the side of Datuk Lim and CBL and not on the side of FEM (see Judgment at [81]–[85] and [93]–[94]).

143 The Judge then went on to hold that there was reliance (see Judgment at [128]), as follows:

> Second, it is clear that FEM relied on this misrepresentation and entered into the Engagement Letter. I accept that FEM would not have entered into the said Letter had it known that Mr Lee was behind Axis, for that would place Mr Lee in a position of conflict between the interests of CBL and Datuk Lim on the one hand, and FEM on the other hand.

144 The Judge did not in this paragraph spell out the representation being relied on, but it must be taken to be the one pleaded, namely that Mr Lee was *only* the advisor and representative of CBL and Datuk Lim. This is significant as the law imposes liability for non-disclosure only in limited circumstances.

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97 D&CC (A2) at para 19B.1 (RA Vol II (Part B) at p 154).

Liability in common law for false representations of fact is broader than that for non-disclosures alone (see John Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (Thomas Reuters, 5th ed, 2019) at paras 16–02 and 16–03). Here, the actionable representation pleaded is that Mr Lee was represented to be only an advisor or representative to CBL and Datuk Lim, which, when coupled with the non-disclosure that Mr Lee was Axis' beneficial owner, together conveyed a false representation of fact to FEM that Mr Lee was *not* Axis' beneficial owner. Perhaps because of the way that the case was argued before him, the Judge did not make any express finding that the representation operated in the mind of Mr Aljunied or Mr Hong at the time of entry into the Engagement Letter. He only found that FEM would have acted differently if Mr Lee's beneficial ownership had been disclosed. But that in itself is not sufficient. The representation must have played a real and substantial part in FEM entering into the Engagement Letter (see [138]–[140] above).

145 As the Judge did not make any finding that the false representation of fact operated on the minds of Mr Aljunied and Mr Hong in their decision to execute the Engagement Letter, we have to answer that question for ourselves. In doing so, we keep in mind the Judge's findings of fact concerning the witnesses. As Mr Hong's evidence was that he signed the Engagement Letter because Mr Aljunied had already done so,[98] it is Mr Aljunied's state of mind when he signed the Engagement Letter that is critical. Mr Aljunied was accepted by the Judge as a truthful witness. Mr Aljunied's evidence was as follows:[99]

> 50. Mr Lim explained that Axis would be able to assist FEM in arranging the Proposed Transaction as Axis had experience in assisting other parties in transactions similar to that of the Proposed Transaction before.

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98 HKI at para 30 (RA Vol III (Part W) at p12).

99 SAN at paras 50–52, 55 and 57 (RA Vol III (Part S) at pp 21–23).

> 51. This was the first time I came across the name "Axis". I asked Mr Lim who Axis' representatives were and who had signed the Engagement Letter on behalf of Axis.
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> 52. Mr Lim simply informed me that I would have the opportunity to meet Axis' representatives in due course when Axis commences work on the Proposed Transaction. I understood from Mr Lim's explanation that I had yet to meet any of Axis' representatives, and that Axis was an independent third party who was able to assist with the Proposed Transaction.
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> …
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> 55. I thus relied on Mr Lim's assurance that Axis would be able to assist FEM in the Proposed Transaction and signed the Engagement Letter. …
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> …
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> 57. I must emphasize that when I signed both versions of the Engagement Letter, I believed that Axis and its beneficial owners and representatives were independent third parties who did not have any relationship with China Bearing and that, consequently, Axis' beneficial owner and representative could not have been Mr Lee. …

146 This evidence taken at face value indicates that Mr Aljunied did have in mind Mr Lee's prior representation implied from his conduct that he was acting only as Datuk Lim's adviser when Mr Aljunied accepted "Mr Lim's assurance that Axis would be able to assist FEM in the Proposed Transaction". Moreover, the stance taken by Axis and Mr Lee – that the independence of the arranger was never material to FEM (see [55] above) – is not enough to displace Mr Aljunied's evidence.

147 We would therefore not depart from the Judge's conclusion that "it is clear that FEM relied on this misrepresentation and entered into the Engagement Letter" (see Judgment at [128]).

148 Accordingly, we uphold the award of damages in the amount of S$10,210 in respect of FEM's investigation expenses.

Conclusion

149 In conclusion, we allow Axis and Mr Lee's appeal in AD 107 in part. Accordingly, we set aside the following findings –

(a) firstly, the finding that the Engagement Letter is void *ab initio* (see Judgment at [39], [105] and [113]);

(b) secondly, the dismissal of Axis' Suit 342 against FEM for the Consideration Sum (see Judgment at [3], [39], [113] and [148]); and

(c) thirdly, the order that Axis and Mr Lee are jointly and severally liable to reimburse the costs of FEM in the amount of $393,287.02, on a standard basis.

150 In respect of [149(b)] above, we observe that, at the trial below, Axis had originally sought specific performance of the Engagement Letter as its primary relief.[100] By the close of the trial below, however, CBL was no longer a Singapore-listed company and all of its shares had been acquired by a third party pursuant to a general offer.[101] This was undoubtedly why the appellants, in their case on appeal, prayed for an order that FEM "pay Axis the sum of US$2,000,000.00",[102] as opposed to an order for the Engagement Letter to be specifically performed, with shares in CBL being transferred to Axis.

151 In the appellants' closing submissions at the trial below, in May 2023 (after the delisting of November 2022), they elected to pursue an order for

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100 SOC (A2) at prayer (1) (RA Vol II (Part B) at p 65).

101 Transcript of Hearing in HC/S 342/2021 dated 17 February 2023 at p 9 lines 22–24 (RA Vol III (Part AJ) at p 14).

102 AC at para 99.1.

damages in lieu of specific performance, and on that basis, sought "an award which serves to put Axis into the position they would have been in if payment by FEM had been made to them promptly upon the performance of the Services and the success of the Proposed Transaction, *i.e.* the Consideration Sum of US$2,000,000.00".[103] In FEM's closing submissions at the trial below, they did not challenge that measure of damages in lieu of specific performance, instead resting on their arguments for the dismissal of Axis' Suit 342 for the Consideration Sum.[104] A review of the Engagement Letter reveals why FEM did not challenge this and why it would be appropriate to make the order sought. Under the heading "Fees and Expenses and Method of Settlement",[105] the first paragraph established US$2,000,000 as the success fee and labelled this with the capitalised term Consideration. In the second paragraph, the method of settlement was specified to be the issuance of the Consideration Shares and thereafter a formula was provided for the calculation of the number of shares to be issued. Accordingly, given that the method of settlement is no longer available, the court may order damages quantified by reference to the Consideration.

152 Consequently, we award damages in favour of Axis in the amount of US$2 million, payable by FEM under the Engagement Letter, as damages in lieu of an order for specific performance. This remedy was prayed for at the trial below by Axis "Further and/or alternatively".[106]

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103 RA Vol IV (Part J) at pp 60–61.

104 RA Vol IV (Part V) at p 59.

105 RA Vol V (Part G) at p 4.

106 SOC (A2) at prayer (2) (RA Vol II (Part B) at p 65).

153 We award interest on the damages awarded at [152] above under s 12 of the Civil Law Act 1909 (2020 Rev Ed) at a rate of 5.33% per annum from the date of the filing of the writ (*ie*, 13 April 2021) to the date of this judgment.[107]

154 We uphold the Judge's award of S$10,210 (*ie*, the investigation expenses) as damages for fraudulent misrepresentation and similarly award interest on this sum at the same rate and for the same period as on the award of damages in favour of Axis.

155 In respect of the costs of the trial, we order that FEM bear the costs of Axis and Mr Lee in the sum of S$100,000 together with reasonable disbursements, which if not agreed may be assessed by the Registrar. Axis and Mr Lee had contended below that the amount of S$282,000 was the reasonable sum to award to FEM as costs if FEM had succeeded on all issues, given a trial of 13.5 days.[108] This same figure would be a reasonable starting point for Axis' and Mr Lee's costs in turn, if they had succeeded on all issues. However, Axis did not succeed on all issues. FEM succeeded in its counterclaim for damages for misrepresentation but failed not only in its defence of mistake but also on the issue of rescission and on its counterclaim for conspiracy. Looking at the matter holistically, a net award of costs of $100,000 in favour of Axis and Mr Lee would be fair.

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107 Writ of Summons in HC/S 342/2021 filed 13 April 2021 (RA Vol II (Part B) at pp 5–7).

108 Plaintiff's and 1st Defendant in Counterclaim's Costs Submissions dated 14 September 2023 at para 20.

156 Finally, in relation to the appeal, we award costs in favour of Axis and Mr Lee in the amount of $60,000 (all-in, inclusive of disbursements) with the usual consequential orders.

Belinda Ang Saw Ean
Justice of the Court of Appeal

Kannan Ramesh
Judge of the Appellate Division

Philip Jeyaretnam
Judge of the High Court

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