IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 162

Suit No 520 of 2016

Between

Alacran Design Pte Ltd

… *Plaintiff*

And

Broadley Construction Pte Ltd

… *Defendant*

JUDGMENT

[Contract] — [Misrepresentation] — [Fraudulent]
[Contract] — [Mistake]

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Alacran Design Pte Ltd
v
Broadley Construction Pte Ltd

[2017] SGHC 162

High Court — Suit No 520 of 2016
Audrey Lim JC
18 April; 29 May 2017

10 July 2017

Audrey Lim JC:

1 The plaintiff, Alacran Design Pte Ltd ("Alacran"), claimed against the defendant, Broadley Construction Pte Ltd ("Broadley"), a sum of $423,407.34 for equipment supplied to Broadley in the construction of a residential development project ("the Project"), of which Broadley was a sub-contractor. The main contractor of the Project was Singbuild Pte Ltd ("Singbuild"). It is undisputed that Broadley owed that sum to Alacran. The dispute centres on whether a letter of undertaking discharged Broadley from liability for payment of the sum on the basis that Singbuild was authorised to pay the sum to Alacran on Broadley's behalf.

Background

2 The parties entered into a contract on 8 July 2013 for Alacran to supply equipment to Broadley which Broadley in turn installed for Singbuild for the

Project. From time to time, Broadley would issue delivery orders ("DOs") to Alacran for it to supply the equipment. Around 2015, Broadley became unable to pay Alacran on some of the DOs as it was unable to obtain payment from Singbuild. Several meetings ensued to resolve the issue of payment to Alacran, which eventually led to the signing of a letter of undertaking.

The plaintiff's case

3 Alacran's case is narrated by Jacky, its former business development manager. Jacky had chased Broadley on several occasions in 2015 for payment of the outstanding DOs. In August 2015, he informed Broadley's managing director, Roy, that Alacran would cease to supply further equipment to Broadley if it did not pay on the outstanding DOs. Roy then requested a meeting with Jacky to resolve the payment issue. The meeting took place in August 2015 ("the First Meeting") and was attended by Roy, Chatterly (Broadley's senior quantity surveyor), Ramesh (Broadley's site manager for the Project) and Jacky.

4 At the First Meeting, Roy explained that Broadley could not pay Alacran as it had not received payment from Singbuild. Roy requested Alacran to continue supplying the equipment so that Temporary Occupation Permit could be obtained in time for the Project. Roy also stated that Broadley was expecting monies from Singbuild soon and it would then be able to pay Alacran. Jacky informed Roy that he could not accede to the request unless the then outstanding amount of around $215,588.31 was first paid up. Roy suggested issuing Alacran post-dated cheques for that outstanding amount. However, as Broadley did not have sufficient money in its account, Roy requested Jacky to refrain from presenting the cheques until Broadley had been paid by Singbuild. On that basis Alacran continued to supply Broadley the necessary equipment. Broadley

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subsequently issued to Alacran two cheques post-dated to September 2015 ("the Cheques").

5 On 28 September 2015, Jacky informed Roy that Alacran intended to encash the Cheques. Roy stated that Broadley still did not have sufficient money to honour the Cheques and that he would update Jacky once Singbuild had paid Broadley. After Temporary Occupation Permit was obtained for the Project, Roy arranged another meeting ("the Second Meeting") with Jacky to discuss the outstanding payments, which was by then $423,407.34 ("the Outstanding Sum").

6 The Second Meeting, which took place on 4 November 2015, was attended by Jacky, Roy, Ramesh and Chatterly. At the meeting, Jacky suggested that Broadley pay the Outstanding Sum by instalments. Roy replied that Broadley was not able to pay Alacran so long as Singbuild did not pay Broadley. Roy proposed instead that an undertaking be issued to authorise Singbuild to pay the Outstanding Sum directly to Alacran from moneys that Singbuild owed Broadley under the Project. Jacky informed Roy that it made no difference to Alacran who paid the Outstanding Sum so long as Alacran was paid in full, and that if Singbuild defaulted on the payment Broadley would remain liable for any amount that was outstanding. Roy remained silent when Jacky informed him as such, and Jacky took it that Roy had agreed to what he had said.[1] The parties agreed that what transpired at the meeting would form the basis of their agreement, and Roy stated that he would prepare an undertaking authorising Singbuild to pay the Outstanding Sum to Alacran on Broadley's behalf. At this meeting, Broadley did not mention that it would be absolved from its liability

[1] Notes of Evidence ("NE"), pp 16–20.

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to pay Alacran should Singbuild fail to do so, and Roy also did not request for the Cheques to be returned.

7 On 6 November 2015, Broadley emailed to Jacky a scanned copy of a letter of undertaking ("the Undertaking"), which had been pre-signed by Broadley and Singbuild. The Undertaking stated as follows:

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

8 Jacky signed the Undertaking on Alacran's behalf and sent it back to Broadley. To Jacky's understanding, the Undertaking authorised Singbuild to pay Alacran on Broadley's behalf but did not absolve Broadley from paying Alacran if Singbuild failed to do so. He did not realise that the Undertaking, through its last paragraph, waived Alacran's right to claim the Outstanding Sum from Broadley, as he had signed the Undertaking on the basis that it was consistent with what was agreed by the parties at the Second Meeting and in reliance on the title of the document as an "undertaking".[2] Broadley had thus

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[2] NE, pp 21–22.

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surreptitiously inserted a clause (the last paragraph in the Undertaking) to exclude itself from liability to pay the Outstanding Sum owed to Alacran.

9 A few days after returning the Undertaking to Broadley, Roy phoned Jacky for the return of the Cheques. Jacky informed Roy that Alacran was retaining the Cheques as security, as Singbuild had not paid Alacran and there was no guarantee that it would do so pursuant to the Undertaking. Roy did not call Jacky again to ask him to return the Cheques.

10 As it transpired, Singbuild never paid Alacran the Outstanding Sum despite being chased to do so by Alacran. Alacran therefore proceeded to encash the Cheques in February 2016 but discovered that Broadley had stopped payment on them. Hence, Alacran now claims the Outstanding Sum from Broadley on the following basis: (a) the Undertaking was not valid and binding; (b) there has been a total failure of consideration; (c) Alacran entered into the Undertaking based on a fraudulent misrepresentation or under a unilateral mistake; (d) *non est factum*; and (e) the Undertaking did not contain the entire agreement between the parties.

The defendant's case

11 Roy, Broadley's director and sole shareholder, stated that it was Jacky and not him who had suggested, at the First Meeting, that Broadley issue post-dated cheques to pay the outstanding amount owed to Alacran.[3] Roy agreed to issue the Cheques on condition that Alacran would only present them for payment after being notified by Broadley that it had been paid by Singbuild. As Broadley was unable to pay Alacran even in October 2015, the Second Meeting was held. At that meeting, Roy informed Jacky that Broadley had not received

[3] NE, pp 54–55.

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payment from Singbuild and was thus unable to pay the Outstanding Sum to Alacran. The parties thus agreed that Alacran would absolve Broadley of "any and all liability for [Alacran's] outstanding invoices if Singbuild were to assume full responsibility and accept all liability for the said outstanding invoices".[4]

12 In cross-examination, Roy related the following conversation that transpired at the Second Meeting.[5] Roy told Jacky that when Singbuild pays Broadley, he would notify Jacky to encash the Cheques. Jacky then made a phone call to check with Alacran's management. After that call, Jacky asked Roy to issue an undertaking as Alacran wished to collect the Outstanding Sum directly from Singbuild. Roy asked Jacky what would happen to the Cheques if Broadley issued an undertaking. Jacky replied that he would return the Cheques to Broadley once the undertaking was signed by Alacran, Broadley and Singbuild. Roy agreed to prepare an undertaking and informed Jacky that the undertaking would absolve Broadley from all further liability to Alacran.

13 After the Second Meeting, Chatterly drafted the Undertaking on Broadley's behalf. Before it was signed, Roy met Singbuild's representative, who asked him whether, based on the Undertaking, Singbuild could pay Alacran directly from the amounts that it owed to Broadley. Roy informed Singbuild that it could do so. The Undertaking signed by Broadley and Singbuild was then sent to Alacran on 6 November 2015. Alacran did not seek any clarification on or raise any objections to the Undertaking and returned a signed copy to Broadley. At all material times, Roy was under the impression that Alacran was aware of the terms of the Undertaking, as the Undertaking encapsulated what was agreed at the Second Meeting.

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[4] Roy's Affidavit of Evidence-in-Chief ("AEIC"), para 20(b).

[5] NE, pp 68–74.

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14 As for the Cheques, Jacky did not return them to Roy despite Roy's repeated requests. Around 11 November 2015, Roy informed Jacky that he would cancel the Cheques, which Roy subsequently did on 13 November 2015. In the circumstances, the plain words of the Undertaking clearly supports Broadley's defence that it has been indemnified and is no longer liable to Alacran for the Outstanding Sum.

My decision

What transpired at the Second Meeting

15 Jacky claimed that the parties agreed that what was mentioned at the Second Meeting would form the basis of the agreement between them.[6] Roy similarly stated that the terms of the agreed arrangement formed at that meeting were thereafter encapsulated in the Undertaking.[7] In other words, both parties agreed that the contents of the Undertaking would be based on their oral agreement at the Second Meeting. Hence, I have to determine what transpired at that meeting, in particular who had suggested preparing an undertaking and what the parties had agreed to. Having examined the evidence, I find on balance that it was Roy who had suggested issuing an undertaking, and I prefer Jacky's testimony over Roy's as to what transpired at that meeting.

16 Jacky's testimony in this regard had been consistent. He maintained in evidence-in-chief and in cross-examination that it was Roy who proposed that Singbuild be authorised to pay the Outstanding Sum to Alacran and who mentioned that Broadley would prepare the undertaking for this purpose. This was also stated in Jacky's affidavit (adduced by Broadley) filed for Alacran's

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[6] Jacky's AEIC, paras 28–30.

[7] Roy's AEIC, para 26.

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summary judgment application ("O14 affidavit").[8] On the contrary, Roy's evidence-in-chief was silent on who had first broached this, despite him having the benefit of knowing Jacky's assertions in his O14 affidavit filed earlier. It was only in cross-examination that Roy claimed that it was Jacky who instructed him to issue an undertaking after Jacky had made a phone call to consult Alacran's management. Thus, I find that it was, more likely than not, Roy (and not Jacky) who had proposed an undertaking to authorise Singbuild to pay the Outstanding Sum directly to Alacran on behalf of Broadley, and that Jacky had agreed to this.

17 Next, Roy claimed that the parties agreed that Alacran would absolve Broadley of all liability to pay the Outstanding Sum "if Singbuild were to assume full responsibility and accept all liability for the said outstanding invoices", and that the terms of the oral agreement were encapsulated in the draft copy of the Undertaking[9] (which was the same as the signed copy). Yet what Roy claimed was agreed at the Second Meeting was not, in fact, encapsulated in the draft or signed Undertaking. The Undertaking did not state that Singbuild would assume full responsibility and accept all liability for the Outstanding Sum. On the contrary, in so far as Singbuild's role was concerned, the Undertaking merely stated that it was authorised to pay the Outstanding Sum on Broadley's behalf, which was consistent with Jacky's testimony. Roy could not explain in court where his version of the purported agreement was reflected in the Undertaking and eventually conceded that the Undertaking did not state that Singbuild would assume full responsibility and accept all liability for the Outstanding Sum owed by Broadley to Alacran.[10]

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[8] Defendant's supplementary bundle of documents ("2DB"), pp 9–10.

[9] Roy's AEIC, paras 20(b) and 26.

[10] NE, pp 103–104.

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18 There was thus no evidence, other than Roy's mere assertion, that Singbuild had agreed to assume liability to pay the Outstanding Sum to Alacran. Roy claimed that before signing the Undertaking, Singbuild's representative had asked him whether it could pay Alacran directly from the amounts Singbuild owed to Broadley and Roy had confirmed that it could do so.[11] There was no understanding reached between Broadley and Singbuild that, by signing the Undertaking, Singbuild would assume full responsibility and accept all liability for the repayment of the Outstanding Sum. Although Broadley's assertion that Singbuild has assumed liability for the Outstanding Sum was material to its case, Broadley did not call Singbuild's representative to testify. Even accepting that Roy's conversation with Singbuild's representative occurred, this conversation revealed that, at best, the intent was to allow Alacran to obtain from Singbuild the Outstanding Sum, and for Singbuild to be able to set-off whatever amount it paid to Alacran from the debt that it owed to Broadley. This did not equate to Singbuild agreeing to assume or assuming full responsibility and accepting all liability for the Outstanding Sum. This would also be consistent with the second paragraph of the Undertaking and Jacky's testimony. Roy also admitted that the Undertaking did not mention that Singbuild was obliged to pay Alacran.[12] He also stated that if Singbuild never paid Alacran at all towards fulfilment of the Outstanding Sum pursuant to the Understanding, *he did not know* whether Broadley could claim the entire sum that Singbuild owed to Broadley under the Project[13] – it would seem that Roy himself was not clear as to the purport of the Undertaking.

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[11] NE, p 87.

[12] NE, p 102.

[13] NE, p 101.

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19 Hence I prefer Jacky's testimony that Roy did not mention at the Second Meeting that Broadley would be absolved from its liability or obligation to pay the Outstanding Sum to Alacran if Singbuild assumed liability and responsibility for the Outstanding Sum. Roy's version was not borne out by the subsequent Undertaking or otherwise (see [17] and [18] above). In cross-examination, the reliability of Roy's evidence was further undermined when he first stated that he had mentioned to Jacky that Alacran would absolve Broadley of all liability for the Outstanding Sum if Singbuild were to assume full responsibility and accept liability for it, only to then change his position and claim that it was mentioned by Ramesh instead – a claim which in any event I disbelieved.[14] Surprisingly, Ramesh, who was Broadley's employee, was not called to testify to such a crucial point.

20 I also accept Jacky's evidence that he had informed Roy that it made no difference to Alacran who paid Alacran and that Broadley would remain liable to Alacran for the Outstanding Sum if Singbuild failed to pay Alacran, and that Roy did not disagree with this. In my view (and quite apart from whether there was any misrepresentation by Roy, a point which I will deal with later), Roy's conduct and failure to object to what Jacky had said evinced an acceptance of Jacky's term (see *RI International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521 at [51], [53] and [54]).

21 I thus reject Roy's assertion that the parties had agreed to absolve Broadley of its liability to Alacran once the Undertaking was signed or if Singbuild were to assume full responsibility and accept all liability for the Outstanding Sum, regardless of whether or not Singbuild did pay the Outstanding Sum to Alacran. It was unlikely that Alacran would agree to

[14] NE, pp 73–74, and 77–78.

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absolve Broadley from its debt and look only to Singbuild for payment. This would have made no commercial sense. Alacran knew fully well that Singbuild had cashflow problems and could not even pay its debts to Broadley, and that Broadley's difficulties in paying Alacran was caused by delays in Singbuild paying Broadley. Alacran's conduct throughout, in taking steps to secure payment, has been consistent. This included supplying Broadley with equipment only after Broadley's issuance of the Cheques, chasing Broadley for payments repeatedly, and retaining the Cheques after the Undertaking was signed. Jacky's conduct in retaining the Cheques after the Undertaking was signed lent support to his testimony on what transpired at the Second Meeting, namely that Alacran would look to Broadley if Singbuild did not pay Alacran.

22 I also accept Jacky's testimony that Roy did not again pursue Jacky for the return of the Cheques after Jacky informed him that he would retain the Cheques as security. Even if Roy had made repeated attempts to obtain the Cheques from Jacky, this does not affect my findings on what transpired at the Second Meeting. As such, I find that the Undertaking, particularly the last paragraph, did not accurately encapsulate what was agreed by the parties at the Second Meeting, notwithstanding that they had intended such agreement to be so encapsulated.

23 Defence counsel raised the issue that Jacky did not mention in his summary judgment application or initial Statement of Claim that he had informed Roy that Alacran would look to Broadley for payment of the Outstanding Sum if Singbuild did not pay Alacran. Nevertheless, this does not affect my findings above. Although the original Statement of Claim was short on details, Alacran had consistently maintained (even in its initial Reply) that the Undertaking was merely for Broadley to authorise Singbuild to pay the Outstanding Sum to Alacran on Broadley's behalf and that the parties never

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mentioned that Broadley would be absolved of its liability to Alacran if Singbuild failed to pay.[15] In any event, I had also found that neither Roy nor Ramesh had informed Jacky that Broadley would be absolved from all liability to Alacran once the Undertaking was signed, or that the parties had agreed to relieve Broadley from its liability to Alacran.

Was the Undertaking a valid agreement

24 Based on the above factual findings, I turn to the legal issues and claims made by Alacran. First, the Undertaking is a valid agreement in that the parties intended to create legal relations by entering into it and they agreed that the eventual Undertaking prepared was to be based on what was agreed at the Second Meeting. That much the parties are in agreement.[16] In my view, consideration was also provided for entering into the Undertaking. Without the Undertaking, Alacran was to receive the Outstanding Sum only from Broadley, the sub-contractor of the Project, but payment from Broadley was not forthcoming because it was awaiting payments from Singbuild, the main contractor of the Project. There was thus sufficient consideration for Alacran to enter into the Undertaking, as it allows Alacran to obtain payment directly from Singbuild, and this would presumably allow Alacran to receive the monies faster. The last paragraph of the Undertaking provides that Broadley would be absolved from any further liability to Alacran for the Outstanding Sum. The question then is whether the Undertaking should stand, in light of Alacran's claim that it was induced to enter into it due to Broadley's misrepresentation.

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[15] Para 4 of Reply (Set Down Bundle Tab C); paras 26–27 of Jacky's affidavit in the summary judgment application (2DB 10).

[16] Jacky's AEIC, para 30; Roy's AEIC, para 26; NE, pp 14–15.

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Fraudulent misrepresentation

25 Jacky claimed that he had signed the Undertaking based on Roy's representation at the Second Meeting, that Broadley was to authorise Singbuild to pay the Outstanding Sum to Alacran directly. Further, when Jacky informed Roy that Broadley would remain liable to pay the Outstanding Sum if Singbuild failed to do so, Roy did not say anything to contradict Jacky and thus he took it that Roy had agreed to what he had said. In addition, the title of the document which the parties signed was stated as an "Undertaking Letter". Acting in reliance of those representations made by Roy, Jacky signed the Undertaking.

26 In *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 at [14], the Court of Appeal set out the elements of the tort of deceit (*ie* fraudulent misrepresentation) as follows:

> … 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 had 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.

The Court of Appeal further held (at [24]) that it was no defence that the representee acted incautiously and failed to take steps to verify the truth of the representations which a prudent man would have taken.

27 I have found that Roy had informed Jacky that Broadley would issue an undertaking to authorise Singbuild to pay the Outstanding Sum directly to Alacran, and that Jacky had made it clear to Roy that Alacran would look to Broadley to pay if Singbuild did not. I first deal specifically with whether Roy's silence, when Jacky informed him that Alacran would look to Broadley to

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discharge the Outstanding Sum if Singbuild did not pay, could amount to a representation by Roy.

28 In *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve and another* [2013] 3 SLR 801, the Court of Appeal held at [65] that "mere silence, however morally wrong, will not support an action of deceit". The Court of Appeal also held that there can be no misrepresentation by omission, although active concealment of a particular state of affairs may amount to misrepresentation. In *Trans-World (Aluminium) Ltd v Cornelder China (Singapore)* [2003] 3 SLR(R) 501 at [66] and [68] ("*Trans-World*"), Belinda Ang J held:

> 66 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.
>
> …
>
> 68 When silence … or a failure to speak is alleged to constitute misleading conduct or deception, *the proper approach to take is to assess the silence as a circumstance like any other act or statement and in the context in which it occurs*. Hence, it is necessary to examine the silence with reference to the charge that is made against the defendants.
>
> [emphasis added]

29 Hence, silence or omission to inform the other side of pertinent facts may constitute misrepresentation (*Singapore Tourism Board v Children's Media Ltd and others* [2008] 3 SLR(R) 981 at [46]), and where silence is relied upon, it would normally be necessary to show that the silence was maintained in circumstances where the court considered that the party in question should have spoken (*Hong Leong Singapore Finance Ltd v United Overseas Bank Ltd* [2007] 1 SLR(R) 292 ("*Hong Leong*") at [194]). Although the pronouncement in *Hong Leong* was made in the context of when silence may amount to a

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representation in a claim in estoppel, I am of the view that it is equally applicable in the present case concerning a claim in fraudulent misrepresentation.

30 On the facts, I find that Roy's conduct, taken together with the other matters that transpired at the Second Meeting, amounted to a misrepresentation. This was not a case where Roy was merely silent or had simply omitted to mention to Jacky that the Undertaking was intended to absolve Broadley from all liability to Alacran, whether or not Singbuild pays Alacran. Neither was it a case in which Alacran had formed its own mistaken belief and Broadley had merely passively acquiesced in or not disabused Alacran of that disbelief (*EA Apartments Pte Ltd v Tan Bek and others* [2017] 3 SLR 559 at [29]–[30]). Here, Jacky had conveyed a positive statement to Roy that Broadley would remain liable for the Outstanding Sum if Singbuild did not pay Alacran. Having laid this in the open, Broadley should have refuted this if it did not agree. Roy's position was that the Undertaking would absolve Broadley from all liability to Alacran if Singbuild were to assume full responsibility and accept liability for the Outstanding Sum. This was diametrically opposite to Jacky's term. In the circumstances, Broadley was obliged to inform Jacky that Alacran's position was incorrect or that Broadley did not agree with it. By remaining silent, Roy had misled Jacky, the way a reasonable person in Jacky's position would have been misled, by giving him the false impression that Broadley agreed to what Jacky had stated. Roy had thus wilfully suppressed a material fact which would have been important for Alacran to know, having heard Alacran's position on the matter.

31 It is clear that Jacky had acted upon Roy's misrepresentation when he signed the Undertaking because, as both parties agreed, the Undertaking was meant to capture what was agreed at the Second Meeting. Although Jacky stated in cross-examination that, in signing the Undertaking, he relied on some things

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that Roy *said* and not on everything that he *said*, that was an incomplete picture. Jacky's explanation of what he had relied on (as representation from Roy) was based on defence counsel's question of what Roy had *said* which Jacky relied on.[17] As Jacky explained in evidence-in-chief and in cross-examination, he had signed the Undertaking on the assumption that since Roy said nothing more when Jacky informed him that Broadley would remain liable for the Outstanding Sum if Singbuild did not pay, that formed part of the parties' agreement.[18] In my view, if Jacky had not so assumed but had known that the Undertaking absolved Broadley from liability to pay the Outstanding Sum even if Singbuild failed to pay, he would not have signed the Undertaking.

32 I also find that the representations made by Roy (on Broadley's behalf) was intended to be acted upon by Alacran because Broadley was then owing Alacran a substantial amount and it was in Broadley's interest to find a way to pay Alacran the Outstanding Sum. Jacky had made it clear to Roy that Alacran would look to Broadley to discharge the Outstanding Sum if Singbuild did not pay, and Roy must have known that if he had voiced his disagreement with that, then Jacky would not have agreed to sign the Undertaking. He therefore chose to remain silent, so that Jacky might sign the Undertaking thinking that Roy agreed with his position.

33 In my judgment, Roy did not have an honest belief in the truth of his proposal when he made it. If his intent was to assign to Singbuild Broadley's liability to pay Alacran the Outstanding Sum and to absolve Broadley completely from the debt, he would have known that what he informed Jacky (*ie* that Singbuild would merely be authorised to pay Alacran directly) was not

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[17] NE, pp 30–31.

[18] Jacky's AEIC, paras 29 and 30; NE, pp 16–20.

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true. His real intent, namely that Singbuild would "assume full responsibility and accept all liability" for the Outstanding Sum, was never revealed to Jacky before he signed the Undertaking, and was not even expressly recorded in the Undertaking. There was also no evidence that Singbuild agreed to assume such liability. Roy could not even explain in cross-examination what the second paragraph of the Undertaking was meant to achieve and what an "indemnity" (mentioned in the last paragraph of the Undertaking) meant.[19] This is despite that Broadley had drafted the Undertaking.

34 I would add that even if it could not be said that Jacky had relied on Roy's silence to his statement (that Broadley remained liable if Singbuild defaulted), this did not change my finding that Roy had nevertheless represented to Jacky that Broadley would authorise Singbuild to pay Alacran the Outstanding Sum and that the parties agreed that what was orally agreed would be encapsulated in the Undertaking. Even on this alone, I find that Roy had made such representation deliberately, which he knew to be false, to induce Jacky to sign the Undertaking. It was false because what Broadley intended was to absolve itself from the debt owed to Alacran, and not merely that Singbuild be authorised to release money directly to Alacran of the Outstanding Sum that Broadley owed Alacran.

35 Finally, it is clear that Alacran had suffered damage by acting upon Broadley's representation. It had entered into the Undertaking, the effect of which precluded Alacran from claiming from Broadley the Outstanding Sum even if Singbuild failed to pay. As Singbuild was unable to pay Alacran, Alacran is left without recourse based on the Undertaking. As such, I find that Alacran had made out its claim in fraudulent misrepresentation.

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[19] NE, p 89.

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36 Defence counsel cited the case of *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] 2 Lloyd's Law Rep 511 ("*Peekay*") to state that even if there was a misrepresentation, it was no longer actionable as it would have been corrected by the clear and unambiguous terms of the Undertaking; and stated that *Peekay* received judicial endorsement in *Jurong Shipyard Pte Ltd v BNP Paribas* [2008] 4 SLR(R) 33 ("*Jurong Shipyard*"). This is a misreading of *Peekay* and *Jurong Shipyard*. The Court of Appeal's finding in *Peekay* was based on the facts. The Court found (at [52] and [60]) that the defendant bank had provided to the plaintiff a document which clearly set out the nature of an investment product, but the plaintiff signed the document and entered into the contract without reading the document, acting on his *own* assumption that the investment product to which the document related corresponded to a description that the bank had, on an earlier occasion, provided to him. In other words, there was no misrepresentation from the defendant that the plaintiff relied on. The High Court in *Jurong Shipyard* observed the same when, in referring to *Peekay*, it stated (at [104]) that, "[t]hus, *in the absence of the normal vitiating factors such as duress, undue influence and misrepresentation*, P's signature on the Risk Disclosure Statement estopped the plaintiff from advancing arguments in contradiction of the representations made therein" [emphasis mine]. The cases of *Peekay* and *Jurong Shipyard* therefore do not assist Broadley.

37 As I have found that Alacran had entered into the Undertaking due to Broadley's fraudulent misrepresentation, Alacran has the right to rescind from the Undertaking. It has exercised this right by bringing the present proceedings. Hence, Broadley remains liable to Alacran for the outstanding amount of $423,407.34.

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Unilateral mistake

38 The doctrine of unilateral mistake has mainly been applied with respect to contracts for sale of goods. However, I see no reason in principle why it should also not apply to other types of contract such as that which is the subject of the dispute in the present proceedings. In *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502 at [34] and [53], the Court of Appeal held that for a plea of unilateral mistake to succeed, it must be proved that: (a) one party had made a mistake; (b) the mistake is a sufficiently important or fundamental mistake as to a term; and (c) the non-mistaken party has actual knowledge of the mistaken party's mistake.

39 Hence, even if the Undertaking is not voidable pursuant to fraudulent misrepresentation, it would be void due to Jacky's unilateral mistake. Jacky was mistaken that the Undertaking did not have the effect of absolving Broadley from liability to pay the Outstanding Sum whether or not Singbuild pays on Broadley's behalf. This is a sufficiently important and fundamental mistake. In my view, had Jacky known that the effect of the Undertaking was to absolve Broadley from liability whether or not Singbuild pays on Broadley's behalf, he would not have executed it (see [31] above). Further, Roy had actual knowledge of Jacky's mistake, as Jacky's position that Alacran would still hold Broadley responsible for the debt if Singbuild fails to pay was expressly made known to Roy, and the parties had signed the Undertaking on the basis of their agreement at the Second Meeting.

Miscellaneous grounds

40 Alacran further claimed that the Undertaking was not a valid and binding agreement due to the total failure of consideration by Broadley. This erroneously conflates contractual consideration which is necessary for the

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formation of a valid and binding contract, and consideration given by one party of a contract in anticipation of the other party's performance of contractual obligations. In relation to the former, I have found (at [24] above) that consideration was provided for Alacran's entering into the Undertaking, which was therefore a valid and binding agreement. In relation to the latter, this was not addressed in Alacran's closing submissions and I do not intend to do so since I find that Alacran has succeeded in its claim on other grounds.

41 Likewise, it is not necessary to further consider whether the Undertaking was meant to represent the entire agreement between the parties (which in any event, based on my above findings, would not have been so) and whether any exceptions to s 94 of the Evidence Act (Cap 97, 1997 Rev Ed) should apply to contradict, vary, add to or subtract from the terms of the Undertaking. Finally, as I find that as Alacran had proved its claim on misrepresentation (and additionally in unilateral mistake), I need not deal with its plea of *non est factum*. If I had to decide on this point, I would have found that it was not made out.

Conclusion

42 In conclusion, I allow Alacran's claim with costs. Broadley remains liable to pay Alacran the Outstanding Sum of $423,407.34. As for the costs, I award Alacran $15,000 with reasonable disbursements. In addition, I award $6,000 (inclusive of disbursements) for the summary judgment application taken out by Alacran in this suit.

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Audrey Lim
Judicial Commissioner

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Eugene Thuraisingam and Syazana Yahya (Eugene Thuraisingam LLP) for the defendant.

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