

## When Will the Breach of Duty Exception Apply?

In *Axis Megalink Sdn Bhd v Far East Mining Pte Ltd* [2023] SGHC 243 (***Axis Megalink***), the General Division of the High Court of Singapore (**High Court**) expounded on the breach of duty exception and elaborated on how this principle interacts with the attribution of an agent's knowledge and acts to his principal. The High Court also explained how a mistake as to a counterparty's identity (in particular, the *characteristics* of the counterparty) could lead to the contract being declared void through the operation of the doctrine of unilateral mistake at common law. The High Court further reaffirmed the principle that silence *can* amount to an operative misrepresentation if there is a duty on the alleged representor to speak or disclose certain facts to the representee.

**Our Partners Koh Swee Yen SC and Joel Chng, Senior Associate Felicia Soong and Associate G Kiran acted for the successful defendant before the High Court.**

### Our Comments

The breach of duty exception *vis-à-vis* the attribution of an agent's state of mind and acts to his principal is not new to Singapore law (see the Court of Appeal decision in *Singapore Swimming Club v Koh Sin Chong Freddie* [2016] 3 SLR 845 (***Singapore Swimming Club***)). The High Court's decision in *Axis Megalink* elaborates on this exception and provides guidance on how it should be applied. In doing so, the High Court drew from principles espoused in the leading UK Supreme Court decision of *Bilta (UK) Ltd (in liquidation) and others v Nazir and others (No 2)* [2015] 2 WLR 1168 (***Bilta***), before summarising the principle as follows: an agent in breach of his duties to his principal, or a person who knows of the agent's breach, cannot rely on the agent's knowledge of his breach to argue that he (the agent or a person who knows of the agent's breach) should not be liable to the principal.

Apart from the breach of duty exception, there may be other situations where the court may find that an agent's knowledge is not attributable to the principal. One such circumstance is where there is no connection between the scope of the knowledge-holder's power to act for the principal, and the content of the knowledge that is sought to be attributed to the principal.

The High Court also revisited two familiar doctrines in its decision:

- (a) Unilateral mistake at common law, with the High Court explaining how a mistake as to the *characteristics* of the contracting entity could give rise to a unilateral mistake at common law so as to render the contract in question void; and
- (b) Fraudulent misrepresentation, with the High Court confirming that: (i) silence can amount to a misrepresentation in certain situations; and (ii) it does not matter that the representee was negligent in not verifying the representation, so long as reliance on the false representation is proven.

This update takes a look at the High Court's decision.

## Background

The plaintiff, Axis Megalink Sdn Bhd (**Axis**), is a company incorporated in Malaysia. The defendant, Far East Mining Pte Ltd (**FEM**), is a company incorporated in Singapore, and carries on business as an asset management company. Central to the dispute between Axis and FEM is an engagement letter dated 16 August 2016 (**Engagement Letter**) by which FEM engaged Axis as FEM's introducer and arranger for a then-proposed reverse takeover of China Bearing (Singapore) Limited (**CBL**) by FEM (**Transaction**).

Axis claimed that it should be paid an arranger fee of US\$2 million due to it under the Engagement Letter (**Arranger Fee**) because it had performed all the services specified in the Engagement Letter (**Services**).

On the other hand, FEM's case was that it should not be held to the Engagement Letter on several grounds, including that: (a) Axis had not performed any of the Services; and (b) the Engagement Letter should be void for unilateral mistake. The thrust of FEM's case was that it had entered into the Engagement Letter without knowing that one Mr Lee Kien Han (**Mr Lee**) was the beneficial owner of Axis. This was particularly significant as, throughout the course of the Transaction, Mr Lee had represented himself, and acted, as the legal advisor and representative of CBL / Datuk Lim Kean Tin (**Datuk Lim**, the then non-executive Chairman and majority shareholder of CBL). To conceal the clear position of conflict that Mr Lee was in, it was FEM's case that Axis, Mr Lee, one Mr Lim Eng Hoe (**Mr Lim**, FEM's then Chief Financial Officer), and one Ms Chong Wan Ling (**Ms Chong**, FEM's then Group Financial Controller) took deliberate steps to conceal Mr Lee's beneficial ownership of Axis from FEM's directors. Accordingly, FEM commenced a counterclaim against Axis, Mr Lee, Mr Lim and Ms Chong for, among other things, misrepresentation.<sup>1</sup>

The High Court considered two key questions:

- (a) Did FEM know that Mr Lee was the beneficial owner of Axis when it entered into the Engagement Letter?
- (b) What was the legal effect of FEM not knowing that Mr Lee was the beneficial owner of Axis?

## The High Court's Decision

After a careful analysis of the evidence and witness testimony, the High Court found that FEM was not aware that Mr Lee was the beneficial owner of Axis at the time it entered into the Engagement Letter. The legal effect of this finding was that the Engagement Letter was void for unilateral mistake at common law, and FEM was entitled to avoid the Engagement Letter on this basis. The High Court further agreed with FEM that Axis and Mr Lee were liable for fraudulent misrepresentation, and that FEM was entitled to rescind the Engagement Letter and claim damages.

### *Breach of duty exception and attribution of knowledge*

It was undisputed that, prior to the execution of the Engagement Letter, both Mr Lim and Ms Chong were aware that Mr Lee was the beneficial owner of Axis. Accordingly, the High Court had to first address the question of whether Mr Lim and Ms Chong's knowledge was attributable to FEM. It found that it was not, *albeit* for different reasons.

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<sup>1</sup> FEM discontinued its counterclaim against Mr Lim before trial.

First, the High Court found that Mr Lim's knowledge of Mr Lee's beneficial ownership of Axis could not be attributed to FEM because of the breach of duty exception laid down by the Court of Appeal in *Singapore Swimming Club*. As explained in *Singapore Swimming Club*, the breach of duty exception applies in certain circumstances to prevent the attribution of an agent's knowledge of his breach of duty or acts to the principal even though in other contexts or circumstances, the agent's state of mind and acts would be so attributable.

The High Court expounded on this principle (with reference to Lord Mance's observations in *Bilta*), and summarised it as follows:

*[...] an agent in breach of his duties to his principal, or a person who knows of the agent's breach, cannot rely on the agent's knowledge of his breach to successfully argue that he (the agent or a person who knows of the agent's breach) should not be liable to the principal.*

Applying this principle to the facts, the High Court found that Mr Lim's knowledge of Axis's beneficial ownership could not be attributed to FEM as he had breached his fiduciary duty of loyalty to FEM. In reaching this conclusion, the High Court first found that Mr Lim owed fiduciary duties to FEM as he had voluntarily placed himself in a position where the law can objectively impute an intention on his part to undertake fiduciary duties (citing *Tan Yok Koon v Tan Choo Suan and another and other appeals* [2017] 1 SLR 654 at [194]). Mr Lim breached his fiduciary duties by concealing from, and misrepresenting to, FEM's directors, the beneficial ownership of Axis.

The High Court undertook a different analysis *vis-à-vis* Ms Chong. Rather than an application of the breach of duty exception, the High Court observed that there must be some connection between the scope of the knowledge-holder's power to act for the principal, and the content of the knowledge that is sought to be attributed to the principal. It was of the view that, since Ms Chong's responsibilities were limited to those of an administrative nature and did not include a power to contract on behalf of FEM, there was no reason why her knowledge should be attributed to FEM for the purpose of ascertaining FEM's state of mind when it entered into the Engagement Letter.

#### *Unilateral mistake at common law*

Following from its finding that FEM did not know that Mr Lee was the beneficial owner of Axis at the time of the signing of the Engagement Letter, the High Court then determined that the Engagement Letter should be declared void due to a unilateral mistake at common law on FEM's part as to the beneficial ownership of Axis.

The applicable law in this respect is well settled: in essence, one party must have transacted while operating under a mistake as to a fundamental term of the contract, and the non-mistaken party must have had actual knowledge of the mistaken party's mistake (Court of Appeal in *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 (at [80])).

In reaching its decision, the High Court first examined the decision in *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407, where the Court of Appeal approved of the following principle in cases of mistaken identity as follows:

*...To summarise, the principle espoused in that case is simply that a person cannot make another a contracting party with himself, when he knows or ought to know that the other intends to contract not with him but with another.*

Applying this principle, the High Court concluded that the Engagement Letter should be declared void as FEM and Axis were not *ad idem* as to the party that FEM was contracting with. It observed that:

- (a) 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. In this regard, the High Court accepted that it was FEM's intention to contract with an independent third party who would be able to assist FEM to complete the Transaction.
- (b) It was clear that Axis, through Mr Lee, would have been well aware of FEM's mistake. The High Court noted that Mr Lee was an experienced lawyer who would surely have known that FEM would not have appointed him as FEM's arranger given the position of conflict of interest that he would be placed in. The High Court further recognised that Mr Lee's conduct throughout the Transaction was "*designed to create the impression that he continued to act solely as CBL's or Datuk Lim's lawyer*", and thus found that Mr Lee had *actual knowledge* of FEM's mistake, and omitted to rectify the situation.

#### *Fraudulent misrepresentation*

In respect of FEM's counterclaim against Axis and Mr Lee, the High Court agreed that they had, by their conduct or silence, fraudulently misrepresented the beneficial ownership of Axis.

The law in respect of an actionable fraudulent misrepresentation is also well settled, with the innocent party being required to show that:

- (a) A representation was made by one party;
- (b) The representation was acted on by an innocent party;
- (c) The innocent party suffered detriment as a result; and
- (d) The representation must have been made with the knowledge that it was false; it must have been wilfully false, or at least made in the absence of genuine belief that it was true.

In the context of *Axis Megalink*, the High Court went further to address two specific issues of law, namely:

- (a) Whether mere silence can ever amount to an operative misrepresentation; and
- (b) Whether it matters that the alleged representees (i.e., FEM's directors) did not take steps to ascertain the true ownership of Axis.

In respect of the first issue, the High Court confirmed that silence can amount to a misrepresentation if there is a duty on the alleged representor to speak or disclose certain facts to the representee. Such a duty may arise out of the parties' relationship, or other circumstances if a reasonable person would view the silence as being improper in the circumstances. In the present case, Axis and Mr Lee maintained their silence and did not inform FEM's directors that Mr Lee was the beneficial owner of Axis despite knowing that their silence conveyed a falsity and that this information would be material to the Engagement Letter.

In respect of the second issue, the High Court found that, so long as reliance on the false representation is proven, it does *not* matter that the representee was *negligent* in not verifying the representation, notwithstanding the availability of materials for verification. Accordingly, flowing from the High Court's finding that FEM relied on Axis's and Mr Lee's misrepresentations and entered into the Engagement Letter, it was immaterial that FEM's directors could have taken steps to verify the true ownership of Axis but did not.

In the light of the foregoing, Axis's contractual claim for the Arranger Fee premised on the Engagement Letter was dismissed. The High Court further awarded FEM its claim for damages by reason of its finding that Mr Lee and Axis were liable for fraudulent misrepresentation.

If you would like information and/or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:



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