CASE UPDATE

Parties Who Freely Enter Into Contracts Are Expected To Read And Understand The Contracts They Choose To Enter Into.

21 May 2018

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Introduction

1. In the case of *Broadley Construction Pte Ltd v Alacran Design Pte Ltd* [2018] SGCA 25, the Court of Appeal emphasised that it is inherent in the law of contract and integral to commercial life that parties who freely enter into a bargain are expected to read and understand the contracts they choose to enter into. Parties cannot escape the consequences of such contracts based on doctrines of mistake and/or misrepresentation if they failed to do so, and cannot seek to shift the blame on the counterparty for not looking out for their interests.

2. In this case, two parties engaged in negotiations before they signed an undertaking. During the negotiations, one party put forward a particular position, which was met with silence from the opposing party. After the negotiations, the opposing party produced an undertaking with a clause in direct contradiction to the proposing party's position. The proposing party signed the undertaking without reservation or qualification, instead of rejecting the clause or seeking clarifications.

3. The Court of Appeal decided (on the facts) that the proposing party was bound by the undertaking.

Facts

4. Broadley Construction Pte Ltd (**"Broadley"**) was Singbuild Pte Ltd's (**"Singbuild"**) sub-contractor. Broadley used the equipment supplied under a contract with Alacran Design Pte Ltd (**"Alacran"**) to fulfill its obligations under its contract with Singbuild. However, Singbuild defaulted on its payments to Broadley, causing Broadley in turn to default on payments to Alacran. The representatives from Broadley and Alacran then met to discuss the default in payment.

5. During one of the meetings, it was proposed that an undertaking be issued to authorise Singbuild to pay Alacran directly using part of the monies that Singbuild owed Broadley.

6. Alacran's representative then informed Broadley that it did not matter who paid the outstanding sum as long as it was paid, but if Singbuild defaulted on the payment, Broadley would remain liable for any outstanding amount. In response to this particular statement, Broadley's representative remained silent.

7. Two days after the aforementioned meeting, Broadley sent a draft of the undertaking to Alacran. The draft was a brief, one-page letter (**"the Undertaking"**). The terms of the Undertaking authorised Singbuild to pay on behalf of Broadley the outstanding sum due to Alacran. The Undertaking also expressly stipulated that "*[t]his letter indemnifies [Broadley], and is free of any responsibility and is no longer liable with regards to the outstanding balance with [Alacran].*" In other words, the Undertaking released Broadley from its obligation to pay Alacran if Singbuild defaulted on the payment.

8. Thereafter, Singbuild did not pay Alacran and Alacran sued Broadley for the outstanding sum. Broadley relied on the Undertaking to argue that it was absolved from any liability to pay Alacran. In response, Alacran argued that the Undertaking was vitiated. In particular, Alacran argued that it had communicated to Broadley that Broadley would remain liable for any outstanding sum if Singbuild defaulted, and there was fraudulent misrepresentation on Broadley's part and/or unilateral mistake as to a term of the Undertaking on Alacran's part.

9. The High Court originally accepted Alacran's arguments and held that the Undertaking was vitiated. Broadley appealed against the High Court's decision. The Court of Appeal allowed the appeal and decided that the Undertaking was valid in absolving Broadley of its liability to Alacran.

Silence as a form of representation

10. The Court of Appeal held that silence inherently lacks the definitive quality of an active statement and is rarely considered sufficient to amount to a representation. However, silence can amount to a representation if a reasonable person would construe it as one in the circumstances.

11. In this case, the silence by Broadley's representative was ambiguous at best and a reasonable person would not have understood the silence as an assent to Alacran's position. The parties were negotiating with clear opposing commercial positions. Alacran had to put forth its position that Broadley remain liable after signing the Undertaking, to which Broadley's representative did absolutely nothing in response. It was material to the court that Broadley did not shrug, nod or did anything by way of his conduct that might have signified agreement. Hence, the court found that Broadley did not expressly agree to Alacran's position or was at the very least non-committal.

12. More importantly, it was the common understanding between both parties that a written agreement would be entered into after the meeting. The silence by Broadley's representative was **before** the written Undertaking was entered into. Broadley's disagreement with Alacran's position (that Broadley ought to remain liable) was clear from the terms of the Undertaking.

13. Accordingly, the Court found that the silence by Broadley's representative did not amount to a representation.

A misrepresentation would not induce a party into a contract when the express terms of the contract corrected the position.

14. Even if the silence by Broadley's representative had amounted to a representation, the Court held that Alacran would not have been induced by the representation.

15. The terms of the Undertaking clearly contradicted or corrected Alacran's position that Broadley would remain liable for the outstanding sum, and both parties knew that the written Undertaking was meant to be the operative contract between them.

16. It is Alacran's own responsibility to read and understand the Undertaking which was a brief and simple one-page document. The indemnity clause which absolved Broadley of all liability is also clearly provided for just above the space for the parties' signatures.

17. The Court stressed that a person is bound by the terms of the contract he signs, notwithstanding that he may be unaware of its precise legal effect. Businessmen with equal bargaining power are expected to read their contracts, know the falsity of the earlier representation and defend their own interests before entering into contractual obligations.

18. Alacran could have declined to sign the Undertaking or sought clarifications as to its legal effects. If anything, Alacran had assumed that the Undertaking reflected the agreement at the meeting. It cannot be said that Alacran was induced by an earlier representation made by Broadley at the meeting.

Unilateral Mistake

19. The alternative argument by Alacran was that it had entered into the Undertaking under a unilateral mistake that Broadley remains liable to Alacran.

20. However, the Court of Appeal held that Broadley did not have actual knowledge of Alacran's alleged mistake. Alacran's own evidence was that they had time to review the Undertaking, had a subsequent meeting with Singbuild and Broadley where Singbuild and Broadley signed the Undertaking before Alacran's representative finally took the Undertaking back to its office for signing.

21. It was therefore entirely reasonable for Broadley to assume that Alacran had read, and was agreeable to, all the terms of the Undertaking.

22. Broadley was also not willfully blind to Alacran's alleged mistake. There was no evidence that Broadley's representative had a suspicion that Alacran was mistaken as to the terms of the Undertaking.

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