

Bank of China Limited (Singapore Branch) v Huang Ziqiang and another
[2014] SGHC 245

Case Number : Suit No 138 of 2013
Decision Date : 20 November 2014
Tribunal/Court : High Court
Coram : Belinda Ang Saw Ean J
Counsel Name(s) : Hri Kumar Nair SC, Tham Feei Sy and Zhao Liwen Constance (Drew & Napier LLC) for the plaintiff; Chan Ming Onn David, Seah Yong Quan Terence, Christine Ong and Justin Chan (Shook Lin & Bok LLP) for the first defendant.
Parties : Bank of China Limited (Singapore Branch) — Huang Ziqiang and another

Civil Procedure – Rules of court – Order of speeches

Credit and Security – Guarantees and indemnities – Guarantor

Evidence – Documentary evidence

Contract – Misrepresentation – Fraudulent

Contract – Consideration – Promissory estoppel

20 November 2014

Judgment reserved.

Belinda Ang Saw Ean J:

Introduction

1 This is an action by the plaintiff, Bank of China Limited (“the Bank”), to recover the sum of US\$66,838,374.08 and contractual interest from the first defendant, Mr Huang Ziqiang (“Mr Huang”), as guarantor of loans granted by the Bank to Yuan Sheng Shipping (Singapore) Pte Ltd (“the Borrower”). The second defendant, Huali Shipping Holding (H.K.) Co Limited, a company incorporated in Hong Kong, was the corporate guarantor of the Borrower’s liabilities to the Bank.

2 The present action continues against Mr Huang alone pursuant to his personal guarantee dated 13 January 2009 (“the Guarantee”) and a written confirmation and undertaking dated 1 April 2011 (“the Undertaking”). Judgment in default of defence was entered against the second defendant on 10 July 2013.

3 Mr Huang does not dispute the Borrower’s indebtedness to the Bank. At the heart of this dispute are the Guarantee and the Undertaking, in respect of which Mr Huang now says that he executed pursuant to the Bank’s fraudulent misrepresentations. The central thrust of Mr Huang’s defence in repelling the Bank’s claims is that the Bank’s officers had falsely represented that the Bank would not enforce its rights under the Guarantee. In his defence, Mr Huang relies upon the aforementioned fraudulent misrepresentations that allegedly induced him to execute the Guarantee. The same false representations are said to also give rise to Mr Huang’s counterclaim for a rescission of the Guarantee. Mr Huang essentially relies on his counterclaim as his defence that he is not liable on the terms of the Guarantee. The alleged fraudulent misrepresentations made by the Bank are also

said to give rise to the defence of promissory estoppel.

4 In this judgment, the evidence as to whether the alleged false representations were indeed made by the Bank will be examined. This court will also consider the commercial reality of the situation, and whether it is conceivable that the Bank would have made the alleged false representations. When fraudulent misrepresentation is alleged, the question of motive is often raised. As was the case here, Mr Huang put this question of motive at the forefront of his arguments. What the parties did, wrote and said to each other are either established by documentary evidence or dependent on the witnesses' recollection of relevant events that occurred more than five years ago. Needless to say, the witnesses for Mr Huang were required to give evidence about words spoken more than five years ago. Inevitably, recollections would have faded over time and attempts at later reconstruction would result in robust cross-examinations of factual witnesses.

5 In this action, the Bank is represented by Mr Hri Kumar SC ("Mr Kumar"). Mr Huang is represented by Mr David Chan Ming Onn ("Mr Chan").

The loan facility, loan revisions and event of default

6 The background of this case is symptomatic of ship purchases which were made at record high prices on the back of rising charter rates. In those halcyon years, ship prices climbed to their highest in 2008. After 2008, however, charter rates tumbled precipitously, resulting in a slump across the world's merchant fleets, and ship prices consequently plunged to their lowest in almost a decade in 2012. With neither a rebound in charter rates nor a revival of ship prices in sight, the crystal ball gazing turned to when the slump would bottom out. The industry sentiment then was that charter rates and ship prices would rally after some time. The Bank's time horizon was that it would take two years before any sign of recovery in the shipping industry could be seen. According to the Bank, Mr Huang had a more positive outlook. As at 2009, his sentiment was that the industry would improve *within* the next two years. [\[note: 1\]](#)

7 In July 2008, the Bank lent US\$90.65m to the Borrower on a term loan facility ("the 2008 Loan Facility") to partially finance the purchase of a bulk carrier, *Bet Performance* (later renamed *Pacific Yuansheng*). The 2008 Loan Facility was secured by a first statutory mortgage on *Pacific Yuansheng*, an assignment of charter hire and insurance proceeds in respect of *Pacific Yuansheng* and a corporate guarantee dated 8 July 2008 ("the Pacific King Corporate Guarantee") from Pacific King Shipping Holding Pte Ltd ("Pacific King"). Mr Huang was at all material times the majority shareholder and a director of Pacific King.

8 The charterer of *Pacific Yuansheng* defaulted on the charter about four months after the full amount of the 2008 Loan Facility was drawn down. Pacific King, on behalf of the Borrower, who anticipated difficulties in keeping up with the loan instalments, commenced negotiations with the Bank to revise the 2008 Loan Facility. [\[note: 2\]](#) Negotiations took place between the parties to revise the instalment payment schedule in November 2008. By a facility letter dated 6 January 2009 ("the 2009 Facility Letter"), the Bank revised the 2008 Loan Facility limit downwards to US\$78.15m after giving credit for five months of instalment payments made by the Borrower. The original repayment schedule was revised and rescheduled. The 2009 Facility Letter was accepted by way of the First Supplemental Facility Agreement dated 13 January 2009 between the Bank and the Borrower ("the 1SFA").

9 Clause 3 of the 1SFA, which relates to additional security, states, *inter alia*, as follows: [\[note: 3\]](#)

The parties hereto agree that with effect from the date hereof, following additional terms and conditions shall be included in the Facility Agreement:

3.1 Additional Security. In addition to the Mortgage, ... and the [Pacific King Corporate Guarantee], the Borrower shall, as security the payment of the Total Indebtedness, cause to be executed and delivered to the [Bank] a fresh personal guarantee by [Mr Huang] ... in the Bank's standard format.

10 Pursuant to cl 3 of the 1SFA, Mr Huang gave his personal guarantee to the Bank (*ie*, the Guarantee).

11 Some two years later, the Bank was again asked, for the second time, to further revise the 2008 Loan Facility as amended by the 1SFA. By a facility letter dated 1 March 2011 ("the 2011 Facility Letter"), the Bank revised the facility limit to US\$74.67m after giving credit for what had been paid by the Borrower. The 2011 Facility Letter was accepted by way of a Second Supplemental Facility Agreement dated 1 April 2011 ("the 2SFA"). The 2SFA was secured by, *inter alia*, the Pacific King Corporate Guarantee and the second defendant's corporate guarantee. Mr Huang signed the Undertaking confirming that the Guarantee would apply to the 2SFA.

12 The Borrower eventually defaulted on the loan repayments. The Bank made a demand for repayment of the loan and interest on 25 January 2013, and thereafter commenced the present action to seek repayment of the outstanding principal sum along with substantial interest. As stated, the Borrower's indebtedness to the Bank and the amount of the indebtedness are not disputed.

Mr Huang's misrepresentation allegations

13 It is necessary to outline the separate events said by Mr Huang to have given rise to the fraudulent misrepresentations made by the Bank that it would not enforce its rights under the Guarantee. Mr Huang's pleadings included a claim under s 2 of the Misrepresentation Act (Cap 390, 1994 Rev Ed), but this particular claim was not seriously pursued in his closing submissions. Thus, the main focus of this judgment will be on Mr Huang's pleaded case of fraudulent misrepresentation and his defence of promissory estoppel.

14 It is Mr Huang's pleaded case that in order to induce him to execute the Guarantee, two of the Bank's officers, Mr Hu Beihai ("Mr Hu") and Mr Zheng Guoliang (who is also known as Mr Tay Kok Leong ("Mr Tay")), had orally represented to Mr Yang Yongjun ("Mr Yang"), the Finance Director of Pacific King and a director of the Borrower the following: [\[note: 4\]](#)

(a) that the Bank would continue to provide the term loan facility (albeit now in the sum of US\$78.15m) only if Mr Huang provided a personal guarantee to the Bank to jointly and severally guarantee the payment of the said sum should the Borrower fail to abide by its obligations under the 2008 Loan Facility ("Representation 1");

(b) that the Bank would not call on and enforce the Guarantee ("Representation 2"); and

(c) that the Guarantee was merely a formality required by the Bank for the continuation of the 2008 Loan Facility (as revised by the 1SFA) and for the Bank to continue to liaise with Mr Huang ("Representation 3").

15 Mr Huang's pleadings collectively referred to the above three representations as "the Representations". He further averred in his pleadings that the Representations were falsely made in

order to induce him to execute the Guarantee, and that the Representations were made on various occasions before he signed the Guarantee: [\[note: 5\]](#)

6.1.5 On various occasions thereafter, the [Bank's Mr Hu and Mr Tay], in order to induce [Mr Huang] to enter into the [Guarantee], repeated the Representations to [Mr Huang].

6.1.6 In order to induce [Mr Huang] to enter into the [Guarantee], the [Bank's] Ms Diana Ho and Ms Chung Ngian Sin also made the Representations to [Mr Huang].

6.1.7 In or about March 2009, Ms Diana Ho and/or Ms Chung Ngian Sin further repeated the Representations to [Mr Huang] during a meeting in respect of the [Guarantee]. Relying on the Representations and induced thereby, [Mr Huang] signed the [Guarantee].

16 Mr Huang pleaded that the Bank knew the Representations to be false in view of its intention to enforce the Guarantee as evidenced by its demand for payment under the Guarantee on 25 January 2013 and its commencement of the present action on 18 February 2013. [\[note: 6\]](#)

The negotiations leading to the 1SFA in 2009

17 The individuals from Pacific King who were involved in the negotiations with the Bank to revise the 2008 Loan Facility were: (a) Mr Yang; and (b) Mr Keith Lim ("Mr Lim"), the Financial Controller of Pacific King.

18 According to the Bank, on or about 7 November 2008, four of its officers (namely, Mr Hu, Ms Chung Ngian Sin ("Ms Chung"), Ms Diana Ho ("Ms Ho") and Mr Tay) met Mr Huang, Mr Yang and Mr Lim at the Borrower's office. At the material time, Mr Hu was the Bank's Assistant General Manager in the Corporate Banking Department, whilst Mr Tay was the head of the Bank's Corporate Banking Department. Ms Chung was a Team Leader in the Bank's Corporate Banking Department, and she supervised the relationship managers in that department. Ms Ho was the assigned relationship manager of the Borrower.

19 At that 7 November 2008 meeting, the Bank was asked to revise the repayment schedule in order to help the Borrower tide over the economic slowdown. The Bank's version of events is that Mr Hu informed Mr Huang that the Bank would require additional security for the revision of the 2008 Loan Facility. A personal guarantee from Mr Huang was mentioned. Mr Huang disagreed that the Bank mentioned the subject of a personal guarantee at the 7 November 2008 meeting.

20 Approval of the proposed revised repayment schedule was given by the Bank's Head Office on or around 31 December 2008. One of the conditions of the revision was the provision of a personal guarantee by Mr Huang, and this was set out in the 2009 Facility Letter. Mr Yang claimed that prior to 31 December 2008, during meetings with Mr Hu and Mr Tay, the Representations were made to him, and he then communicated the Representations to Mr Huang.

The negotiations leading to the 2SFA in 2011

21 Negotiations for the 2SFA started in June 2010. Mr Yang and Mr Xue Wei ("Mr Xue"), the second defendant's Vice-Manager (Finance), were involved in the negotiations. The plan was to seek a second revision of the 2008 Loan Facility. In early 2011, Mr Li Chongyang ("Mr Li"), the second defendant's General Manager, replaced Mr Yang in the negotiations.

22 Mr Huang's pleaded case was that a second revision of the 2008 Loan Facility took place in or

around May 2011 in Hong Kong when the Bank's officers, Mr Tay and Ms Dang Fang ("Ms Dang"), met him and Mr Li. However, in his testimony, he referred to a meeting in Hong Kong at the second defendant's office in June 2011 ("the June 2011 Meeting"). At the June 2011 Meeting, the Bank's Mr Tay and Ms Dang informed Mr Huang that he would be required to sign documents relating to the second revision of the 2008 Loan Facility and that the documents would be no different from those which he had previously signed in respect of the 1SFA ("Representation 4").

23 Mr Huang averred that the Undertaking was "surreptitiously" included in the bundle of documents for the 2SFA and that the inclusion of the Undertaking was contrary to Representation 4. Mr Huang said that he signed the 2SFA and the Undertaking in June 2011, and that the Undertaking was backdated to 1 April 2011. Notably, this alleged backdating of the Undertaking is not an issue in this action.

Representations repeated in July 2012

24 Mr Huang alleged in this Affidavit of Evidence-in-Chief that he met Mr Tay and another gentleman from the Bank's Credit Risk Department in Hong Kong in or around the second half of 2012. In cross-examination, Mr Huang clarified that the 2012 Meeting was in July 2012 ("the July 2012 Meeting"). According to Mr Huang, Mr Li and Mr Xue were present at the July 2012 Meeting.

25 Mr Huang claimed that he brought up the Representations at the July 2012 Meeting, and Mr Tay nodded in agreement. Presumably, Mr Huang is saying that he interpreted Mr Tay's nod as affirming the truth of the Representations. I will comment on this July 2012 Meeting when considering the defence of promissory estoppel (see [112] below).

The burden of proof

26 According to Mr Huang, the Representations were made on several occasions by various officers of the Bank *prior* to the execution of the Guarantee, which, he maintained, was signed in or about March 2009 and not on the date stated on the face of the document (*ie*, 13 January 2009). The allegation of backdating was used to explain and support Mr Huang's assertion that the Guarantee was executed later than the date stated on the face of the Guarantee. Notably, it was not Mr Huang's case that the backdating was improper so as to invalidate the Guarantee. Against the backdrop of this narrative, and before the first day of trial, the Bank filed an application (*vide* Summons No 3481 of 2014 ("SUM 3481")) to cross-examine Mr Huang on the Representations before the Bank's witnesses took the stand. In other words, the Bank, as the plaintiff (who would usually open its case first), wanted Mr Huang to open his case first.

27 Order 35 r 4(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the RSC") provides:

The Judge before whom an action is tried may give directions as to the party to begin and the order of speeches at the trial and, subject to any such directions, the party to begin and the order of speeches shall be that provided by this Rule.

28 Order 35 r 4(6) of the RSC provides, *inter alia*, that the defendant is to begin his case where the burden of proof on all issues lies with him.

29 Section 105 of the Evidence Act (Cap 98, 2008 Rev Ed) is also relevant. Section 105 reads:

The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any particular

person.

30 Mr Kumar relied on the aforesaid provisions of the RSC and the Evidence Act (specifically, ss 103–105 thereof) to invite the court to direct Mr Huang to open his case first since: (a) the Bank had *prima facie* proved its case based on the undisputed facts; and (b) the legal and evidential burden to prove the Representations was on Mr Huang. In sum, Mr Kumar submitted that all the issues in dispute related to the defences pleaded by Mr Huang.

31 In considering Mr Kumar's argument, I began with the pleadings. Ordinarily, the pleadings are relevant to determine the question of who should open the case. The burden of proof is generally on the party who affirms rather than denies a particular thing, and this can be deduced from the pleadings (see, for example, *Joseph Constantine Steamship Line Limited v Imperial Smelling Corporation Limited* [1942] AC 154).

32 The English decision of *Grunther Industrial Development Ltd v Federated Employers Insurance Association Ltd* [1973] 1 Lloyd's Rep 394 is instructive as it highlights the distinction between the burden of proof and affirmations and denials in pleadings. In that case, the plaintiff brought an action on a fire policy against the defendant insurer. The defendant admitted the policy and the occurrence of the fire, but raised fraud as a defence. On the question of whether the defendant should begin instead of the plaintiff, the trial judge directed the plaintiff to begin even though the defendant had raised fraud in its defence. The English Court of Appeal agreed with the trial judge. Lord Roskill observed at 395:

The gravamen of Mr Mortimer's submission was – as no doubt it was before Mr Justice Bean – that the substantial issue in this case is on the question of fraud raised by the defendants. *That in the event may well prove to be so; but that, in my judgment, does not in the least determine upon whom is the obligation to open the case. For that it is necessary to look at the pleadings, and when one looks at the pleadings one finds that the statement of claim alleges a loss under a consequential loss policy of fire insurance. The defence first of all requires the production of that policy as a condition precedent to its admission; and, secondly, puts in issue the loss.* Therefore it seems to me that *before there can be any question of the issue of fraud arising here, the plaintiffs must first of all produce the original policy, because otherwise, without its production, the claim fails in limine; and, secondly, the plaintiffs must prove some loss even though it is agreed that liability only is to be determined at the trial;* because without proof of some loss there could be no cause of action in any event.

[emphasis added]

33 At the hearing of SUM 3481, Mr Kumar argued that since Mr Huang was not challenging his signature on the Guarantee and the indebtedness of the Borrower, Mr Huang should be ordered to open his case and lead evidence-in-chief before the Bank. In short, the legal and evidential burden was on Mr Huang to prove the Representations, and he should therefore take the stand on this issue before the Bank's witnesses did so. In my view, the critical point that was not addressed was Mr Huang's pleaded case that he executed the Guarantee in or about March 2009, and not on 13 January 2009, the date appearing on the face of the Guarantee. The month of March 2009 is significant: on Mr Huang's pleaded case, he executed the Guarantee after the Representations; he relied on them and was thereby induced into executing the Guarantee.

34 I concluded that this was *not* a case where the burden of proof in respect of all the issues rested on Mr Huang. Even though Mr Huang did not dispute the Borrower's indebtedness and his signature on the Guarantee, the Bank was still required to admit in evidence the primary facts that

gave rise to the creation of obligations under the Guarantee on 13 January 2009. As stated above (at [3]), Mr Huang relies on his counterclaim as his defence that he is not liable on the terms of the Guarantee. The Representations made by the Bank were also said to lead to the defence of promissory estoppel. If Mr Huang wished to allege that the Guarantee was backdated such that he was induced by the Representations to sign the Guarantee on a later date, he must first elicit in his evidence-in-chief both the alleged fact of backdating as well as the making of the Representations before the Bank could rebut his evidence.

35 Accordingly, I decided the Bank would have to open its case first and lead evidence-in-chief in respect of its primary case involving the 2008 Loan Facility and the revisions thereto, as well as the execution of the Guarantee on 13 January 2009 and the Undertaking on 1 April 2011, including the legal and binding effect of the Guarantee and the Undertaking on Mr Huang. The Bank, however, was not required to call rebuttal evidence on the Representations pleaded in Mr Huang's defence at that stage. With the exception of one witness, Ms Ho, the witnesses called by the Bank to give rebuttal evidence were different from the witnesses called to give evidence-in-chief on the Bank's primary case. I further decided that Mr Huang should be cross-examined on the issues of the Representations and backdating before the Bank's rebuttal witnesses took the stand.

Was the Guarantee backdated to 13 January 2009?

36 An important preliminary issue is the alleged backdating of the Guarantee. Mr Huang needed to establish backdating of the Guarantee because on his pleaded case, the Representations were made after 13 January 2009. Mr Huang maintained that he signed the Guarantee only in March 2009, and not on 13 January 2009, the date stated on the face of the Guarantee.

37 Mr Kumar invited the court to make a finding that the Guarantee was executed on 13 January 2009. He submitted that a resolution of the alleged backdating in favour of the Bank would decidedly resolve this action on the Guarantee since the finding of the primary fact (*ie*, the date of execution of the Guarantee) would permit the court to draw an inference which would go on to destroy the Representations alleged by Mr Huang and his defence of promissory estoppel.

38 After considering the totality of the evidence and the submissions by counsel on both sides, I find that the Guarantee was executed on 13 January 2009, the date stated on its face. I will now elaborate.

Proof of the date of the Guarantee

39 As a starting point, a plain reading of the Guarantee suggests that it was executed under seal on 13 January 2009. Ordinarily, the date on the face of a document is *prima facie* evidence that the document was executed on that particular date. *Halsbury's Laws of Singapore* vol 10(2) (LexisNexis, 2013 Reissue) ("*Halsbury's* vol 10(2)") comments at para 120.275:

The date which the document bears is *prima facie* the date on which the document was made. The evidence which the inscribed date represents is, however, rebuttable and may be rebutted by evidence that the document was post-dated in order to attain a particular purpose, or to commit a fraud or by circumstantial evidence of the post-mark on the evidence in which it was carried to its destination. ...

40 In respect of deeds, the general rule is that a deed takes effect from the date upon which execution is completed by delivery, and the date on the document is *prima facie* the date of delivery of the document (see *Universal Permanent Building Society v Cooke* [1952] 1 Ch 95 at 101). Similarly,

Patterson J in *Browne v Burton* (1847) 17 LJQB 49 said at 50:

... [A] deed or other writing must be taken to speak from the time of execution, and not from the date apparent on the face of it. That date is indeed to be taken prima facie as the true time of execution but as soon as the contrary appears, the apparent date is to be utterly disregarded.

41 It was not disputed that the Guarantee was executed as a deed. By cl 4 of the 2009 Facility Letter, the Borrower's obligations were to be secured as follows: [\[note: 7\]](#)

4. Security

The Revised Facility together with all monies and liabilities that may be owing to the Bank from time to time shall be secured by:-

...

(iii) a personal guarantee from [Mr Huang] for US\$78,150,000.00 in the bank's standard form. *The said guarantee is to be executed under seal in the presence of a Solicitor if executed in Singapore and a Notary Public if executed outside Singapore.*

[emphasis added]

42 The execution page of the Guarantee shows that it was signed under seal in the presence of a witness on 13 January 2009. That witness was one Ms Kueh Ping Yang ("Ms Kueh"), the solicitor from Rajah & Tann LLP ("R&T") acting for the Bank in the revision of the 2008 Loan Facility. The Guarantee also contained an attestation certification which reads as follows: [\[note: 8\]](#)

On this 13 day of January 2009 before me, Kueh Ping Yang, an Advocate and Solicitor of the Supreme Court in the Republic of Singapore practising in the Republic of Singapore personally appeared Huang Ziqiang who of my own personal knowledge I know to be the identical person whose name is subscribed to the within written instrument and acknowledged that he had voluntarily and knowingly executed this instrument at Singapore.

Witness my hand, (signature)

43 Section 6(b) of the Civil Law Act (Cap 43, 1999 Rev Ed) only requires a guarantee to be in writing and signed by the guarantor. As noted at [41] above, it was a contractual requirement of the 2009 Facility Letter that the Guarantee was to be executed under seal *and* be witnessed by the Bank's solicitor. In this context, the certification of the attesting witness (at [42]) was not a requirement by law, but the product of an agreement between the parties. This distinction is important because in the latter scenario, due execution of the deed in question may be proved by other evidence in the absence of the attesting witness to prove due execution (see *Halsbury's* vol 10(2) at para 120.273).

44 In this case, the solicitor, Ms Kueh from R&T, was not called as a witness to prove due execution of the Guarantee on 13 January 2009. Instead, the Bank led other evidence to prove that.

Other evidence adduced by the Bank to prove due execution of the Guarantee on 13 January 2009

45 As Mr Kumar pointed out, it was clear on the face of the Guarantee and from all the other

documentary evidence tendered that the overall objective evidence pointed to the Guarantee having been executed on 13 January 2009. In contrast, the only "rebuttal evidence" adduced by Mr Huang was his own "bald assertion" that the Guarantee was signed only in March 2009 and was backdated to 13 January 2009. [\[note: 9\]](#)

Prima facie evidence on the face of the Guarantee

46 The *prima facie* evidence on the face of the Guarantee is that it was signed under seal and delivered on 13 January 2009. The signature page showed that Mr Huang signed the Guarantee in the presence of Ms Kueh. Mr Huang's signature is not in dispute and the signature on the face of the document must *prima facie* be taken to have the intended effect on the signatory.

47 I agreed with Mr Kumar that the absence of the attesting witness, Ms Kueh, at the trial was not fatal to the Bank's case that the Guarantee was executed on 13 January 2009. Mr Kumar relied on the contemporaneous nature of Ms Kueh's attestation. It is not controversial that Ms Kueh was the lawyer appointed by the Bank to prepare the 1SFA and to attend to the additional security required by the Bank in the 2009 Facility Letter (see [53] below). Ms Kueh's certification that Mr Huang appeared before her to execute the Guarantee under seal on 13 January 2009 (at [42] above) was made in the ordinary course of the discharge of her professional duty following the requirement in the 2009 Facility Letter that Mr Huang's "guarantee is to be executed under seal in the presence of a Solicitor if executed in Singapore" (see [41] above). Mr Huang's overall evidence in cross-examination did not rebut this *prima facie* evidence of Ms Kueh's certification.

48 During cross-examination, Mr Huang was referred by Mr Kumar to Ms Kueh's certification (at [42] above):

Q: ... So what this notation means is that Ms Kueh from Rajah & Tann is certifying that you appeared before her on 13 January to sign the guarantee.

A: It was signed subsequently.

Q: Right. So on your evidence, therefore Ms Kueh is telling a lie. On your evidence.

A: I can't say that. ...

...

Q: So, please. On your evidence, therefore, Ms Kueh is being dishonest?

A: I wouldn't dare say that. I did sign this document, and it was pursuant to the bank's request that we have the date backdated.

...

Q: Are you saying that Ms Kueh was wrong?

A: I wouldn't dare say so.

...

Q: ... My question is, when the bank sued you, you realised that what Ms Kueh says is wrong

and against your interest; “yes” or “no”?

A: In these proceedings -- yes.

...

49 Mr Kumar continued to press Mr Huang on Ms Kueh’s certification: [\[note: 10\]](#)

Q: ... I think the witness is absolutely clear about what the position is. This [attestation] clause says, and the witness knows that he appeared before Ms Kueh on 13 January 2009 to sign the guarantee, and did sign the guarantee. Right, Mr Huang. Your evidence is quite clear. And you accept – and your evidence also says that Ms Kueh was wrong.

A: Well, this document is detrimental to me.

Mr Huang’s personal guarantee was a condition of the 1SFA

50 It is the Bank’s case that the 2009 revision to the original repayment schedule under the 2008 Loan Facility was subject to Mr Huang providing a personal guarantee; otherwise the Borrower would have to make instalment payments as per the original repayment schedule or risk defaulting. All the Bank’s witnesses, Mr Hu, Mr Tay, Ms Chung and Ms Ho, deposed to this condition pertaining to the requirement of additional security for the 1SFA. There was also reference to this condition in the Bank’s internal document of 6 January 2009 (see [82] below). It is therefore plausible that the Bank did indeed require this condition to be satisfied before the 1SFA could take effect.

Contemporaneous documentary evidence

51 I now turn to other contemporaneous documentary evidence that the Bank adduced to prove that the Guarantee was signed on 13 January 2009. Notably, the 1SFA and the additional security required under the 2009 Facility Letter had to be ready and signed by 15 January 2009. This followed from the fact that 15 January 2009 was the commencement date of the new repayment schedule for the 96 monthly instalments. The undisputed fact is that the Bank and the Borrower (together with Pacific King) were working towards revising the 2008 Loan Facility by 15 January 2009. In this regard, the revision would only take effect upon R&T’s confirmation on 14 January 2009 that legal documentation for the revision of the 2008 Loan Facility had been completed and was in order. [\[note: 11\]](#) In other words, R&T, who was acting for the Bank in the revision of the 2008 Loan Facility, was required to confirm to the Bank that the legal documentation for the revision was in order and had been duly completed before the new repayment date of 15 January 2009 under the 1SFA.

52 The contemporaneous documentary evidence showed that R&T sent a draft copy of the 1SFA and the Bank’s standard personal guarantee to the Borrower on 9 January 2009 and 12 January 2009 respectively. Mr Huang admitted that he attended at R&T’s office to sign the 1SFA on 13 January 2009. He was aware that he signed the 1SFA on 13 January 2009 because the Borrower needed the 2009 Loan Facility to be revised before 15 January 2009. He was also aware that one of the conditions of the 1SFA was for him to provide his personal guarantee for the revision. [\[note: 12\]](#)

53 Ms Gao Shan (“Ms Gao”), the Bank’s Vice-President of the Legal and Compliance Department, was the officer who instructed Ms Kueh to prepare the legal documentation necessary for the revision of the 2008 Loan Facility. [\[note: 13\]](#) Despite Mr Huang’s claim that he signed the Guarantee in March 2009, Ms Gao’s evidence, which was supported by contemporaneous documents and which was not

rebutted at the trial, was that the Guarantee, duly executed by Mr Huang, was received by the Bank on 13 January 2009. Ms Gao received it under cover of R&T's letter dated 13 January 2009. [\[note: 14\]](#) The 1SFA, the Guarantee, the requisite Directors' Resolution and Members' Resolution were then sent to the Bank's Safe Custody Division for retention on 15 January 2009. The Bank's Application for Lodging of Securities bears the date 15 January 2009. In addition, Mr Chan did not challenge Ms Chung's internal report dated 13 January 2009, where Ms Chung wrote: [\[note: 15\]](#)

...

- The Supplemental Agreement relating to the revised repayment schedule as per the Bank's Letter of Offer dated 6 Jan 2009 Ref: CBD/0004/09 was signed by the Company on 13 Jan 2009. Legal Section is arranging for the Bank to execute the Supplemental Agreement.
- *Personal Guarantee from [Mr Huang] for USD 78,150,000.00 was signed and given to the Bank on 13 Jan 2009.*

....

- Considering that the relevant documents have been duly executed coupled with the fact that the financial covenants are fully complied with, would concur with RM's recommendations to permit the revised repayment plan to take effect immediately upon receiving R&T's advice that all documentations are in order (R&T's advice are expected to be given to the Bank on 14 Jan 2009). For approval.

[emphasis added]

54 All this contemporaneous documentary evidence, the authenticity of which was not challenged by Mr Huang, further supported a finding that the Guarantee was indeed executed on 13 January 2009 as stated on its face.

Mr Huang's unsubstantiated allegation of execution in March 2009

55 Even though Mr Huang's answers in cross-examination (at [48]–[49] above) did not allege that Ms Kueh's certification of the due execution of the Guarantee on 13 January 2009 was improper, it is significant that Mr Huang's evidence that he signed the Guarantee only in March 2009 was not corroborated. He gave little detail of the alleged March 2009 execution. He merely said that he attended at the Bank's office together with Mr Lim to sign the Guarantee. Significantly, Mr Lim was not called as a witness.

56 Furthermore, Mr Huang's plea in his amended defence was as follows: [\[note: 16\]](#)

6.1.7 In or about March 2009, [Ms Ho] and/or [Ms Chung] further repeated the Representations to [Mr Huang] during a meeting in respect of the [Guarantee]. Relying on the Representations and induced thereby, [Mr Huang] signed the [Guarantee].

57 It bears noting that Mr Huang's *oral* testimony seriously undermined his plea in para 6.1.7 of his amended defence (see [56] above). Put simply, his oral testimony that he relied upon and was induced by the Representations to execute the Guarantee *after* he met the Bank's Mr Hu at a dinner at the Shangri-La Hotel was a departure from the plea in his amended defence.

58 On Mr Huang's own case, the representation that he took seriously was Representation 2 (*ie*,

that the Bank would not enforce the Guarantee against him). Mr Huang stated that he agreed to give his personal guarantee *after* he met the Bank's Mr Hu at a dinner at the Shangri-La Hotel in or around February 2009. At that dinner, Mr Hu told him that the Guarantee was merely facilitative and that the Bank would not enforce it against him. Mr Huang explained that prior to Mr Hu's utterance of Representation 2, other officers of the Bank had told Mr Yang the same thing, but he (Mr Huang) had been somewhat "sceptical" until the same representation was repeated by Mr Hu, who was a senior officer of the Bank.

59 For completeness, Mr Hu denied making the Representations. He also denied dining with Mr Huang at the Shangri-La Hotel in or about February 2009. I will assess Mr Huang's evidence of his meeting with Mr Hu against the relevant documentary evidence in due course.

Mr Huang's conduct prior to securing the 2011 revision to the 2008 Loan Facility

60 Mr Kumar referred to Mr Huang's personal contribution of US\$200,000, which was one of the conditions imposed by the Bank for the second revision of the 2008 Loan Facility in 2011. It was submitted that Mr Huang's conduct confirmed his mindset that the Guarantee was executed on 13 January 2009. Mr Kumar argued that Mr Huang's conduct after the execution of Guarantee supported the Bank's case that it had not promised to refrain from enforcing the Guarantee against Mr Huang.

61 Mr Huang's reason for the contribution is significant. In cross-examination, Mr Huang confirmed that it was because of the Guarantee which he gave to the Bank that allowed the latter to ask him to pay the US\$200,000. [\[note: 17\]](#) Mr Huang's witness, Mr Xue, testified that the payment of US\$200,000 was not from Mr Huang and that he had inserted Mr Huang's name as the remitter in the remittance advice at the request of the Bank for reporting purposes. This oral testimony appears to be an afterthought. It was not mentioned in Mr Xue's written evidence nor was it alluded to by Mr Huang either in his oral testimony or in his pleadings.

Mr Huang's inconsistent conduct in Suit No 131 of 2013

62 I now turn to Suit No 131 of 2013. This was an action brought by the liquidator of Pacific King against Mr Huang and Mr Yang for alleged breaches of their duty as directors ("the Pacific King Action"). As it turned out, Mr Huang's subsequent conduct in the Pacific King Action proved to be a double-edged sword for him.

63 In my view, it was not easy to reconcile Mr Huang's conduct in the Pacific King Action with his ostensibly conflicting testimony in the present proceedings that he executed the Guarantee only in March 2009. In this regard, Mr Huang's subsequent conduct in the Pacific King Action is admissible in evidence to show, for the purposes of the present proceedings when the Guarantee was created (*ie*, the date when it was signed under seal and delivered).

64 In the Pacific King Action, Mr Huang accepted and proceeded on the basis that: (a) the Guarantee was executed on 13 January 2009; [\[note: 18\]](#) and (b) the Guarantee was enforceable against him. When it came to the present proceedings, however, he adopted the contrary position that the Guarantee was executed only in March 2009 and was backdated to 13 January 2009, and sought rescission of the Guarantee because of the Representations, which he alleged to be untrue. Mr Huang's explanation of these inconsistencies was unconvincing, and I was not impressed by his attempt to disassociate himself from the defence which he filed in the Pacific King Action. That defence contained a clear affirmation that the Guarantee was executed on 13 January 2009 and that Mr Huang had assumed legal obligations by reason of the Guarantee: [\[note: 19\]](#)

In consideration for [the Bank's] agreement to revise the terms of the [2008 Loan Facility], to *inter alia*, grant further time to repay the [2008 Loan Facility], [Mr Huang] executed the [Guarantee] to secure the [2008 Loan Facility as revised] on 13 January 2009.

65 Mr Huang admitted to appointing R&T as his lawyers in the Pacific King Action and giving instructions to R&T to advance such a defence in the Pacific King Action. [\[note: 20\]](#) It seems to me that the averment quoted above (at [64]), which was prepared on Mr Huang's instructions, represented and confirmed his mindset that the Guarantee was executed on 13 January 2009. Mr Huang had ample opportunities to bring up the backdating in the course of the proceedings in the Pacific King Action if he had wanted to, but he did not do so. For instance, Mr Huang filed two other affidavits in the Pacific King Action in respect of which he gave instructions to R&T in relation to the Guarantee. Notably, those affidavits were filed before the defence quoted above (at [64]), and the deliberate impression given in those affidavits was his potential exposure to personal liability by reason of the Guarantee, which was a valid and enforceable guarantee. That stance contrasted sharply to the one taken by Mr Huang in the present action where he is denying personal liability under the Guarantee on account of the Representations.

66 Mr Huang's instructions to his lawyers in the Pacific King Action represented and confirmed his mindset that the Guarantee was executed on 13 January 2009. In particular, the affidavit which he filed on 29 November 2012 to set aside a *mareva* injunction order obtained by the liquidator in the Pacific King Action is illuminating and exposes the inconsistent stance taken by him. It showed Mr Huang blowing hot and cold on the issue of the enforceability of the Guarantee against him. In that supporting affidavit, Mr Huang's position was that he had taken on personal liabilities by giving the Guarantee to the Bank, and that he had done so to financially assist Pacific King and its subsidiaries: [\[note: 21\]](#)

37. The efforts taken by me in ensuring that the Group and its assets are preserved is at odds with the Liquidator's claims that I was not acting in the interest of [Pacific King] and was misappropriating funds from [Pacific King]. In contrast, I wish to highlight that I had personally taken on liabilities when there was no legal obligation for me to do so:

...

(b) in the Revised Banking Facility dated 6 January 2009 in relation to the US\$90,650,000 term loan facility granted by [Bank of China] to the Group's Subsidiary, [the Borrower]. I had to secure the revised Banking Facility by a personal guarantee for the sum of US\$78,150,000. ...

...

38. If I had intended to misappropriate the funds of [Pacific King] as alleged by the Liquidator, there would have been no reason for me to undertake these personal liabilities in later 2008 and 2009.

67 Mr Huang's allegation in the passages quoted above of having undertaken personal liabilities is patently inconsistent with his vehement rejection of liability under the Guarantee in the present case. Additionally, in related proceedings in Hong Kong, Mr Huang again accepted the Guarantee as enforceable. It is significant that he informed the Hong Kong court under oath that he had taken on personal liabilities under the Guarantee: implicit in that statement was his belief that the Guarantee was enforceable against him. In my view, the contradictory positions taken by Mr Huang were

irreconcilable and they undermined his case.

Finding on whether the Guarantee was backdated

68 For the reasons above, I find that Mr Huang failed to rebut the Bank's overall evidence, which consisted of oral and documentary evidence and other objective evidence that showed, on a balance of probabilities, that the Guarantee was indeed executed on 13 January 2009, the date stated on its face. In coming to this conclusion, I tested the credibility of Mr Huang's assertion of the dinner at the Shangri-La Hotel with Mr Hu in February 2009 when the Representations were ostensibly made against the contemporaneous documentation. I found that the contemporaneous evidence showed that on a balance of probabilities, the Guarantee was executed by Mr Huang on 13 January 2009, and not in March 2009.

69 I thus find that Mr Huang executed the Guarantee in Ms Kueh's presence on 13 January 2009, and in doing so, he knew that the Bank would use it as security for the Borrower's repayment obligations under the 1SFA. Mr Huang signed the Guarantee so as to allow the Bank and the Borrower to proceed to restructure and reschedule the Borrower's instalment payments, with the revised payment schedule to commence on 15 January 2009.

Allegations of the Representations to resist enforcement of the Guarantee

Observations

70 In view of my finding that the Guarantee was executed on 13 January 2009, Mr Huang's claim that he was induced to execute the Guarantee after his alleged dinner with Mr Hu at Shangri-La Hotel in February 2009 did not provide any sustainable basis upon which he could resist enforcement of the Guarantee.

71 There is, however, a further discrete issue as to whether the Bank is estopped from relying on its strict legal rights under the Guarantee. This discrete issue is founded on the same representations that are said to be false and untrue (*ie*, the Representations). It requires this court to consider the Representations, which were allegedly made on different occasions by various officers of the Bank (see [14]–[15] above). It was Mr Huang's pleaded case that *after* he signed the Guarantee, the Bank's Mr Tay (also known as Mr Zheng) orally reassured him in May 2011 (before he signed the Undertaking) that the Representations were true. Furthermore, Mr Huang in his Affidavit of Evidence-in-Chief deposed that in July 2012 the Bank assured him that the Representations were true. [\[note: 22\]](#) Mr Huang thus argued that pursuant to the oral reassurances, the Bank was to refrain from enforcing the Guarantee and the Undertaking. [\[note: 23\]](#)

72 In examining this issue, apart from considering evidence as to whether the Representations were made, the court will also consider the commercial reality of the situation as alleged by Mr Chan (*ie*, the "motive" argument described at [91] below) and whether it is conceivable that a lender would have made a representation that it would not enforce the personal guarantee.

73 As fraudulent misrepresentation is alleged, Mr Huang has to show that the Bank either made the Representations without any honest belief that they were true, or made the Representations recklessly or carelessly without regard to whether they were true or false. For completeness, the elements of fraudulent misrepresentation as stated by the Court of Appeal in *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 at [14] are:

... First, there must be a representation of fact made by the defendant 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.

74 The Bank denied making the Representations. Its case was that it was entitled to recover from Mr Huang the debts of the Borrower under the terms of the Guarantee and the Undertaking.

75 Mr Huang's misrepresentation allegations may be trimmed to essentially one all-encompassing allegation in the form of Representation 2. Even if such a representation had indeed been made, it would have had to be made fraudulently in order for Mr Huang to succeed on his misrepresentation defence. The burden of proof on Mr Huang in this regard is onerous, even on the balance of probabilities (see *Wu Yang Construction Group Ltd v Zhejiang Jinyi Group Co Ltd and others* [2006] 4 SLR(R) 451 at [94]).

76 I should also point out that by the end of the trial, Mr Huang appeared to be relying on a variant of Representation 2 namely, that the Bank would not call on and enforce the Guarantee *under normal circumstances* ("Meaning A").

Discussion and decision

77 Having considered the totality of the evidence and the submissions by counsel for both parties, I find that there is no sustainable basis upon which Mr Huang can resist enforcement of the Guarantee. I will now elaborate.

Did the Bank make any representations?

78 The first question is whether the Bank made any representations to Mr Huang and, if so, what those representations were. As regards the Representations, Mr Huang and Mr Yang testified that they were made, whereas the Bank's officers deny that they were made. This court will have to decide whose version is more probable.

79 Mr Chan referred to the Bank's documents and motive as its reasons for making the Representations. I make two points. First, Mr Chan's submissions were based on his case theory, which was premised on *ex post facto* reasoning. Secondly, Mr Chan faced the difficulty of pointing to clear evidence that the Bank's officers had knowingly made false representations. The Bank cannot be found guilty of fraud unless it is shown that it intended or was willing for the Representations to be understood in a sense which it knew to be false.

(1) The Bank's documents

80 I begin with Mr Chan's cross-examination of Mr Tay. As stated earlier, Mr Tay is also known as Zheng Guoliang in the documents. At the material time, Mr Tay was the Bank's Departmental Head of Corporate Banking. Mr Chan's first point related to assurances allegedly given by the Bank to Mr Huang in order to convince the latter to give a personal guarantee. Those assurances were supposedly "documented".

81 Mr Tay was cross-examined on two documents. The first was the Bank's call report dated 6 January 2009 prepared by Ms Ho, the relevant portions of which read as follows: [\[note: 24\]](#)

Response from Borrower

...

Although [Mr Huang] had previously agreed to provide his personal guarantee, we were informed by Mr Yang that [Mr Huang] may be reluctant to provide the same. ...

...

Comments

[Mr Huang] had been absent during our past two visits to the [Borrower]. According to [Mr Yang] and [Mr Lim], *he is still reluctant to provide his personal guarantee despite our repeated reassurances.*

...

[emphasis added]

82 The second document is an internal memo written by Ms Chung on 6 January 2009. The relevant portions of this document read as follows: [\[note: 25\]](#)

...

- [Mr Huang], the major shareholder and key person, initially agrees to guarantee the Revised Facility of USD 78,150,000.00 for the survival of the [Borrower]. However, he indicated his reluctance to give his personal guarantee recently after seeking opinions from his business associates and other professionals.

- *CBD ultimately manages to convince [Mr Huang] to cooperate in giving his guarantee, falling which the [Borrower] will face immediate legal proceedings from the Bank.*

- Should [Mr Huang] abide by his words to wrap up all the necessary documentation before the 14 Jan 2009, the revised repayment schedule will take effect.

- In the event that [Mr Huang] changes his mind and chooses not to cooperate to have the matter wrapped up before 14 Jan 2009, the original repayment schedule remains. Failure or refusal to meet the repayment due under the original repayment schedule under this circumstance will result in an Event of Default.

[emphasis added]

83 Mr Chan questioned Mr Tay on what "reassurances" were given to Mr Huang by the Bank, and whether it was the case that those "reassurances" managed "to convince" Mr Huang to execute the Guarantee. [\[note: 26\]](#)

A: ... 6 January. Like what Diana had written in her report on 3 AB76, Mr Huang felt that the outlook for the next two years was not good. It should be that he said that there was a positive outlook for the next two years. So, Mr Huang himself felt that it was good, so he wanted to restructure the loan, and therefore he agreed to provide the personal guarantee.

Q: Mr Tay, is it your evidence that there were no assurances, or in fact, reassurances, given to Mr Huang to convince him in his personal capacity to take on the borrower's liability?

A: That's right.

Q: The bank did not persuade him, cajole him?

A: No, we did not.

84 Mr Chan continued to press Mr Tay on the subject matter: [\[note: 27\]](#)

Q: I understand your evidence earlier to be that the reassurance, the pressure, the pushing, occurred in December 2008 during the two meetings through Mr Yang Yongjun and Mr Keith Lim; correct?

A: Yes.

Q: Can I now ask you to clarify what was this pressure or pushing that was applied by your bank on Mr Huang through Mr Yang Yongjun and Mr Keith Lim?

A: Very simple. The restructure was subject to Mr Huang's provision of his personal guarantee, and this was a must. When Keith had the negotiation with us, we told Keith to go back to tell Mr Huang, to convey that to Mr Huang, and that he had definitely to do it. Because it was a requirement. If Mr Huang was unable to provide his personal guarantee, then we would fall back on the original agreement.

...

Q: ... I put it to you that the reassurance or the pushing or the pressure that was applied by the bank on Mr Huang was that the personal guarantee would never be enforced against Mr Huang.

A: I disagree.

85 Mr Kumar made two points in respect of Mr Tay's answers in cross-examination as set out above. First, it was no longer Mr Huang's case (given Mr Yang's oral testimony) that Representation 2 was a representation that the Bank would *never* enforce the Guarantee against Mr Huang. Mr Yang's evidence in cross-examination on what Mr Tay said was that *the Guarantee would not be enforced under normal circumstances* . [\[note: 28\]](#) I have referred to this variant of Representation 2 as Meaning A (at [76] above). In other words, the representation made in Meaning A is that the Bank would not call on and enforce the Guarantee *under normal circumstances*. Mr Chan argued that Mr Yang's testimony did not change the meaning of Representation 2. He interpreted Mr Yang's evidence as this: a breach of the Guarantee due to the Borrower's inability to pay was a "normal circumstance" under which the Bank would not enforce the Guarantee. [\[note: 29\]](#)

86 I find Mr Yang's attempt to explain what he meant by "normal circumstances" somewhat contrived. [\[note: 30\]](#) Having surmised that the Bank would enforce the Guarantee only under "special circumstances", he was simply guessing and could not explain what "special circumstances" meant. [\[note: 31\]](#) I find that, on any view, a representation in the form of Meaning A is too vague to amount to be a representation of a material fact. It is trite law that to constitute a representation, a

statement must relate to a matter of fact (see *Bestland Development Pte Ltd v Thasin Development Pte Ltd* [1991] SGHC 27). Furthermore, since the representation made in Meaning A is too vague, it is not possible for Mr Huang to prove that the Bank intended Meaning A to be understood in a sense which it knew to be false. Put another way, it is clear that Mr Huang failed to prove that the representation made in the form of Meaning A was false.

87 Mr Kumar's second point was the alleged pressure that was placed on Mr Huang to give a personal guarantee made no sense if such pressure was intended to coerce him into giving a personal guarantee that was not going to be enforced. I completely agree with Mr Kumar's rhetorical question: [\[note: 32\]](#)

But it is completely inconsistent to then allege (as Mr Huang does) that the Bank would **at the same time say that it would not enforce the [Guarantee]**. If so, where was the "pressure"? The suggestion made by Mr Huang's counsel, with respect, makes no sense. [emphasis in bold and emphasis in italics in original; emphasis added in bold]

88 Mr Kumar also raised the point that Ms Ho, the maker of the Bank's call report dated 6 January 2009, was not cross-examined on what she meant by the phrase "repeated reassurances". To Mr Tay, the "repeated reassurances" that the Bank gave was that it would work together with the Borrower to wait out the difficult market conditions prevailing at that time. On that evidence, Mr Kumar submitted, the Bank did exactly what Mr Tay explained when it agreed to the Borrower's request to revise the repayment schedule a second time in 2011.

89 The transaction in question involved restructuring the original repayment schedule under the 2008 Loan Facility in early 2009. I had in mind the serious nature of the fraudulent misrepresentation allegations made against the Bank. Plainly, the burden of proof rested on Mr Huang to make good his case of fraud. In my view, there was no basis for concluding that Mr Huang was somehow duped into executing the Guarantee. If Mr Huang were correct, it would mean that the aim of the Bank's officers in Singapore would then have been to mislead not only Mr Huang, but the Bank's Head Office in Beijing as well. Mr Kumar interpreted all this – including Mr Huang's evidence in cross-examination [\[note: 33\]](#) that he was led to believe that the Bank's officers in Singapore wanted his personal guarantee only to satisfy the Bank's Head Office – as implying that the Bank's officers in Singapore were involved in a conspiracy to mislead the Bank's Head Office and that Mr Huang was a willing participant to their plan. [\[note: 34\]](#) To this submission, Mr Chan clarified that it was not Mr Huang's case that the Bank's officers in Singapore intended to mislead the Bank's Head Office, in that Mr Huang was not concerned with what transpired between the Bank and its Head Office. [\[note: 35\]](#) Mr Huang's case was, instead, that the Bank, through its officers, had misled him, and all he had to show to make out his case was that the Bank's officers persuaded him to sign the Guarantee "on the promise that the [Guarantee] will never be enforced against him". [\[note: 36\]](#)

90 In these circumstances, I need say no more other than that I would not readily accept Mr Huang's evidence, let alone regard it as making good a charge of fraud. Besides, his evidence was not corroborated by any reliable evidence.

(2) The "motive" argument

91 I now turn to Mr Chan's other contention. Another limb of Mr Huang's pleaded case was that it would not have made any commercial sense for him to execute the Guarantee if the Representations had not been made. [\[note: 37\]](#) This is the "motive" argument. Mr Chan submitted that it was not commercially sensible for Mr Huang to "imperil his own assets to secure Pacific King's survival" in bad

times: [\[note: 38\]](#)

The market was in the throes of an unprecedented downturn which caught many including the parties to this action by surprise. It is undisputed that [Mr Huang's] fortunes were tied to Pacific King Shipping's. He enjoyed the upside but there was no reason he should go down with the company.

92 Mr Chan's case theory as to why the Bank would promise Mr Huang that it would never enforce the Guarantee was as follows: [\[note: 39\]](#)

In fact it was the [Bank] who was desperate for the repayment plan to be revised and when the [Bank's] Head Office required the provision of a [personal guarantee] from [Mr Huang], the [Bank] had no choice but to make the [Representations] in order to persuade and induce [Mr Huang] to execute the [Guarantee].

93 Put another way, the Bank "would say anything" to secure the Guarantee as it desperately needed the revised repayment schedule so as to avoid significant loss on the 2008 Loan Facility. [\[note: 40\]](#) Thus, on Mr Chan's case theory, the Bank could not, and in fact, did not have any belief or reasonable belief that the Representations were true. [\[note: 41\]](#)

94 Mr Chan highlighted the Bank's "motivation" to make the Representations alongside the grant of a revision of the original instalment payment schedule under the 2008 Loan Facility, in that the Bank was at risk of not recovering the outstanding loan. According to Mr Chan, restructuring was the only "meaningful and realistic option" [\[note: 42\]](#) for the Bank in order to avert a significant loss on the 2008 Loan Facility, especially at a time (so the argument developed) when those of the Bank's officers who were involved in the 2008 Loan Facility were under pressure from the Bank's Head Office to prevent the Borrower from defaulting on a sizeable loan that had been drawn down less than six months ago. In those circumstances, the Bank had "no other option but to suggest a revised repayment plan and therefore did all it could to secure [Mr Huang's Guarantee] which was a condition laid down by [the Bank's] Head Office". [\[note: 43\]](#) To that end, the Bank's officers persuaded Mr Huang to sign the Guarantee on the promise that the Guarantee would "never be enforced against him". [\[note: 44\]](#)

95 According to Mr Chan, if not for the Representations made to Mr Huang, there would have been no logical reason for Mr Huang to agree to give a personal guarantee as he was not confident that the shipping industry would turn around in time for him to steer Pacific King and its group of companies, including the Borrower, out of the financial difficulties prevailing at that time. In fact, Mr Chan submitted, it was the Bank and not the Borrower that wanted the restructuring and a personal guarantee from Mr Huang to make up the shortfall in the value of the security which the Bank had in hand at that time, in the face of the utter lack of any prospect of selling *Pacific Yuansheng* in the difficult market conditions. Mr Chan also pointed out the Bank's acute awareness that Pacific King would not be able to meet its obligations under the corporate guarantee which it had executed for the 2008 Loan Facility and had no other unencumbered assets.

96 I was not persuaded by Mr Chan's "motive" argument for the following reasons. First, despite Mr Chan's *ex post facto* reasoning, there could have been no logical or commercial reason for the Bank to accept a guarantee that was not worth the paper it was written on. Why would the Bank want an unenforceable personal guarantee when its intention was to treat the Guarantee as additional security? That was unthinkable since the Bank's concern at that time was that Pacific King had no unencumbered assets available to offer to the Bank for the revision of the original payment schedule

under the 2008 Loan Facility. The purpose of the personal guarantee from Mr Huang was to serve as additional security to make good the shortfall in the value of *Pacific Yuansheng*.

97 I accepted Mr Kumar's submissions [\[note: 45\]](#) that: (a) the restructuring was mutually beneficial to the parties; (b) Mr Huang was willing to give a personal guarantee as he was confident that Pacific King and its group of companies would be able to ride out the difficult business conditions and that the group's fortunes would improve; (c) the restructuring would give the Borrower and Pacific King the much-needed time to repay the 2008 Loan Facility; and (d) the personal guarantee from Mr Huang was intended to be additional security was to secure that much-needed time.

98 Secondly, I did not think it was useful to dwell on the "motive" argument. It must not be forgotten that Mr Huang was relying on fraudulent misrepresentation to resist the enforcement of the Guarantee against him. On the basis of his case, he had to prove fraud; and if he succeeded in doing so, motive was irrelevant. As Lord Herschell in *Derry v Peek* (1889) 14 App. Cas. 337 said at 374, "if fraud is proved, motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made." Since Mr Huang failed to prove fraud, motive was equally irrelevant, given his pleaded case.

99 For the reasons stated, I agree with Mr Kumar that the Bank did not misrepresent that it would not enforce the Guarantee against Mr Huang. Mr Huang also failed to mount a credible case that the Bank gave representations that it would not enforce its strict legal rights under the Guarantee and the Undertaking. I will now elaborate on the Undertaking.

The Undertaking

100 As regards the enforceability of the Undertaking, Mr Huang's pleaded case is that the Undertaking had no legal binding effect on him as it was a mere letter of comfort. [\[note: 46\]](#) Mr Huang also claimed to have been misled into signing the Undertaking after having been told by the Bank's officers that the documents he would be asked to sign for the 2SFA would be identical to those which he had signed in respect of the 1SFA (*ie*, Representation 4). It was Mr Huang's pleaded case that in or around May 2011, Mr Tay and Ms Dang met him to discuss the second revision of the 2008 Loan Facility (*ie*, the 2SFA). It was at that May meeting that Representation 4 was made by Mr Tay.

101 I noted that Mr Huang's evidence in his Affidavit of Evidence-in-Chief contradicted his pleaded case. Specifically, he deposed to a meeting in June 2011 (and not in the month of May 2011 as pleaded), and that it was at that June 2011 meeting that Representation 4 was made by Mr Tay. Mr Li's Affidavit of Evidence-in-Chief adopted Mr Huang's written evidence, and for the same reason, his testimony was equally unsatisfactory.

102 Mr Xue who was said to be at the June 2011 meeting did not mention this in his Affidavit of Evidence-in-Chief. Instead, Mr Xue, who was called as Mr Huang's witness, orally testified that Mr Tay mentioned that the Bank would not enforce the Guarantee when Mr Xue and Mr Tay were on their way to the airport. Notably, Mr Xue did not depose to this conversation in his Affidavit of Evidence-in-Chief. It was also not a matter referred to in Mr Huang's pleadings.

103 According to the Bank, Mr Tay and Ms Dang met Mr Huang and Mr Li on 23 June 2011 on a very different matter. The purpose of the meeting was to follow up on the shortfall in the Borrower's assignment account and to get an update on the operations of the Borrower. The Guarantee was not discussed at all at that meeting. Hence, there was no reason for either Mr Tay or Ms Dang to have made Representation 4, which, in any case, made no sense to the Bank.

104 The 2011 Facility Letter was issued in March 2011 with the revised terms of the loan to commence from January 2011. Clause 5 of the 2011 Facility Letter provided as follows: [\[note: 47\]](#)

5. SECURITY

The Revised Facility together with all monies and liabilities that may be owing to the Bank from time to time shall continue to be secured by:–

- (i) the [Mortgage];
- (ii) the existing Corporate Guarantees; and
- (iii) the [Guarantee]

105 By cl 2 of the 2SFA, the second revision to the 2008 Loan Facility was to take effect from 1 April 2011. The 2SFA and the Undertaking were both dated 1 April 2011, and the requisite resolution was passed on 31 March 2011. In short, the Bank relied on the dates stated in the SFA and the Undertaking as the effective dates of these two documents.

106 The Bank's claim against Mr Huang for breach of the Undertaking is on the basis that he had failed, neglected and refused to: (a) procure the Borrower's timely repayment of the sums due under the 2008 Loan Facility (as amended by the 1SFA and the 2SFA); and/or (b) perform the Borrower's obligations thereunder. Mr Huang did not dispute that he signed the Undertaking. It follows that the signature on the face of the document must *prima facie* be taken to have the intended effect on the signatory.

107 Besides, the Undertaking was part of a commercial transaction and the language of the Undertaking sought to create legally binding obligations between the Bank and Mr Huang. In cases involving commercial transactions, the parties are presumed to have intended to create legal relations and the burden of proof lies on Mr Huang to show the contrary (see *Hongkong & Shanghai Banking Corp Ltd v Jurong Engineering Ltd and others* [2000] 1 SLR(R) 204 at [43]).

108 In this case, the Undertaking was one of the legal documentation required by the 2011 Facility Letter which was sent to Mr Huang for his execution. In other words, the Undertaking was part of the amendment or variation of the 2008 Loan Facility (as amended by the 1SFA). By the terms of the Undertaking, Mr Huang acknowledged that: (a) the Undertaking was given in consideration of such amendment or variation of the 1SFA; and (b) he was rendering himself legally obliged to perform the Borrower's obligations to the Bank.

109 Mr Huang disputed the effect of the Undertaking, which, he maintains, operated merely as a letter of comfort. Not only did he not substantiate his contention, his answers in cross-examination disclosed precisely Mr Huang's thought at the material time that the Undertaking created legal obligations and that he could not deny liability: [\[note: 48\]](#)

Q: So in your mind when you signed the letter of undertaking- let's call it a letter since you don't like the word undertaking. In your mind, when you signed the letter, you believed it was like a personal guarantee. Yes or no please, Mr Huang?

A: The same as the document that was first executed.

Q: Please answer my question.

A: Yes.

Q: This, in your mind, this personal guarantee, was to secure the second facility revision agreement?

A: Yes.

110 In any event, it was not possible for Mr Huang to argue that the Undertaking was merely a letter of comfort, given my finding that the Guarantee was enforceable against Mr Huang and given the terms of the 2011 Facility Letter.

Promissory estoppel

111 In his closing submissions, Mr Huang invoked the doctrine of promissory estoppel as a defence to resist enforcement of the Guarantee and the Undertaking. This equitable doctrine most commonly applies to promises not to enforce contractual rights. Mr Huang's contention in this regard was that since the Bank intentionally made the Representations knowing that he would rely upon them in executing the Guarantee, it would be unfair for the Bank to now deny that it had made the Representations and/or assert that Mr Huang could not rely on them.

112 Although it was not pleaded, Mr Huang made reference to a meeting in or around the second half of 2012 in his Affidavit of Evidence-in-Chief. I have referred to this as the July 2012 Meeting as Mr Huang in cross-examination reckoned that the meeting was in the month of July 2012. Mr Huang accepted that Mr Tay gave no oral "reassurance" that the Guarantee would not be enforced during the July 2012 Meeting at the second defendant's office. According to Mr Huang, what Mr Tay did was to nod his head in affirmation of what Mr Huang said, *ie* that the Bank would not enforce the Guarantee against Mr Huang. Mr Xue who was supposedly at this July 2012 Meeting did not mention this incident in his Affidavit of Evidence-in-Chief. He also did not corroborate Mr Huang's narrative.

113 In my view, Mr Huang's submissions on promissory estoppel were a misapplication of this equitable doctrine. First, Mr Huang's plea that fraudulent misrepresentations (in the form of the Representations) were made prior to the Guarantee was inconsistent with the doctrine of promissory estoppel. For this doctrine to operate, there must first and foremost be a *legal relationship* giving rise to rights and duties between the parties. The material representation in this case (namely, Representation 2 or Meaning 1)) was one not to enforce strict rights that arose out of the legal relationship concerned: see *Chitty on Contracts* (Hugh G Beale gen ed) (Sweet & Maxwell, 31st Ed, 2012) vol 1 at p 347. This requirement of an existing legal relationship clashed with Mr Huang's main case whereby he sought to rescind the Guarantee by reason of the Representations that allegedly induced him to execute the Guarantee. Secondly, the effect of promissory estoppel is usually suspensory, and that was the case here. On the evidence, Mr Huang failed to make out a case that it would be inequitable for the Bank to resile from the Representations. Put another way, the doctrine of promissory estoppel would bar the Bank from enforcing its legal rights only if and when it would be inequitable for the Bank to insist upon those legal rights. There is no evidence of any inequitable conduct by the Bank here.

Conclusion

114 For the reasons stated, I did not accept any of Mr Huang's bases for resisting enforcement of the Guarantee and the Undertaking. It follows that the Bank is entitled to judgment for the sum of US\$66,838,374.08 together with further contractual interest as claimed in the amended Statement of

Claim. Such contractual interest consists of: (a) interest at the rate of 2% per annum above Libor from 22 July 2014 until the date of full payment; and (b) overdue interest at the rate of 2% per annum above the contractual rate from 22 July 2014 until the date of full payment.

115 The Bank has claimed indemnity costs. I will hear the parties on costs.

[\[note: 1\]](#) Transcript of Evidence dated 15.8.14, p7.

[\[note: 2\]](#) Huang's Defence & Counterclaim Amendments (No 3), para 6.1.2.

[\[note: 3\]](#) 3AB 105

[\[note: 4\]](#) Huang's Defence & Counterclaim Amendments (No 3), para 6.1.3.

[\[note: 5\]](#) Huang's Defence & Counterclaim Amendments (No 3), paras 6.1.5- 6.1.7.

[\[note: 6\]](#) Huang's Defence & Counterclaim Amendments (No 3), para 6.1.11.

[\[note: 7\]](#) 3AB 74

[\[note: 8\]](#) 3AB 121

[\[note: 9\]](#) Bank's Closing Submissions, para 18.

[\[note: 10\]](#) Transcript of Evidence dated 8.8.14, p89.

[\[note: 11\]](#) 3AB 94.

[\[note: 12\]](#) Transcript of Evidence dated 8.8.14 p80.

[\[note: 13\]](#) Transcript of Evidence dated 30 July 2014 p 13.

[\[note: 14\]](#) Gao Shan's AEIC, para 2.

[\[note: 15\]](#) 3AB95.

[\[note: 16\]](#) Huang's Defence & Counterclaim (Amendment No 3), para 6.1.7.

[\[note: 17\]](#) Bank's Closing Submissions, paras 128, 130-131.

[\[note: 18\]](#) Exhibit P2: Huang's Defence filed in Suit No 131 of 2013.

[\[note: 19\]](#) Exhibit P2: Huang's Defence filed in Suit No 131 of 2013 at para 17(d).

[\[note: 20\]](#) Transcript of Evidence dated 12.8.14 pp 6-7.

[\[note: 21\]](#) Exhibit P3.

[\[note: 22\]](#) Huang's Defence & Counterclaim Amendment (No 3), para 6.1.12; F&BP dated 30.5.14.

[\[note: 23\]](#) Huang's Defence & Counterclaim Amendment (No 3), para 6.1.13.

[\[note: 24\]](#) 3AB76

[\[note: 25\]](#) 8AB15.

[\[note: 26\]](#) Transcript of Evidence dated 15.8.14, pp6-7.

[\[note: 27\]](#) Transcript of Evidence dated 15.8.14, pp18-20.

[\[note: 28\]](#) Transcript of Evidence dated 13.8.14 pp 10-11.

[\[note: 29\]](#) Defendant's Closing Submissions, para 3.1.3.

[\[note: 30\]](#) Transcript of Evidence dated 13.8.14, pp13 & 18-19.

[\[note: 31\]](#) Transcript of Evidence dated 13.8.14, pp18-19.

[\[note: 32\]](#) Bank's Closing Submissions, para 94.

[\[note: 33\]](#) Transcript of Evidence dated 12.8.14 pp 23 -26.

[\[note: 34\]](#) Bank's Closing Submissions, para 97(b).

[\[note: 35\]](#) Transcript of Evidence dated 15.8.14, p

[\[note: 36\]](#) Defendant's Closing Submissions, paras 4.3.6- 4.3.7.

[\[note: 37\]](#) Defendant's Amended Defence No 3, para 6.1.9.

[\[note: 38\]](#) Defendant's Closing Submissions, para 1.3.2.

[\[note: 39\]](#) Defendant's Closing Submissions, para 5.1.3.

[\[note: 40\]](#) Defendant's Closing Submissions, para 9.1.1.

[\[note: 41\]](#) Defendant's Closing Submissions, para 9.1.3.

[\[note: 42\]](#) Defendant's Closing Submissions, para 4.1.3.

[\[note: 43\]](#) Defendant's Closing Submissions, para 4.3.3.

[\[note: 44\]](#) Defendant's Closing Submissions, para 4.3.7.

[\[note: 45\]](#) Bank's Closing Submissions, paras 56-62; 89.

[\[note: 46\]](#) Huang's Defence & Counterclaim Amendments (No 3), para 4.1.3.

[\[note: 47\]](#) 5AB234

[\[note: 48\]](#) Transcript of Evidence dated 12.8.14 p70.

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