

Tiong Swee Eng v Yeo Khee Siang
[2015] SGHC 116

Case Number : Suit No 871 of 2013
Decision Date : 27 April 2015
Tribunal/Court : High Court
Coram : Judith Prakash J
Counsel Name(s) : Tan Tuan Wee Andy (Sim Mong Teck & Partners) for the plaintiff; Philip Ling and Yap Jie Han (Wong Tan & Molly Lim LLC) for the defendant.
Parties : Tiong Swee Eng — Yeo Khee Siang

Contract – misrepresentation – action for rescission

Contract – misrepresentation – innocent

Contract – Misrepresentation Act

27 April 2015

Judgment reserved.

Judith Prakash J:

Introduction

1 The plaintiff wife and the defendant husband have been married since 1979. They are still living in the same household and the wife cooks for the husband though otherwise they do not have much to do with each other. Unfortunately, since 2012, they have been adversaries in two law suits, of which this is the second. The first law suit, Suit No 1009 of 2012 (“S 1009”) in which the wife was also the plaintiff, was apparently resolved by a settlement agreement made on 11 July 2013 (“the Settlement Agreement”) but that very night the wife had second thoughts. Those second thoughts led to correspondence between the parties’ solicitors and, ultimately, culminated in this action.

2 In this action, the wife claims damages and rescission of the Settlement Agreement on the grounds of misrepresentation and/or material non-disclosure by the husband. The husband in turn has made a counterclaim for a declaration that:

- (a) the Settlement Agreement is valid and binding on both parties;
- (b) the wife has acted in breach of the Settlement Agreement in trying to wrongfully repudiate it; and
- (c) the parties have reached a full and final settlement of S 1009 and that suit must be deemed to have been discontinued.

The husband also seeks damages.

3 The misrepresentation and non-disclosure alleged by the wife relate to the husband’s statement of “the matrimonial pool of assets” (“Asset List”) contained in the husband’s “Mediation Case Summary” which was prepared and presented for the purpose of a mediation session arranged

for S 1009. Generally, the issues that arise therefore are whether there was misrepresentation, if so, whether the wife relied on the misrepresentation and if there was a duty to disclose which was breached by the husband.

The facts

The background

4 The parties are now in their seventies. The husband was previously married to the wife's younger sister and had two children, a boy and a girl, from that marriage. When the son was aged six and the daughter was aged four, their mother died. About a year later, in December 1979, the husband and the wife married and they have cohabited ever since. The wife brought up the children and regards them as her own. No other children were born to the parties.

5 Prior to the marriage, the wife was a seamstress and had been educated up to pre-University level. Since the marriage she has been a homemaker. The husband graduated from university with a Science degree, having studied physics. He subsequently became a businessman and founded a company called Techplas Industries Pte Ltd ("Techplas") which he developed into an extremely successful business. He was the breadwinner of the family.

6 The husband was the managing director of Techplas and the majority shareholder, holding 622,500 shares in that company. The wife owned 252,000 shares in Techplas. The issue of the beneficial ownership of the Techplas shares in the wife's name formed the nub of S 1009. The wife claimed in S 1009 that they belonged to her absolutely whilst the husband pleaded that they had been held by her on trust for him.

7 In August 2000, Techplas was acquired by a company called Beyonics Technology Limited ("Beyonics"). All the Techplas shares were sold to Beyonics for a consideration comprising cash in the sum of \$12m and 194,805,193 Beyonics shares having, at that time, a market value of \$45m. The value attributed to the Techplas shares in the wife's name was \$3.03m in cash and 49,188,311 Beyonics shares (collectively "the Techplas proceeds"). The cash payment was paid into a joint account in the names of the husband and wife while the Beyonics shares were distributed to the wife. However, thereafter, with her consent, the husband made all the decisions relating to the Beyonics shares including sale and transfer of the same. The husband's share of the sale consideration came to cash of \$7.47m and 121,266,233 Beyonics shares.

8 According to the wife, sometime in 2010 she discovered that the husband was buying apartment units and registering them in his name alone. She then began to insist that he give her the Techplas proceeds and a dispute arose over the beneficial ownership of the wife's Techplas shares. The husband said that in May 2010, in order to resolve matters and preserve their marriage, he agreed to pay the wife the sum of \$3,714,330 in full and final settlement of her claim. In working out the sum to be paid to the wife, the husband used the then market value of the Beyonics shares. According to the husband, the wife accepted the payment of \$3,714,330 and thereafter did not make further claims for the Techplas proceeds until she started S 1009 in 2012.

9 In S 1009, the wife claimed for an account from the husband in respect of the Techplas proceeds and payment of all amounts found owing to her. The husband's position was that her claim had been compromised in May 2010 and, in any event, he was entitled to a declaration that the wife had held her Techplas shares on trust for him.

10 On 28 March 2013, the husband's solicitors in S 1009, Wong Tan & Molly Lim LLC ("WTL") wrote

to the Singapore Mediation Centre ("SMC") on behalf of both parties to request that the SMC conduct a mediation of S 1009. The SMC accepted the request and appointed a senior lawyer as mediator ("the Mediator"). The mediation itself took place on 11 July 2013. Prior to the session, both parties had tendered Case Summaries. The parties attended the mediation accompanied by their respective solicitors. During the mediation, the husband apparently informed the wife and her then solicitor, one Dr Koh Hai Keong ("Dr Koh"), that if S 1009 could not be settled, he would commence divorce proceedings against the wife. In the result, the mediation was apparently successful and both parties signed the Settlement Agreement at the end of the day.

Terms of the Settlement Agreement

11 The Settlement Agreement is fairly brief, consisting of some seven and a half pages. The material terms of this agreement are:

(a) By cl 1, the husband declares that "as at the date of this agreement" he has the assets which are detailed in sub-paras 1(a) to 1(d) and that, apart from the same and his interest as a registered owner of 54 Lorong Melayu jointly with the wife, he owns no other property locally or overseas.

(b) By cl 2, the wife declares that "as at the date of this agreement" she has the assets which are detailed in sub-paras 2(a) to 2(c) and that, apart from the same, she owns no other property locally or overseas.

(c) By cl 3, the parties agree:

(i) that save for the four properties listed in cl 1(d)(i) to (iv), each of them will keep for himself/herself the assets declared in cll 1 and 2 respectively;

(ii) that the four properties listed in cl 1(d)(i) to (iv) shall be held on trust by the husband for the children in equal shares;

(iii) that in respect of the property at Frankel Terrace owned jointly by the wife and the children, should the wife survive the children, she would hold the property on trust for their respective estates in equal shares;

(iv) as for the Lorong Melayu property, the survivor (of the wife and the husband) would hold the same for the benefit of the children or their respective estates in equal shares;

(v) the husband shall pay the wife \$3,000 a month and shall continue to pay the expenses currently borne by him;

(vi) the above terms are in full and final settlement of all claims each may have against the other in respect of matters raised in S 1009;

(vii) subject to any order that the court may make on the dissolution of the marriage between the husband and wife, each of them agrees that the agreement shall be in full settlement of all rights and claims and duties they have to each other in law and is made in contemplation of any divorce between the parties and shall operate to govern the ownership and division of the parties' matrimonial assets; and

(viii) the terms of the settlement are to be recorded as a consent order in S 1009.

12 It is common ground that the lists of the parties' assets set out in cll 1 and 2 of the Settlement Agreement were derived from the Asset List. It is helpful to reproduce paras 15 and 16 of the Husband's Summary in full:

15. Furthermore, the Husband submits that the Techplas Proceeds that is (sic) the subject of the Wife's claims in Suit 1009 are part of the Husband and Wife's matrimonial assets liable to division between the parties if and when there is a divorce.

16. The matrimonial pool of assets, to the best of the Husband's knowledge, information and belief, are as follows:

The Husband's Assets:

S/N	Description	Approximate net value (\$)
A.	Cash/Monies in Bank Account/CPF	\$5,000,000.00
B.	Insurance	\$1,000,000.00
C.	Shares	\$3,000,000.00
D.	80 Lorong K Telok Kurau, #02-02, Espira Residence	\$1,300,000.00
E.	42 Lorong K Telok Kurau, #03-01, Costa Este	\$1,200,000.00
F.	60 Zion Road, #03-06, Zenith	\$1,600,000.00
G.	118 Lor H Telok Kurau, #05-02, The Verte	\$1,900,000.00
Total:		\$15,000,000.00

The Wife's Assets:

S/N	Description	Approximate net value (\$)
H.	Cash/Monies in Bank Account/CPF	\$5,500,000.00
I.	5 Frankel Terrace (matrimonial home; in the joint names of the Wife and [the parties' children])	\$10,000,000.00
Total:		\$15,500,000.00

Assets in parties' joint names:

S/N	Description	Approximate net value (\$)
J.	54 Lorong Melayu, Singapore	\$5,000,000.00
Total:		\$5,000,000.00

The action

13 As stated, the wife developed misgivings over the Settlement Agreement when she went home that night after signing it. She explained in court that she was concerned that the husband might breach cl 3(c) of the Settlement Agreement under which he had agreed that the four properties described in items D, E, F and G of the Asset List would be held by him on trust for the children. Her concern was that he might sell the properties and dispose of the proceeds by giving them to his siblings. In that case, the children would lose out because they would never sue him for breach of trust.

The pleadings

14 This action was commenced on 30 September 2013. The wife's case, as set out in her statement of claim, is founded on two planks. The first plank is that the Asset List was "false, misleading and/or grossly understated" in relation to the matrimonial assets enumerated. The second plank is that the husband failed to disclose various sums of money specified in the statement of claim and, further, that he did not disclose all the matrimonial assets acquired from 23 December 1970 (date of the marriage) until 11 July 2013 (date of the Settlement Agreement) and, as a result, these sums of money and assets were not taken into consideration before the Settlement Agreement was entered into.

15 The pleaded particulars of misstatement and non-disclosure are as follows:

- (a) the husband had failed to disclose that he had given a sum of \$3m to the son to purchase a property in Australia;
- (b) the husband had failed to disclose the balance of the Techplas proceeds, after taking into account the acquisition of properties that were included in the matrimonial pool of assets; the husband should still have had a balance of \$21,609,500 from the sale of the Techplas shares and this sum had not been disclosed in the Asset List;
- (c) the husband had failed to disclose rental proceeds in connection with certain properties;
- (d) the husband had failed to disclose profits from the sale of properties that were either in the parties' joint names or in his sole name;
- (e) the husband had failed to disclose his shares in a number of private limited companies; and
- (f) the husband had failed to disclose all other matrimonial assets acquired from the date of the parties' marriage to the date of the Settlement Agreement.

16 The wife pleaded that she was entitled to rescind the Settlement Agreement and/or regard the same as void or voidable and as having no legal effect whatsoever. Her main reliefs were claims for rescission of the Settlement Agreement and damages for misrepresentation.

17 The husband's case, in essence, is that:

- (a) he was not wrong to have disclosed only his current assets at the date of the Settlement Agreement, and not each and every asset acquired during the course of the marriage;
- (b) he was not wrong to have omitted the gift of \$3m to the son, which was no longer part of the matrimonial pool of assets at that date and, in any case, was known to the wife; and

(c) the Techplas proceeds, rental proceeds, profits from the sale of properties and shares held by the husband had already been accounted for in the Settlement Agreement.

18 The wife's pleadings did not state expressly what the nature of the misrepresentations was: that is, whether the misrepresentations were fraudulent or negligent, or whether there had been any dishonesty on the part of the husband. The primary dispute is over whether the Settlement Agreement should be rescinded. Whether the wife is entitled to this remedy would depend on the nature of the misrepresentation, if any, that she succeeds in establishing.

Legal principles relating to misrepresentation

19 In *Lim Koon Park v Yap Jin Meng Bryan* [2013] 4 SLR 150 ("*Lim Koon Park*"), the Court of Appeal reiterated that the relevant legal principles in relation to an actionable misrepresentation are:

(a) an operative misrepresentation is a false statement of existing or past fact made by one party before or at the time of making the contract, which is addressed to the other party and which induces the other party to enter into the contract (at [38]);

(b) Section 2(1) of the Misrepresentation Act (Cap 390, 1994 Rev Ed) ("the Misrepresentation Act") does not alter the common law as to what constitutes a misrepresentation but reverses the burden of proof so that the party who made the misrepresentation has to show he had reasonable grounds to believe that the fact represented was true (at [39]);

(c) the presumption of reliance is that if the representation is material, the onus would lie on the representor to show the representee's lack of reliance (at [52]);

(d) the presumption is not a legal presumption but is a presumption of fact and may be rebutted by counter-evidence (at [53]);

(e) the presumption of reliance is not mandatory but optional and a court may choose to apply the presumption, depending on the factual matrix as the court is merely applying a common sense inference of fact (at [54]).

20 Neither party addressed the issue of whether a settlement agreement is subject to general contractual principles or, in particular, how an actionable misrepresentation operates in respect of a settlement agreement. However, the husband submitted, on the authority of *Surindar Singh s/o Jaswant Singh v Sita Jaswant Kaur* [2014] 3 SLR 1284 at [60] ("*Surindar Singh*"), that this court should "attach significant weight to the agreement unless there are good and substantial grounds for concluding that to do so would cause an injustice". According to the husband, there is an even greater imperative to do so in this case given that the wife was represented at the mediation by experienced counsel.

21 I agree with the wife's submission that *Surindar Singh* is of little relevance to the present case. As the wife points out, the issue in *Surindar Singh* was not the validity of the Settlement Agreement, but the weight that should be attributed to it in the determination of the ancillary matters upon divorce. Neither party has provided any legal reason why general contractual principles should not apply for the purpose of determining the validity of a settlement agreement which is, when all is said and done, just a species of contract. Thus the elements as identified in *Lim Koon Park* have to be established in order for the wife to succeed.

The issues

22 Arising from the pleadings and the closing submissions, the following issues arise for determination. These are:

- (a) Did the husband make a false representation of fact to the wife?
- (b) If so, was the representation material and did it induce the wife to enter the Settlement Agreement? Alternatively, did the wife rely on the misrepresentation when entering the Settlement Agreement?
- (c) Did the husband breach any duty of disclosure imposed upon him by law?
- (d) If there was either misrepresentation or actionable non-disclosure, should the Settlement Agreement be rescinded?

Analysis of the issues

Was the representation made?

23 Before we get into the meat of misrepresentation, there is a preliminary point to be dealt with, and that is whether any representation was made to the wife at all. It must be borne in mind that the alleged misrepresentation pertains to the itemised "matrimonial pool of assets" in the Asset List and not to the list of the husband's assets in the Settlement Agreement. On 3 July 2013, a copy of the Asset List was sent to Dr Koh, the wife's solicitor. In his closing submissions, the husband argues that the Asset List was not shown to the wife at all and therefore there could not have been any operative representation let alone misrepresentation. This submission was based on the evidence of the wife as adduced in court and was not based on any pleading. On the contrary, para 5 of the Defence and Counterclaim implies that the husband accepted that the representation was made to the wife. However, as the question of whether the representation was made to the wife is relevant to the issue of whether she relied on the representation, I will deal with the husband's submissions on the point.

24 There is no doubt that any representation made in the Asset List was communicated to Dr Koh. The question arises whether the wife's action to set aside the Settlement Agreement can be founded on a misrepresentation communicated to her agent but not to her personally. It would seem that it can. The text, *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012), states at para 11.009 that: "[a] communication of the falsehood to the plaintiff's agent, if meant for the plaintiff, who then relied on it, can also rest liability on the defendant". The husband did not cite any authority that disputed the above as a correct statement of the law. On the facts of this case it is obvious that the contents of the Asset List were meant to be imparted to the wife who would have to decide whether or not to settle. Since the husband raised the point about whether the representation had been made to the wife, he had to show that a representation made to the wife's agent was insufficient for liability. He did not do so and I am satisfied that on this point the law is against the husband.

25 I will, however, also consider the evidence. In court, the wife was confused about the list that Dr Koh had shown her. She stated during cross-examination that it was the Settlement Agreement and not the Asset List which had been shown to her. When she was re-examined, however, she said that she was unable to recall which list had been shown to her. Dr Koh's evidence was that he had a meeting with the wife on the day before the mediation to discuss the Asset List with her. He also testified that he did not go through the Asset List in great detail with the wife at this meeting. He did not take her through it line by line but simply gave her the gist of it, telling her that it was a repeat of

S 1009. He did not tell her the details of the items in the Asset List because he said that that list of assets had been furnished by the husband on other occasions as well. Dr Koh emphasised that he did mention that the Asset List contained a so-called list of assets owned by the wife as well as by the husband, and that this was the matrimonial pool of assets.

26 Counsel for the husband tried to cast doubt on whether the meeting had actually taken place as it had not been mentioned in Dr Koh's affidavit. However, I accept Dr Koh's evidence about the meeting with the wife prior to the mediation. As a matter of course, a solicitor representing a client at a mediation would want to have a discussion with that client on the other side's position as disclosed in his case summary. Dr Koh quite frankly admitted that when he met the wife for this discussion he did not understand why the Asset List appeared in the husband's Summary so he did not really emphasise para 16 during their meeting. This admission lends weight to Dr Koh's evidence as if Dr Koh were making up the meeting, the point of doing so would be to testify explicitly that he had gone through the Asset List with her in detail. I also accept Dr Koh's explanation that there was no need to canvass the individual items mentioned in the Asset List, given that the same list had been furnished by the husband previously. The husband did not challenge Dr Koh's assertion that a similar set of assets had been provided previously, and it is reasonable to infer that the wife would have known of the contents of the Asset List when informed by Dr Koh that it was a repeat of S 1009.

27 In any case, it is not necessary that the individual items on the Asset List were communicated to the wife. In essence, the false representation that the wife alleged was communicated to her is that the matrimonial pool of assets at that time, to the best of the husband's knowledge, information and belief, consisted of the items of property set out in the Asset List. All that is required for the wife to succeed is that the husband's representation as to the *veracity of the Asset List* was communicated to her, that the representation was false, and that it had induced her to enter into the Settlement Agreement.

Was the representation in the Asset List false?

28 The representation in para 16 was: "[t]he matrimonial pool of assets, to the best of the husband's knowledge, information and belief, are as follows...". This statement meant that the Asset List comprised the complete "matrimonial pool of assets" which would be liable to division between the parties if and when they divorced. The husband says that that statement was true because he was only making a representation as to the current state of affairs and in this respect he had disclosed all current matrimonial assets.

29 The wife challenges the accuracy of the Asset List and says it was false because:

- (a) the Women's Charter (Cap 353, 2009 Rev Ed) ("Women's Charter") and its "accompanying precepts in common law" imposed a positive duty on the husband to make full and frank disclosure of the \$3m gift to the son and the supposed gift of 42 million Beyonics shares to the daughter ("the Duty of Disclosure Argument");
- (b) the "matrimonial pool of assets" in the Asset List should have listed all matrimonial assets acquired throughout the marriage, including those which no longer belonged to the parties at that time ("the Cumulative Assets Argument");
- (c) the "matrimonial pool of assets" in the Asset List ought to have been higher based on a "simple cash/asset inflow/outflow calculation" ("the Balance Sheet Argument");
- (d) even if the husband were correct in providing a list of only current assets, the

representation in the Asset List was false as it failed to disclose the assets which the husband only disclosed on 26 June 2014 and during cross-examination ("the Newly Disclosed Assets Argument"); and

(e) even if the husband were correct in providing a list of only current assets, the representation in the Asset List was false as it failed to disclose the 42 million Beyonics shares given to the daughter since they were in fact held on trust by her for his benefit ("the Bare Trustee Argument").

30 The Duty of Disclosure Argument and the Cumulative Assets Argument will be considered together in relation to the question of what obligation of disclosure was imposed on the husband by law. I will deal first with the Newly Disclosed Assets Argument and the Bare Trustee Argument.

The Newly Disclosed Assets Argument

31 On 26 June 2014, WTL wrote to the wife's current lawyers, M/s Sim Mong Teck & Partners, stating that the husband had recently discovered additional documents pertaining to his assets showing that he had:

(a) a property at Anak Bukit Resorts, Johor Bahru ("the Anak Bukit Property") purchased in November 1990 in the parties' joint names;

(b) an unsecured note certificate issued by Laguna National Golf and Country Club Ltd ("Laguna Note");

(c) an account with Maybank Kim Eng Securities Pte Ltd; and

(d) an account with UBS AG.

32 In court, during cross-examination, the husband admitted that he had also left out from the Asset List his 3,000cc Jaguar Excel vehicle which he had owned at the time of the mediation. He estimated that it had then had a value of \$100,000.

33 As for the assets in [31] above, the approximate value of the Anak Bukit Property is currently \$400,000, the Laguna Note had an approximate value of \$37,900 and the UBS AG account had a balance of \$7,499.63 as at 30 June 2013. The husband said there was no value to the Maybank Kim Eng account.

34 I am of the view that the allegedly "Newly Disclosed Assets" were not all newly disclosed. This is because the husband did disclose an asset described as "Cash/Monies in Bank Account/CPF" as item A of the Asset List. This item was valued at \$5m, a most substantial sum, and I am inclined to accept that the Laguna Note, the Maybank account, the UBS AG account and the car were included in this item, notwithstanding that the description "Cash/Monies in Bank Account/CPF", if interpreted strictly, would only apply to the UBS AG account. The wife, in her submissions, has omitted the UBS AG account and the car from her calculation of the total matrimonial pool of assets "due to the likelihood of double counting". She therefore recognises that item A was a catch-all item capable of covering the UBS AG account and the car. In my opinion, it should also cover the Laguna Note, the value of which was relatively low. There is no reason to doubt the husband's assertion that the Maybank Kim Eng account is worthless.

35 The significant asset that was not disclosed in the Asset List was the Anak Bukit Property. The

husband had listed the parties' real properties individually and there was no general category that could have covered the Anak Bukit Property. The husband submitted that the omission of the Anak Bukit Property did not impugn the validity of the Settlement Agreement as both parties had forgotten about its existence at the time of mediation. It should be noted that the wife admitted in court that she too had forgotten about this property, although she was a joint owner, because it had been bought so long ago and had not been rented out. Nor had the parties ever lived there.

36 It is clear that due to the omission of the Anak Bukit Property from the Asset List, the husband did in fact misrepresent the matrimonial pool of assets. I am satisfied that this was either an innocent or a negligent misrepresentation. I accept that the husband had truly forgotten about this property because of the circumstances mentioned in [35] above. I am sure that if he had remembered it, he would have included it as he did the other two properties in the parties' joint names. The husband could not have intended to omit it on purpose as it was a jointly owned property and he would not have known that the wife had also forgotten it. He was probably a bit careless in not checking all his documents before drawing up the Asset List because he did have a copy of the sale and purchase agreement for the Anak Bukit Property and, if he had seen that document when preparing the list, he would not have omitted the property from it.

37 The fact that I agree that there was a misrepresentation by reason of the omission of the Anak Bukit Property, does not mean, however, that the Settlement Agreement must be rescinded. This is a matter that I will consider after dealing with the other issues as to what else should have been included in the Asset List.

The Bare Trustee Argument

Did the particulars of the purported bare trust have to be pleaded?

38 The husband submitted, as a preliminary objection, that the Bare Trustee Argument should be rejected on the ground that it was not part of the wife's pleadings or any of the affidavits affirmed by or on behalf of the wife, and that it had only surfaced on the last day of trial after the close of the wife's case.

39 In response, the wife submitted that "the existence of the bare trust was only uncovered during trial itself", and that the husband was not ambushed as he had prior notice of the wife's discovery of his transfer of the 42 million Beyonics shares by way of the wife's supplementary affidavit of evidence-in-chief. The wife also submitted that there was no need for the bare trust to be pleaded since it was a point of law and, in any case, was merely evidence of non-disclosure.

40 In so far as the Bare Trustee Argument relates to a claim founded in contract and not tort, *Kim Hok Yung v Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank) (Lee Mon Sun, third party)* [2000] 2 SLR(R) 455 at [7] suggests that there was no need for the wife to have pleaded particulars of the purported bare trust:

... A claim founded on the Misrepresentation Act is an action in contract. *In that regard, the plaintiffs need only plead the facts establishing the contract, the representations that induced them into contracting with the defendants, and that the representations were not true*, but this approach cannot be applied to the pleading of an action in deceit which is an entirely different cause of action. ... [emphasis added]

41 In any case, regardless of whether the wife had departed from her pleadings, there is little substantive merit to this argument.

Had the wife adduced sufficient evidence of a bare trust?

42 As a preliminary point, neither party called the daughter, who was the alleged trustee of the 42 million shares, as a witness. Both parties invited the court to draw an adverse inference against the other party under s 116, illustration (g) of the Evidence Act (Cap 97, 1997 Rev Ed) ("Evidence Act"). In my opinion, it is neither appropriate nor necessary to draw an adverse inference in the present case. Given, however, that a transfer of shares to a daughter by her father would be presumed to be a gift rather than an entrustment, if an adverse inference is to be drawn, it would have to be drawn against the wife who would have the onus of showing that the transfer was not a gift. In any event, even without drawing an adverse inference against the wife, the Bare Trustee Argument fails given the paucity of evidence that the wife has adduced.

43 First, her claim that she was deprived of the opportunity to call the daughter as a witness has no merit: she knew on the first day of trial that the shares in question had been transferred to the daughter. Second, the wife herself conceded that she would not have called the daughter as a witness in any event. Third, to the extent that the wife sought to avail herself of the statutory guideline to illustration (g) of s 116 of the Evidence Act by stating that "it is her duty to protect her children and maintain overall harmonious family relations", such considerations would apply equally to the husband. Fourth, *Teng Ah Kow v Ho Sek Chiu* [1993] 3 SLR(R) 43 ("*Teng Ah Kow*"), which the wife sought to rely on, does not assist her. In *Teng Ah Kow*, the plaintiffs were able to shift the evidential burden to the defendants as they had established a prima facie case; here the wife was not able to do so.

44 In support of the Bare Trustee Argument, the wife highlighted what she deemed to be "various indicia of the existence of a bare trust". In summary, they consisted of the following:

- (a) The transfer of shares to the daughter in two tranches, rather than a single transaction, was calculated to preserve the value of shares for the husband's own benefit.
- (b) The daughter would not have needed to borrow \$300,000 from the husband for the purchase of an HDB flat had she truly been the beneficial owner of those shares.
- (c) The fact that the daughter had not mixed the proceeds from the share transfer with her other moneys showed that they still belonged to the husband.
- (d) A possible reason why the daughter is living rent-free in the husband's condominium was that it is payment in kind for her being a bare trustee for the husband.
- (e) The husband retained control over the shares by virtue of the fact that the daughter had been dealing in those shares under his direction.
- (f) The husband had contested the de-listing of Beyonics in order to preserve his beneficial interest in these shares.

45 Even taken as a whole, the above facts do not lead to an "inevitable and inexorable conclusion" that a bare trust existed. The alleged trustee is the husband's daughter, and it is entirely rational for him to provide for her, be it by way of a gift of 42 million shares or by providing her rent-free accommodation. It is also understandable that he wished to preserve the value of those shares for *her* benefit and that she relied on financial advice from her father who had been a successful businessman and was financially savvy. The daughter, although an educated woman, was not active and experienced in the commercial world. The fact that the shares were transferred to her in two

tranches is neither here nor there in relation to whether they were transferred on trust.

46 In respect of the mixing of the proceeds from the share transfer with the daughter's other moneys, this assertion appears to be based on nothing more than the fact that the loan of \$300,000, which the husband gave to the daughter to assist her in purchasing an HDB flat, was treated separately from the proceeds from the sale of the shares. Even if the two sets of proceeds were kept separate, it was consistent with the fact that the gift was kept secret from the parties' son-in-law. The husband explained that he had intended the sum of \$300,000 to be a gift to the daughter but was not adverse to his son-in-law regarding it as a loan and paying him back. This does not seem to me to be a unreasonable (albeit somewhat traditional) attitude on the part of the husband and is hardly sufficient to establish that the daughter held the proceeds from the sale of some of the Beyonics shares solely for his benefit.

47 It is worth noting also that the wife had no objection to the gift of the shares to the daughter. Her concern throughout the trial was that the matrimonial assets be preserved for the children. She did not want any part of them given to the husband's relatives. She would have been quite happy if she had believed the transfer was truly a gift.

The Balance Sheet Argument

48 In essence, the submission was that the "matrimonial pool of assets", which was estimated to be worth \$35.5m based on the figures provided in the Asset List, was in fact worth \$55,952,847.78 (this being the wife's own estimate).

49 The disparity can be attributed primarily to the husband's gift of 42 million Beyonics shares to the daughter. The wife estimated these to have been worth \$19,440,000. Taking away the value of these shares and taking into account the parties' living expenses, which the wife did not, the wife's estimate of the value of the "matrimonial pool of assets" does not deviate greatly from that in the Asset List.

50 In respect of the gift, it should be pointed out that the wife did not dispute that the shares were indeed transferred to the daughter, and that the husband received no consideration in return for this transfer.

51 The Balance Sheet Argument thus merges with the Bare Trustee Argument, providing the wife an avenue for the proposition that the 42 million Beyonics shares ought to have been part of the "matrimonial pool of assets". As I have not accepted the Bare Trustee Argument, the Balance Sheet Argument must also be discounted.

Legal obligation to disclose

52 The wife submitted that non-disclosure could impugn the Settlement Agreement as "the disclosure of the undisclosed facts and circumstances would have been likely to influence a prudent person in entering into a transaction or requiring an amendment of the terms, or simply 'given him pause'". The non-disclosure that the wife complains of is two-fold: on the one hand, she says, generally, the husband should have declared all assets accumulated during the marriage and on the other she says, specifically, he should have disclosed the gifts of \$3m to the son and of the Beyonics shares to the daughter. I will take these separately.

Cumulative Assets Argument

53 First, even if there was a duty of disclosure on the husband, I cannot accept that such a duty would have extended to a listing of all matrimonial assets acquired since the inception of the marriage. The husband was purporting to tell the wife what assets would be available for division if divorce proceedings took place. The general rule in Singapore is that you divide the assets as they exist at the time of divorce and that in this exercise you do not have to consider every asset acquired and disposed of during the whole course of the marriage because the court's power is to divide *existing* assets. It would also be completely impracticable to impose such a duty upon divorcing parties.

54 This principle was clearly enunciated by Belinda Ang J in *Au Kin Chong v Ho Kit Joo* [2007] SGHC 150 at [13], which the husband also highlighted in his submissions:

It is trite law that the court's power to divide assets extends to those subsisting in the sole or joint names of the parties at the time of the hearing of ancillary matters. *As such, assets bought but disposed of during the course of the marriage, would not be included in the pool of matrimonial assets for division.* However, as the judge noted at [58] of her written grounds, "the Court would, in dividing the remaining matrimonial assets have regard to any sums or assets disposed of [during the marriage] and not properly accounted for." This statement echoes the views of Judith Prakash J in *Yow Mee Lan v Chen Kai Buan* [2000] 4 SLR 466 . Prakash J at [69] said:

What the court does is to divide the assets existing at the time of the divorce and assets that were existing at any time prior thereto are not divisible as such. They are only relevant to assist the court in determining whether there has been proper disclosure of the assets presently available for distribution.

[emphasis added]

55 The wife seems to suggest that the omitted assets ought to have been included since they *could be* dissipated assets that ought to be pooled back. As I understand it, her submission was that because the division of matrimonial assets ought to include dissipated assets, the term "matrimonial pool of assets" in the Asset List ought to be construed so that it included assets that were no longer in the parties' names at the time of the alleged misrepresentation. This would be a strained construction since the courts do not divide assets that are no longer owned and cannot even be considered "assets" any more.

56 Further, it is not the wife's pleaded case, nor has it been suggested in evidence, that the husband had intentionally dissipated his assets. The suggestion that a declaration of matrimonial assets subject to division has to include *all* assets acquired during the marriage, regardless of whether they are still the parties' names, simply because of the *prospect* of dissipation, is clearly incorrect. The wife's purported construction of this term also flies in the face of her own failure to declare her past assets, such as the shares in Techplas which were registered in her name. There was no evidence that she was ever advised that she too had a duty of full disclosure of current and/or past assets.

Legal position in relation to disclosure

57 I turn next to the question of whether a duty of disclosure was imposed on the husband at all in the circumstances of this case. It bears emphasis that in the contractual context such a duty is the exception rather than the rule. I should also emphasise that the duty of disclosure that the wife seeks to impose is a duty on the husband to declare material assets which he gave away as gifts to

the children because that might allow her to claim a bigger share of existing assets.

58 The distinction between misrepresentation and non-disclosure is explained in *Misrepresentation, Mistake and Non-Disclosure* by John Cartwright (Sweet & Maxwell, 3rd Ed, 2012) ("*Cartwright*") at para 16-03:

... In the case of a misrepresentation, [the claimant] alleges that it was the defendant's misrepresentation that caused him to make the mistake: the defendant's words or conduct communicated information on which the claimant relied in deciding to enter into the contract. But in the case of non-disclosure the defendant has done nothing to cause the mistake or to give rise to the claimant's assumptions as to the circumstances surrounding the contract; he failed to give the claimant relevant information which would have corrected the mistake or false assumption. A claim of non-disclosure therefore falls between mistake and misrepresentation: the claimant is not simply relying on his own mistake or misunderstanding; but nor does he say that the defendant caused it. *He claims that the defendant should have told him something to correct the mistake or to inform him better about the circumstances relevant to his decision to enter into the contract, and that he is entitled to a remedy in consequence of the defendant's failure to fulfil his duty.* [emphasis added]

5 9 *Cartwright* recognises the limited application of a legal duty of disclosure. In para 16-02, he states the general principle that the common law does not impose on parties who are negotiating for a contract a general obligation to disclose information even when they know that such information would influence the other party's decision whether or not to contract. The classes of contract in which the common law imposes a duty on one or both contracting parties to disclose all material information is extremely small. These classes are listed in Chapter 17 of *Cartwright* and the list does not include settlement agreements even when these relate to disputes between husband and wife.

60 The situation where an obligation to disclose exists that is closest to the present is that where parties conclude a family arrangement. A family arrangement is a contract between members of a family who are settling property disputes among themselves. Such disputes generally concern inheritance. The wife submits that a family arrangement is an agreement between members of the same family intended to be for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property, or the peace or security of the family by avoiding litigation or by saving its honour. She says that the Settlement Agreement has to be considered a family arrangement. I do not agree. When parties make an agreement in contemplation of divorce, such an agreement does not preserve the family property or the peace or security of the family by avoiding litigation. No doubt it reduces litigation but it does so in the context of an end to the family. Once the parties implement the agreement in the course of an ensuing divorce, the family is split asunder and no longer exists. This is antithetical to the underlying ethos of a family arrangement.

61 The wife's other argument is founded on the Women's Charter. The wife submits that in Singapore a positive duty to disclose is imposed via the use of the Women's Charter and its accompanying precepts in common law, and this Settlement Agreement is a post-nuptial agreement falling within s112(2)(e) of the Women's Charter. I accept that if in the future the parties decide to divorce, the Settlement Agreement would likely be regarded as falling within that section. That is because of cl 3(h) of the Settlement Agreement which specifically provides that it is made in contemplation of divorce and shall operate to govern the ownership and division of the parties' assets. However, the fact that in a future divorce one party or the other may seek to rely on the Settlement Agreement to govern the distribution of matrimonial assets does not, in my view, impose any positive duty of disclosure regarding the disposal of assets prior to the date of the agreement.

62 In the case of *BG v BF* [2007] 3 SLR(R) 233, the Court of Appeal observed that the general duty that every party to court proceedings owes to the court to make full and frank disclosure of all relevant information within his or her knowledge is particularly relevant in the context of the division of matrimonial assets (at [52]). The wife cited this observation and, while recognising that the Court of Appeal was adverting to the duty to make full disclosure *to the court*, argued that this duty should as a matter of public policy apply to the parties themselves when they are negotiating post-nuptial agreements in the context of a mediation. There is no authority for such an extension of the duty of disclosure. The court needs to be advised of all relevant information so that it can make an equitable distribution of the matrimonial property between the erstwhile spouses. Those spouses, when they are negotiating outside court, are not in the same adjudicatory position. Rather, they are adversaries, each of whom is seeking their own advantage. Thus, as long as they do not deliberately mislead the other party or omit existing assets, whether held in their own names or on trust for them, there is no reason to take away from them the general common law right not to disclose information that may have an influence on whether the opposing party agrees to their terms.

63 In my judgment, there was no obligation on the husband to disclose the substantial gifts he had made to the son and daughter a few years earlier. The Settlement Agreement cannot be invalidated for non-disclosure. I should note, however, that if the parties do divorce in future, it may be open to the wife to argue that less weight should be given to the division of property effected by the Settlement Agreement because a court should find it inequitable in view of the husband's voluntary disposition of a large part of his fortune. Whether the court would indeed come to such a conclusion, I cannot say, and nothing I have said should be taken as an indication that such an argument should be made. All I mean to reiterate is the well-established principle that a valid settlement agreement made in contemplation of divorce may not be given weight by the court that considers the ancillary matters if it finds that the non-disclosure of certain information at the time the settlement agreement was made led to a less than equitable division of matrimonial property.

Did the wife rely on the Asset List when entering into the Settlement Agreement?

64 In order for the representation to be operative, it must have had real and substantial effect on the representee's mind though it may not have been the only cause which induced the representee to enter the contract: *Alwie Handoyo v Tjong Very Sumito and another appeal* [2013] 4 SLR 308 at [188].

65 The husband submits that the Asset List did not have a real and substantial effect on the wife's mind and therefore the omission of the Newly Disclosed Assets was not material. He made three points:

- (a) Dr Koh would have conveyed his scepticism of the Asset List when he was explaining its contents to the wife and there was no reason for her to have relied on it without making her own enquiries;
- (b) The wife had relied on the advice of the Mediator and Dr Koh, and not the Asset List, in signing the Settlement Agreement; and
- (c) The wife had signed the Settlement Agreement to preserve her marital relations and to benefit the children.

66 The second and third points above are not of much assistance to the husband. Even if I accept that the wife had entered into the Settlement Agreement on the advice of the Mediator and Dr Koh, or in order to preserve her marriage and benefit the children, neither of these reasons is inconsistent

with her having relied on the husband's representation. In fact, it is more likely that the advice was rendered on the basis of the husband's representation as to the parties' assets which continued to operate through the Mediator and Dr Koh.

67 As for the first submission in [65] above, there was no evidence that Dr Koh had in fact conveyed his scepticism to the wife. Even if he did, to the extent that the husband was suggesting that the wife ought to have conducted her own inquiries instead of relying on his representation, the Court of Appeal decision of *Jurong Town Corp v Wishing Star Ltd* [2005] 3 SLR(R) 283 at [113]–[114] suggests that it is not relevant:

113 We see no logic, firstly, in penalising a party who has chosen to act carefully but failed, whether due to negligence or otherwise, to discover the fraud. Put in another way, such a proposition would encourage the indolent. Secondly, such a proposition would also encourage fraud.

114 It is our view that such a proposition cannot be valid. *A person who has made a false representation cannot escape its consequences just because the innocent party has made his own inquiry or due diligence, unless the innocent party has come to learn of the misrepresentation before entering into the contract or does not rely on the misrepresentation when entering into the contract.* This is all the more so when the representation is made fraudulently. We would add that it matters not whether the inquiry or due diligence is conducted by the innocent party or his agents or both. The principle is the same.

[emphasis added]

68 Ultimately, as was held in *Thode Gerd Walter v Mintwell Industry Pte Ltd* [2009] SGHC 44 at [33], whether the wife was induced by the misrepresentation is a question of fact. In this regard, her evidence is unequivocal:

Q. Madam Tiong, when you say 35 per cent of the assets, what are these assets?

A. Our joint assets, the assets jointly owned by us.

Q. So at the time of the mediation do you know what are the jointly owned assets?

A. I did not know about that.

Q. Then why did you sign the settlement agreement?

A. It was because Mr Yeo Khee Siang passed this list to the mediator, so it must be true. Then the separation of the assets must be correct, so I trusted the distribution of the assets.

Court: I thought you didn't trust Mr Yeo. Why are you now saying you trust him, or you trusted the list?

A. Your Honour, I believe that he would not lie in front of the mediator and the lawyers.

69 The husband sought to cast aspersions on her claim of blind reliance by highlighting her distrust of him. While it was plain from her testimony that the wife did have a strong distrust of the husband, I do not think that this distrust would have necessarily extended to the Asset List. It is not entirely inconsistent that she harboured strong suspicions about how he would deal with the assets he held

on trust, yet trusted that he would declare the assets fully. The fact that she was informed by the Mediator that the hiding of details was a criminal offence would have reinforced her belief that the husband's representation could be relied on. I have arrived at this conclusion independent of the presumption referred to in *Lim Koon Park* set out in para [19] above. That presumption would also apply to establish reliance as the husband has not been able to rebut it.

70 As such, I find that the wife had relied on the Asset List in entering into the Settlement Agreement.

What is the appropriate remedy?

71 I have found that the Asset List was incorrect in that the Anak Bukit Property was omitted from it. I have also found that the wife relied on the accuracy of the Asset List in entering into the Settlement Agreement. The last issue that I have to decide is whether because the elements of actionable misrepresentation have been made out, the Settlement Agreement should be rescinded. The wife is *prima facie* entitled to such rescission but, as I explain below, there is a discretion in the court which I now have to exercise.

72 The nature of the misrepresentation in respect of the omission of the Anak Bukit Property is clearly non-fraudulent as I have pointed out at [36] above. In any case, the wife has not pleaded any particulars of fraud. Therefore, s 2(2) of the Misrepresentation Act applies to allow for an award of damages in lieu of rescission. Section 2(2) states:

Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded, the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission, if of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party.

73 The Court of Appeal's observations in *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997 ("*RBC Properties*") at [130] are apposite in the present case:

Whilst the Respondent *did not* include an alternative claim for damages in lieu of rescission under s 2(2), this would not *per se* be a bar to such relief because the remedy of damages in lieu of rescission is, on the plain words of the section, an exercise of the court's discretion that turns on whether the court is "of the opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party". In our view, this discretion is to be exercised *only in accordance with established principles*, the foremost of which is that, where the misrepresentation is slight or relatively unimportant in the circumstances of the case, so that rescission *may* be disproportionately harsh on the *representor*, damages *may* be awarded in lieu thereof ... [emphasis in original]

74 As was the case in *RBC Properties*, neither party made any submissions on whether damages under s 2(2) of the Misrepresentation Act would be an appropriate remedy. What distinguishes the present case, as is evident from the following paragraphs, is that the misrepresentation here did not go to the heart of the agreement.

75 In my judgment, rescission would be a disproportionate response in this case. The wife herself

was aware of the existence of the Anak Bukit Property but had also forgotten about it at the time of entering into the Settlement Agreement. Further, while the value of the property is not insubstantial, it only makes up slightly more than 1% in value of the assets that were the subject of the Settlement Agreement. Also, this property remains an asset of which the wife is a joint owner. She has not lost out on it by reason of the Settlement Agreement. The wife's unhappiness with the Settlement Agreement does not stem from unhappiness over her share of the matrimonial assets but from her desire to safeguard the children's inheritance. To me, her doubts about the husband's care for the children seem ill-founded especially since the revelation of the substantial gifts he has already made to them.

76 I have also to consider the consequences on the husband of rescinding the Settlement Agreement. If I do so, he will be plunged back into litigation on the ownership of the Beyonics shares mainly so that the wife can obtain a greater proportion of the Techplas proceeds and keep them for the children and away from the husband's other relatives. The husband has entered into a Settlement Agreement which, in relation to his solely owned properties, operates as an express declaration of trust in favour of the children. This is a trust that can be enforced if the Settlement Agreement is not rescinded. He has done more than enough to assure the wife of his good intentions. It would not be right to force him back into litigation with her at such an advanced age.

77 As for damages, for the same reason that the wife remains a joint owner of the Anak Bukit Property, it is difficult to see what damage she has suffered by reason of the misrepresentation. If the wife had remembered this property, she would probably have insisted that it be dealt with in the same way as the Lorong Melayu Property, *ie*, that she and the husband should agree that the surviving holder of the said property would hold the beneficial interest for the benefit of the two children or their respective estates in equal shares. Going by her treatment of the other assets, she would not have demanded that the Anak Bukit Property be transferred to her sole ownership. The wife has not established that she has suffered more than nominal damages by reason of the misrepresentation. I therefore award her \$1,000 as nominal damages.

Conclusion

78 For the reasons given above, judgment shall be entered for the wife and she will be awarded \$1,000 as damages. While she has not obtained rescission of the Settlement Agreement, she has established one of the central issues in the case which is that the Asset List was a misrepresentation. However, in view of my finding on misrepresentation, I will for the avoidance of doubt make declarations that:

- (a) the Settlement Agreement is valid and binding on the parties; and
- (b) S 1009 must be deemed to be discontinued.

79 The remainder of the counterclaim is dismissed.

80 I will hear the parties on costs.