



# FRAUDULENT MISREPRESENTATION OF KEY PROJECT PERSONNEL

Contractors and consultants often make pre-contractual statements to secure projects. A common pre-contractual statement is the promised involvement of a particular individual or group of individuals to comprise a project team. The assignment of an individual or team to key posts may distinguish a tenderer from its competitors and provide a material reason for winning the contract. But what happens if the named personnel resigns or is removed from the project before the contract is formally awarded?

The recent UK decision *Fitzroy Robinson Limited v Mentmore Towers Limited: Fitzroy Robinson Limited v (1) Good Start Limited (2) Anglo Swiss Holdings Limited* [2009] EWHC 1552 (TCC) deals with the issue of a party's duty to disclose circumstances affecting the validity of a pre-contractual statement regarding key personnel.

## FACTS

The case involved the engagement of Fitzroy Robinson Limited ("FRL") to act as lead consultant in connection with a scheme to develop the In & Out Club in Piccadilly and the Mentmore Towers (the "Project"). The properties to be developed were owned by three related companies (collectively, the "Defendants"). The Defendants were advised by Buckingham Securities Holdings Plc ("BSH").

FRL first made its bid for the Project in 2005. The key member of the FRL team was Mr. Blake, the director who compiled the FRL bid documents and was involved in all the pre-contractual meetings. Throughout all negotiations, FRL stated both orally and in its bid documents that Mr. Blake was to be FRL's team leader for the entire duration of the Project. The Project was estimated to take 38 months, and completion was scheduled for May 2009.

On March 17, 2006, before the consultancy agreements with FRL were executed, Mr. Blake tendered his resignation to FRL. On March 21, 2006, he further rejected a counteroffer made by Mr. Thompson, the CEO of FRL. No further counteroffer or any similar effort was made by FRL to retain his continued employment. Despite his resignation, Mr. Blake was to remain with and work for FRL for his notice period of one year.

The contracts between FRL and the Defendants were executed by FRL on March 28, 2006, and April 20, 2006, and were countersigned by the respective Defendants in May 2006 (the “Contracts”). However, neither the Defendants nor BSH were informed of Mr. Blake’s resignation at any time before or at the time of execution of the Contracts. FRL did not inform the relevant parties of this news until November 2006.

Despite the Defendants’ grave concerns over Mr. Blake’s resignation, the various planning applications for the Project nevertheless proceeded. However, in May 2007, the Defendants failed to make prompt payment to their various consultants. Payments to FRL stopped in June 2007. FRL eventually received a notice of suspension for all works under the Project in December 2007 from the Defendants. FRL then commenced proceedings for unpaid fees incurred in connection with the Project.

## PRIMARY ISSUE BEFORE THE COURT

In response to FRL’s claims, the Defendants counterclaimed for damages by raising the argument that FRL made a fraudulent or statutory misrepresentation (section 2(1) of the Misrepresentation Act 1967 (UK)) to the Defendants by dishonestly concealing the fact of Mr. Blake’s resignation before the Contracts were signed and nondisclosure of this fact until November 2006.

The judge held that the issues surrounding the Defendants’ various allegations of misrepresentation “boiled down to one simple matter: once (Mr. Blake) had handed in his resignation letter on 17<sup>th</sup> March 2006, and refused the counter-offer of 21<sup>st</sup> March 2006, should FRL have told the Defendants about his resignation, and was their failure to tell the Defendants an actionable wrong?”

## GENERAL PRINCIPLES

To successfully pursue a damages claim arising out of a fraudulent misrepresentation, the judge held that the Defendants must demonstrate, among other things, the following:

- FRL had made a misrepresentation to the Defendants before the Contracts were entered into;
- such misrepresentation was fraudulent;
- the misrepresentation induced the Defendants to enter into the Contracts; and
- the Defendants had suffered loss as a result.

## FRAUDULENT MISREPRESENTATION

The judge held that FRL’s repeated representations as to Mr. Blake’s continued involvement for the entire duration of the Project constituted a representation of fact of the personnel that FRL would provide to the Defendants.

Once the pre-contractual statement was no longer true, it constituted a misrepresentation in law. The Defendants must then prove that the misrepresentation was fraudulent to claim damages. Fraud is established by showing that a misrepresentation has been made: (1) knowingly; or (2) without belief in its truth; or (3) recklessly and careless as to whether it be true or false. In short, there must have been an absence of an honest belief in the truth of what was stated. On the other hand, proof of fraud was not required to establish the Defendants’ claim under section 2(1) of the Misrepresentation Act 1967 (UK). Instead, it had to be shown that the Defendants entered into the Contracts after the misrepresentation was made to them and, as a result, the Defendants suffered loss. The only grounds FRL could rely on to defeat the statutory claim was to prove that it had had reasonable grounds to believe, and did believe up to the time the Contracts were executed, that the representation was true.

Thus, the issue turned on whether Mr. Thompson knowingly misrepresented to the Defendants that Mr. Blake would remain a key person in the Project in order to secure the execution of the Contracts. FRL's failure to inform the Defendants of the change in circumstances was held to be a fraudulent misrepresentation. The judge found that the finality of Mr. Blake's decision to resign was made clear on March 21, 2006, when he refused FRL's counteroffer and no further actions were taken by FRL to retain his services. The representation may have been true up to that date, but thereafter it ceased to be true and the same was acknowledged by Mr. Thompson.

## INDUCEMENT AND RELIANCE

The judge found that the facts of the case proved beyond any reasonable doubt that Mr. Blake's reputation and experience was a very significant factor in the Defendants' decision to place the Contracts with FRL. In reaching this conclusion, the judge relied on the following facts: Mr. Blake had attended all the pre-contractual meetings with the Defendants on behalf of FRL; Mr. Thompson himself noted the Defendants' clear liking of Mr. Blake; FRL's bid documents stressed FRL's previous involvement in the Grove, a major project which Mr. Blake had overseen on behalf of FRL and the Defendants considered to be a significant example of FRL's past experience; and Mr. Thompson made it plain that Mr. Blake would be involved throughout the entirety of the Projects.

Based on the above evidence, the judge held that statements about Mr. Blake's pivotal role as team leader were plainly designed to induce the Defendants to enter into the Contracts. In fact, it was held to be one of the main reasons why FRL was eventually awarded the Contracts. Consequently, the misrepresentation was held to be a material inducement resulting in the Defendants entering into the Contracts.

## RECOVERY OF DAMAGES

Notwithstanding the finding of fraudulent misrepresentation by the judge, the Defendants must have suffered loss as a result of the fraudulent misrepresentation in order to claim

for damages. The mere finding that, but for the fraudulent misrepresentation, the Contracts would never have been entered into does not, of itself, establish that the Defendants actually suffered loss. As such, the court held that any loss was to be measured by reference to the actual consequences of Mr. Blake's departure.

The judge held that Mr. Blake's resignation did not cause any delay or disruption to the Project. Rather, it was more likely that Mr. Blake's departure caused disruption within FRL and some duplication of work for FRL alone (for example, time taken by Mr. Blake's replacement to "get up to speed" with details of the Project). Consequently, the claim for damages was held to be limited to reductions in FRL's fees by reference to the disruption and duplication of work caused to FRL (for example, Defendants shall not be required to pay for any "catch up" work done by FRL).

## COMMENTARY

Apart from the particular duty to disclose the resignation of proposed key personnel from a firm to a prospective client, the holding in this case sounds a general caveat to contractors and consultants that they are under a duty to disclose to their prospective clients circumstances that render untrue pre-contractual statements regarding key personnel. Although this case is a UK decision, the principles enunciated in the judgment are equally applicable in Hong Kong given that the Misrepresentation Ordinance (Cap 284 of the Laws of Hong Kong) and the general body of law regarding fraudulent misrepresentation in Hong Kong largely mirror those of the UK.

It follows that parties preparing pre-bid statements, documentation, and bid agreements should bear this decision in mind when making such representations and should be mindful of whether accompanying qualifications may be required before executing project agreements. As an added caution, contractors and consultants are well advised to engage in open and frank disclosure to their prospective clients of any alteration of circumstances *during the course of projects* that would render pre-contractual statements untrue to avoid legal liability for such nondisclosure.

## LAWYER CONTACTS

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