**Opinion issued March 10, 2011**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-09-00417-CV**

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**ANGLO-DUTCH PETROLEUM INTERNATIONAL, INC., Appellant**

**V.**

**SHORE HARBOUR CAPITAL MANAGEMENT CORPORATION, Appellee**

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**On Appeal from the 333rd District Court**
**Harris County, Texas**
**Trial Court Case No. 2004-48053**

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## MEMORANDUM OPINION

Anglo-Dutch Petroleum International, Inc. appeals the trial court's judgment awarding Shore Harbour Capital Management Corporation $100,000, plus pre- and post-judgment interest on its claim for fraud. Shore Harbour alleged that Anglo-

Dutch made a fraudulent misrepresentation to persuade Shore Harbour to invest in a project with Anglo-Dutch. On appeal, Anglo-Dutch contends that the trial court erred by ruling in Shore Harbour's favor on its fraud claim arguing, among other things, that the claim was barred as a matter of law because the alleged misrepresentation was an expression of an opinion. We agree, and we reverse and render judgment that Shore Harbour take nothing on its fraud claims.

## I. Factual and procedural background

The facts underlying this case span nearly two decades, involve multiple transactions related to the development of a foreign oil and gas field, and relate to numerous lawsuits involving Anglo-Dutch. For the purposes of this appeal, the following facts are relevant.

Anglo-Dutch Petroleum International, Inc. was a partner in Anglo-Dutch Kazakhtenge (ADK), which itself was a partner in a joint enterprise to develop an oil and gas field in Kazakhstan, called the Tenge Joint Enterprise. The other joint-enterprise partner was the national oil company of Kazakhstan. Anglo-Dutch wanted to buy out its ADK partners and required working capital to finance its expenses related to this transaction.

Shore Harbour considered a proposal to contribute capital to Anglo-Dutch to facilitate the buy-out transaction. In making its decision to contribute, Shore Harbour relied on oral conversations between its managing shareholder, Don

Chamberlin, and Anglo-Dutch's president, Scott Van Dyke. Shore Harbour also relied upon a prospectus received from Anglo-Dutch. In the initial letter Anglo-Dutch sent to Shore Harbour, Van Dyke stated:

> As we discussed, Anglo-Dutch is in the final stages of buying its current partners' interests in the Tenge Field. Anglo-Dutch is buying the interests of . . . a subsidiary of . . . the national oil company of Taiwan, and the interests of some other smaller partners. Funds are being raised from Franklin Natural Resource Fund, InterCapital Investments, Inc., and from an individual in Pennsylvania.

Anglo-Dutch attached a copy of the proposed Profit Distribution Agreement with the prospectus. The agreement stated:

> Anglo-Dutch is attempting to purchase ADK's 50% interest in the Tenge JE. At Closing . . . Anglo-Dutch intends to assign the ADK interest to a newly formed company (herein referred to as "Eur-Oil"). To fund its purchase of the ADK interest and to raise additional development capital for the Tenge JE, Anglo-Dutch intends to sell a portion of Eur-Oil to one or more companies at Closing.

The agreement specifically states that conveyance of a percentage interest of up to 0.25% of the revenue from the Tenge Field would occur at the closing of the deal to buy out ADK's partners. It also specifies that, "in the event Closing occurs," Shore Harbour's initial contribution of $25,000 would be returned within one year of closing. Finally, the agreement requires both parties to take all actions "necessary to effectuate the intent and purpose of this Agreement and carry out the transaction as contemplated herein."

Two days after Chamberlin had his first conversation with Van Dyke, he signed the agreement on behalf of Shore Harbour. Shore Harbour contributed a total of $100,000 to Anglo-Dutch pursuant to the Profit Distribution Agreement. Chamberlin never asked to see any documentation about Anglo-Dutch's proposed buy-out transaction. Van Dyke testified that he encouraged Chamberlin to visit a Houston data room that held all the documentation Van Dyke had collected pertinent to the Tenge Field. The data room included information pertaining to geology, engineering, production, governmental licenses and interactions, and correspondence from partners and investors or potential investors. Van Dyke testified that he filed all documents pertaining to the Tenge Field and the Tenge Joint Enterprise in the data room. Chamberlin testified that he could not recall if Van Dyke had invited him to see the data room, but both parties agree that Chamberlin never visited the data room or reviewed the information included there.

At trial, Chamberlin, who was also an investment advisor by trade, testified that he knew he was making an investment, not a loan, but he did not realize he could lose his investment if Anglo-Dutch did not close the buy-out transaction. Chamberlin contended in the trial court, as he does in this appeal, that Van Dyke represented to him that the deal would close.

The deal did not close. In violation of a confidentiality agreement, a third party misused information gained from Anglo-Dutch's data room and purchased the interests of Anglo-Dutch's partners. Anglo-Dutch initiated litigation over the breach and attempted to block the sale. When that was unsuccessful, Anglo-Dutch sought damages representing the value of the data itself as well as the lost opportunity. Anglo-Dutch prevailed in that lawsuit and later reached a settlement with one party, but Anglo-Dutch's recovery was far less than the damages it sought. Shore Harbour demanded repayment of its $100,000 contribution, but Anglo-Dutch did not refund Shore Harbour's money.

Instead, Anglo-Dutch filed suit seeking a declaration of the parties' rights under the contract. Shore Harbour countersued, alleging fraud and fraudulent inducement, among other things. Relying on Shore Harbour's discovery responses, the trial court limited Shore Harbour's fraud and fraudulent inducement claims at trial to a single alleged misrepresentation by Anglo-Dutch, specifically that "the deal would close." After a bench trial, the trial court awarded Shore Harbor $100,000 on its fraud claim, plus pre- and post-judgment interest. In its sole issue, Anglo-Dutch contends that the trial court erred by ruling in Shore Harbour's favor on its fraud claim because the alleged misrepresentation was not the kind of statement for which a cause of action for fraud may be pursued.

## II. Standards of review

Anglo-Dutch requested findings of fact and conclusions of law before the interlocutory ruling on Shore Harbour's fraud claims and before the final judgment in this case. The appellate record does not include a notice of past due findings of fact and conclusions of law, *see* TEX. R. CIV. P. 297, and Anglo-Dutch does not challenge the trial court's failure to make findings of fact on appeal. Because the trial court did not issue findings of fact and conclusions of law, "all facts necessary to support the judgment and supported by the evidence are implied." *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002). Thus we presume that the trial court resolved all factual disputes in favor of its judgment. *See Tri-State Bldg. Specialties, Inc. v. NCI Bldg. Sys., L.P.*, 184 S.W.3d 242, 246 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (citing *American Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 806 (Tex. 2002)). These findings are not conclusive when the appellate record includes both reporter's and clerk's records, and they may be challenged for legal and factual sufficiency on appeal. *Id.* To the extent that the underlying facts are undisputed, however, we conduct a de novo review. *Glattly v. CMS Viron Corp.*, 177 S.W.3d 438, 445 (Tex. App.—Houston [1st Dist.] 2005, no pet.). We review de novo a trial court's implied conclusions of law. *See BMC Software*, 83 S.W.3d at 794.

In reviewing the legal sufficiency of the evidence, we view the evidence in the light most favorable to the fact finding, crediting favorable evidence if reasonable persons could, and disregarding contrary evidence unless reasonable persons could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. 2005). We must sustain a legal sufficiency point: (1) when there is a complete absence of a vital fact; (2) when rules of law or evidence preclude according weight to the only evidence offered to prove a vital fact; (3) when the evidence offered to prove a vital fact is no more than a scintilla; or (4) when the evidence conclusively establishes the opposite of the vital fact. *El-Khoury v. Kheir*, 241 S.W.3d 82, 86 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (citing *City of Keller*, 168 S.W.3d at 810 & nn. 15–16 (Tex. 2005)). "The final test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review." *City of Keller*, 241 S.W.3d at 827.

## III. Analysis

Shore Harbour alleged causes of action for fraud and fraudulent inducement. Its theory of the case was that Anglo-Dutch falsely misrepresented that the deal to buy out its ADK partners "would close," thereby inducing Shore Harbour to enter into the Profit Distribution Agreement.

The elements of fraud are: (1) that a material representation was made; (2) that it was false; (3) that, when the speaker made it, he knew it was false or

made it recklessly without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by the party; (5) that the party acted in reliance upon it; and (6) that he thereby suffered injury. *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 524 (Tex. 1998); *Trenholm v. Ratcliff*, 646 S.W.2d 927, 930 (Tex. 1983). Fraudulent inducement is "a particular species of fraud that arises only in the context of a contract and requires the existence of a contract as part of its proof." *Haase v. Glazner*, 62 S.W.3d 795, 798 (Tex. 2001).

An actionable misrepresentation is one concerning a material fact; a pure expression of opinion will not support an action for fraud. *Trenholm*, 646 S.W.2d at 930. Whether a statement is an actionable statement of "fact" or merely one of "opinion" often depends on the circumstances in which a statement is made. *Transport Ins. Co. v. Faircloth*, 898 S.W.2d 269, 276 (Tex. 1995). Among the relevant circumstances are the statement's specificity, the speaker's knowledge, the comparative levels of the speaker's and the hearer's knowledge, and whether the statement relates to the present or the future. *Id.* An opinion may constitute fraud if the speaker has knowledge of its falsity. *Trenholm*, 646 S.W.2d at 930. An opinion about a future event may also constitute fraud where the speaker purports to have special knowledge of facts that will occur or exist in the future. *Id.* Finally, "[a] promise of future performance constitutes an actionable

misrepresentation if the promise was made with no intention of performing at the time it was made." *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors*, 960 S.W.2d 41, 48 (Tex. 1998). But the mere failure to perform a contract is not evidence of fraud. *Id.*

By its judgment in favor of Shore Harbour on its fraud claims, the trial court impliedly concluded that the alleged misrepresentation that "the deal would close" was actionable as a matter of law. On appeal, Anglo-Dutch argues that the alleged statement was an expression of opinion and not actionable as a matter of law. We review this contention de novo. *See BMC Software*, 83 S.W.3d at 794. In accordance with the principles outlined above, we specifically consider the circumstances in which that statement was made, the speaker's knowledge of the alleged falsity, any special knowledge the speaker may have had of future facts, and whether a promise to perform had been made with no intention of performing it.

*Circumstances in which the statement was made.* Chamberlin testified that in their initial conversation, Van Dyke said that Anglo-Dutch was trying to buy out its partners and needed money for transaction costs. Chamberlin asserts that Van Dyke told him that the deal would close during this conversation, in which they discussed the proposed Profit Distribution Agreement. The agreement itself, which Van Dyke sent to Chamberlin later that day, explained that Anglo-Dutch

was "attempting" to buy out its partners. The contract describes a bargain in which Chamberlin would give Anglo-Dutch money in exchange for the contingent rights to receive repayment of the initial contribution and a percentage of revenue if Anglo-Dutch successfully closed its buy-out transaction. The agreement required that Anglo-Dutch "do all such further acts . . . as may be necessary to effectuate the intent and purpose of this Agreement and carry out the transaction as contemplated herein."

Both parties agreed that Anglo-Dutch had a data room in Houston pertaining to the Tenge Field and that no representative from Shore Harbour ever visited the data room. They also agreed that this was an arms-length transaction. *See DRC Parts & Accessories, L.L.C. v. VM Motori, S.P.A.*, 112 S.W.3d 854, 858 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) ("[A] party to an arm's length transaction must exercise ordinary care and reasonable diligence for the protection of his own interests, and a failure to do so is not excused by mere confidence in the honesty and integrity of the other party."). The unrefuted evidence at trial was that all documents relevant to the project were kept in the data room, including the information that Shore Harbour now contends Anglo-Dutch should have but failed to disclose. Chamberlin was an experienced investor, and he testified that he should have asked more questions. The circumstances all suggest that the alleged representation that the transaction "would close" would be most properly

understood as an expression of Van Dyke's opinion and not a representation that a future event certainly would occur.

*Knowledge of falsity.* Van Dyke testified that he believed the statement in his letter to Shore Harbour, "Anglo-Dutch is in the final stages of buying its current partners' interests in the Tenge Field," was true at the time he wrote it. He testified that he had been working to acquire Anglo-Dutch's partners' interests for two to three years before Shore Harbour signed the Profit Distribution Agreement, that he had been exchanging proposed contracts with the partners, and that he had no reason to doubt that they would sell to Anglo-Dutch because it had the only data room pertaining to the Tenge Field. He also had been negotiating with three other potential investors listed in his letter to Shore Harbour. Nothing in the record contradicts Van Dyke's testimony on these matters. *See El-Khoury*, 241 S.W.3d at 86 (noting that court must sustain legal sufficiency challenge when evidence conclusively establishes the opposite of the vital fact); *see also Tri-State Bldg. Specialties, Inc.*, 184 S.W.3d at 246 (holding that implied findings of fact may be challenged for legal sufficiency).

Chamberlin testified in his deposition that he believed Van Dyke had answered his questions truthfully when they initially spoke. At trial Chamberlin said that he later found out that Van Dyke had been untruthful, but he also testified that he stood by his deposition testimony, in which he said that Van Dyke had been

truthful but he had not asked the right questions. Accordingly, assuming that Van Dyke did tell Chamberlin that the deal would close, the evidence at trial could not have supported a conclusion that Van Dyke, acting on behalf of Anglo-Dutch, knew that this statement was false or that he made it recklessly without knowledge of its truth or falsity. Likewise, the evidence did not support a conclusion that Anglo-Dutch promised to close the deal with no intention of doing so.

*Special knowledge of future facts.* Nothing in the record suggests that Van Dyke purported to have special knowledge of facts that would occur or exist in the future. Van Dyke testified extensively about his knowledge and work regarding the Tenge Field. For example, he testified that he spent two years doing his own due diligence and analysis before initially deciding to invest. He compiled all of his information and documentation regarding the Tenge Field into a data room in Houston. He testified that the data room contained the production histories of the existing wells, seismic data, governmental contracts, engineering designs of surface facilities, correspondence with partners and governmental agencies, and licenses. Van Dyke testified that the information was organized in file cabinets and available for review by potential investors. None of this evidence of Anglo-Dutch's accumulated knowledge, however, shows that it purported to have the kind of special knowledge of future events necessary to make Van Dyke's opinion

about the future closing of a transaction actionable as a fraudulent misrepresentation. *See Trenholm*, 646 S.W.2d at 930.

Shore Harbour argues that Van Dyke's failure to mention then-existing facts transformed his opinion about a future event into a representation of fact. For example, Shore Harbour argues that Van Dyke failed to disclose existing tax liabilities and threats by the Kazakh government to revoke the Tenge JE's license. However, Shore Harbour's fraud claim was limited to the single misrepresentation allegation disclosed in discovery, i.e., that the deal would close. Accordingly, the trial court could not have ruled in Shore Harbour's favor on a fraud-by-omission theory, and we do not imply such a conclusion.

## CONCLUSION

Shore Harbour presented no evidence that the alleged statement was made with knowledge of its falsity, that Van Dyke purported to have knowledge of specialized facts not available to Chamberlin or Shore Harbour, or that Van Dyke (on behalf of Anglo-Dutch) promised to take action to carry out the transaction without the intent to do so. Under these circumstances, we conclude that the alleged statement, if made, was an expression of opinion. We therefore hold that it cannot, as a matter of law, be the basis of a cause of action for fraud. We sustain Anglo-Dutch's sole issue.

We reverse the judgment of the trial court and render judgment that Shore Harbour take nothing by its claims.

Michael Massengale
Justice

Panel consists of Justices Keyes, Sharp, and Massengale.