Lim Yeow Hon & Ors v Euroland & Development Sdn Bhd & Ors [2022] MLJU 2448

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

AZIMAH OMAR J

CIVIL SUIT NO WA-22NCvC-55-02 OF 2021

25 May 2022

Daljit Singh Giil (Daljit Singh Partnership) for the plaintiff.
Kee Hwai Zher (with Nathalie Annette) (Thomas Philip) for the second and third defendants.
Ong Kar Voi (KV Ong, Chua & Partners) for the fifth, sixth, seventh and eighth defendants.
Amber Kiew (Ranjit, Singh & Yeoh) for the ninth, tenth, 11th and 12th defendants.

Azimah Omar J:

GROUNDS OF JUDGMENTS

(Enclosures 35 & 41 - Striking Out Under O.18 r 19 ROC 2012**)**
A. INTRODUCTIONTHE APPLICATIONS

[1]In the present case there are two (2) applications for this Court's determination namely; Enclosure 35 and Enclosure 41:

(i) **Enclosure 35:**

The Fifth (5th), Sixth (6th), Seventh(7th) and Eight (8th) Defendants' striking out Application pursuant to Order 18 Rule 19(1) (a) or (b) or (d) of the Rules of Court 2012 **("ROC 2012").**

(ii) **Enclosure 41:**

The Second (2nd) and Third (3rd) Defendants' striking out Application pursuant to Order 18 Rule 19(1) (a) or (b) or (d) of the ROC 2012.

[2]These two applications filed by 2nd, 3rd, 5th, 6th, 7th and 8th Defendants to strike out the Plaintiffs' claim against them are largely premised on the following grounds:

(i) The Plaintiffs' claim discloses no reasonable cause of action / is unsustainable; and/or

(ii) The Plaintiffs'claim is scandalous, frivolous or vexatious; and/or

(iii) The Plaintiffs' claim is an abuse of the process of the court.

PARTIESTHE PLAINTIFFS

[3]The Plaintiffs in the main suit are as follows:

3.1 The First Plaintiff (Lim Yeow Hon - 1st Plaintiff), the Second Plaintiff (Jonathan David Yulian - 2nd Plaintiff), the Third Plaintiff (Yeoh Theam Chye - 3rd Plaintiff) and the Fourth Plaintiff (Tan Kee Lin - 4th Plaintiff) are all individuals and citizens of Malaysia whose last known address are respectively as follows:

(i) No. 6, Jalan Tarun, 27/23, Subang Alam, Seksyen 27, 40400 Shah Alam, Selangor Darul Ehsan.

(ii) Unit C12-05, Alam Damai Kondominium, 88300 Kota Kinabalu, Sabah.

(iii) No. 32, Jalan SP 6/7, Taman Segar Perdana, 43200 Batu 9, Cheras, Selangor.

(iv) A-20-2, The Maple Condominium, No. 1A, Persiaran Park View, Sentul, 51100 Kuala Lumpur, Wilayah Persekutuan.

THE DEFENDANTS

3.2 The First Defendant (Euroland & Development Sdn Bhd - 1st Defendant) is a private limited company which was incorporated under the Companies Act 1965 and/or Companies Act 2016 and/or laws of Malaysia having a registered address at Suite 10.02, Level 10, The Gardens South Tower, Mid Valley City, Lingkaran Syed Putra, 59200 Kuala Lumpur, Wilayah Persekutuan. The 1st Defendant is a subsidiary company of Euro Holdings Berhad (Company No: 646559-T) **("EHB").** At all material times, the 1st Defendant is the developer for a project known as "Projek Damai Vista" **("the said project").**

3.3 The Second Defendant (Choong Yuen Keong @ Tong Yuen Keong - 2nd Defendant), the Third Defendant (Tong Yun Mong- 3rd . Defendant) and the Fourth Defendant (Tong Kah Hoe - 4th Defendant) are all individuals and citizens of Malaysia whose last known address are respectively as follows:

(i) No. 18, Jalan Enak, Off Jalan Ramah, Happy Garden, 58200 Kuala Lumpur, Wilayah Persekutuan

(ii) No. 12A, Jalan USJ 5/4C, 47610 Subang Jaya, Selangor Darul Ehsan

(iii) Suite 10.02, Level 10, The Gardens South Tower, Mid Valley City, Lingkaran Syed Putra, 59200 Kuala Lumpur.

3.4 The Fifth Defendant (Ong Kar Voi - 5th Defendant) is an individual and citizen of Malaysia practicing as an advocate and solicitor in the name of Eighth Defendant having a last known address at No. 251, 1st Floor, Jalan Radin Bagus, Sri Petaling, 57000 Kuala Lumpur.

3.5 The Sixth Defendant (Alex Boon Thai Woo - 6th Defendant) is an individual and citizen of Malaysia practicing as an advocate and solicitor in the name of Eighth Defendant having a last known address at No. 25-1, 1st Floor, Jalan Radin Bagus, Sri Petaling, 57000 Kuala Lumpur.

3.6 The Seventh Defendant (Chin Jing Shen - 7th Defendant) is an individual and citizen of Malaysia practicing as an advocate and solicitor in the name of Eighth Defendant having a last known address at No. 25-1, 1st Floor, Jalan Radin Bagus, Sri Petaling, 57000 Kuala Lumpur.

3.7 The Eighth Defendant (Tetuan K.V. Ong, Chua & Partners - 8th Defendant) is a legal firm that provides legal services having an address at No. 25-1, 1st Floor, Jalan Radin Bagus, Sri Petaling, 57000 Kuala Lumpur.

3.8 The Eighth Defendant was the appointed panel conveyancing firm for the First Defendant for the said project, while the Fifth to Seventh Defendants are advocates and solicitors as well as partners at the Eighth Defendant - law firm.

3.9 The Ninth Defendant (Steven Toh Kang Nian - 9th Defendant) is an individual and citizen of Malaysia practicing as an advocate and solicitor in the name of the Twelfth Defendant who at the material time has a postal address at L-3A-09, No. 2, Jalan Solaris, Solaris Mont Kiara, 50480 Kuala Lumpur.

3.9 The Tenth Defendant (Liew Yung Fai -10th Defendant) is an individual and citizen of Malaysia practicing as an advocate and solicitor in the name of the Twelfth Defendant who at the material time has a postal address at L-3A-09, No. 2, Jalan Solaris, Solaris Mont Kiara, 50480 Kuala Lumpur.

3.10 The Eleventh Defendant (Tee Siow Ching - 11th Defendant) is an individual and citizen of Malaysia practicing as an advocate and solicitor in the name of the Twelfth Defendant who at the materia] time has a postal address at L-3A-09, No. *2,* Jalan Solaris, Solaris Mont Kiara, 50480 Kuala Lumpur.

3.11 The Twelfth Defendant (Tetuan Toh Liew & Gentry -12th Defendant) is a legal firm originally known as Tetuan Toh, Liew & Partners which later in 2019 has changed its name to Tetuan Toh Liew & Gentry.

3.12 The 1st Defendant (in resisting the Plaintiffs' claims) has also filed a Counterclaim against the Plaintiffs and 4th Defendant to 8th Defendants. In its counterclaim, the 1st Defendant pleaded that the Plaintiffs together with the 4th to 8th Defendants had fraudulently procured and forged *inter alia* (i) the sale and purchase agreements utilised for the alleged purchases of the units by the Plaintiffs (ii) the deed of mutual covenants (iii) the letter of authorisation (iv) the cash rebate letters and (v) the official receipts pertaining to the alleged purchase of the five units. The Plaintiffs and the 4th to 8th Defendants were alleged to have conspired to defraud the 1st Defendant.

B. THE BACKGROUND FACTS AS PLEADED BY THE PLAINTIFFS IN THEIR STATEMENT OF CLAIM

[4]The background facts laid down by the Plaintiffs in the Statement of Claim are as follows:

4.1 At the material time, the 4th Defendant was the Chief Operating Officer **("COO")** of the 1st Defendant having the authority to execute all relevant documents and papers for the sale and purchase transactions on behalf of the 1st Defendant in respect of a development project known as "Projek Damai Vista" (the said project).

4.2 Circa September 2018, the 4th Defendant had offered the 1st Plaintiff to purchase several units of the said project (which the 4th Defendant had represented that those units were reserved to him by the 1st Defendant for him to sell).

4.3 The 4th Defendant had also represented to the 1st Plaintiff that there was a promotion for the units reserved to him in the form of a cash rebate in the sum of RM380.000.00. The 4th Defendant further informed the 1st Plaintiff that the cash rebate promotion would only be given if the 1st Plaintiff pays for the units by cash. Thus, the purchase price (with cash rebate of RM380,000.00) totals to the price of RM 300,000.00 per unit.

1st visit to the 1st Defendant's Sales Gallery for the said project

4.4 A month later i.e around October 2018, the 1st Plaintiff had visited the 1st Defendant's Sales Gallery for the said project at Bandar Alam Damai, Cheras **("Sales Gallery").** At the Sales Gallery, the 1st Plaintiff was attended by the 4th Defendant and the sales agent of the 1st Defendant. At the Sales Gallery, the 4th Defendant had represented to the 1st Plaintiff *inter alia* the following:

(i) the 1st Defendant had reserved several units of the said project for the 4th Defendant to sell;

(ii) the 1st Defendant had given the 4th Defendant the authority to deal with the sale of those reserved units;

(iii) the 4th Defendant had with him a Letter of Authorisation from the 1st Defendant to open a new market to sell the those reserved units;

(iv) the 4th Defendant is the nephew of the 2nd and 3rd Defendants who are Directors of the 1st Defendant;

(v) the 1st Defendant's Letter of Authorisation that was given to the 4th Defendant was signed and approved by the 3rd Defendant; and

(vi) the 1st Plaintiff will be entitled to free legal service if the 1st Plaintiff were to use the service of the 1st Defendant's panel of lawyers/solicitors.

4.5 Being impressed of the attractive offer/promotion, the 1st Plaintiff had also introduced the said project to the 2nd, 3rd and 4th Plaintiffs.

4.6 Around December 2018, the 1st Plaintiff (also on behalf of the 2nd, 3rd & 4th Plaintiffs) had informed the 4th Defendant that they are interested to purchase several units of the said project if the units are still available (together with the cash rebate promotion of RM380,000.00). The Plaintiffs were told by the 4th Defendant to proceed to the 1st Defendant's Sales Gallery and choose their units.

2nd visit to the 1st Defendant's Sales Gallery for the said project

4.7 On or about December 2018, the Plaintiffs attended the 1st Defendant's Sales Gallery with the intention to purchase the units. At the Sales Gallery, the Plaintiffs had signed the booking forms for the purchase of the said units. The 1st Plaintiff had purchased two units, while each of the 2nd to 4th Plaintiffs had purchased one unit each. The signed booking forms were returned to the 1st Defendant (4th Defendant). The 1st Defendant had informed the Plaintiffs that the execution of Sale

and Purchase Agreements of the units will be attended by the 8th Defendant being the panel solicitors of the 1st Defendant for the said project.

Appointment of 9th -12th Defendants as Conveyancing Solicitors for the Plaintiffs

4.8 Thereafter, the Plaintiffs had appointed the 9th till 12th Defendants to represent the Plaintiffs in the sale and purchase transactions of the units that they had purchased. All correspondences between the Plaintiffs and the appointed lawyers/solicitors were communicated via WhatsApp.

4.9 On or about January 2019, the Plaintiffs had attended the signing of all relevant documents consisting of the Sale and Purchase Agreements **{"SPAs")** and the Deeds of Mutual Covenants **("DMCs")** pertaining to the purchased units at the office of the 12th Defendant. Subsequent to the execution of all the relevant documents, the Plaintiffs had then respectively paid the sum of RM600,000.00, RM300,000.00, RM300,000.00, and RM350,000.00 to the 4th Defendant in cash. The sums paid by the Plaintiffs were made on the reliance of the 'cash rebate promotion' represented by the 4th Defendant. The Plaintiffs' solicitors and the 5th till 8th Defendants had confirmed the said cash rebate promotion given.

4.10 Consequent thereto, each of the Plaintiffs have received the 1st Defendant's letters dated 8,1.2019 to confirm the cash rebate in purchasing the said units. The 1st Defendant had also issued payment receipts dated 9.1.2019 to each of the Plaintiffs.

4.11 Around June 2019, the Plaintiffs had inquired from the 9th to 12th Defendants on the status of their purchased units and to verify on the delivery of vacant possession of these units. However, the Plaintiffs' inquiry was not met with any response from the 9th to 12th Defendants.

4.12 Thereafter, the Plaintiffs went to the 1st Defendant's Sales Gallery to check on the status of their purchases but to their dismay, the Plaintiffs were informed that the units that they had purchased have been registered under the names of some other unknown parties.

4.13 It was this shocking revelation that had prompted the Plaintiffs to file this present action against all the Defendants on 1.2.2021. The Plaintiffs' claim against the Defendants are essentially for fraudulent misrepresentation, misrepresentation, negligence, fraud and conspiracy to injure.

4.14 As against all of the Defendants, the Plaintiffs claim that they had been induced to purchase the said units and they have entered into the sale and purchase agreements on the reliance of the fraudulent misrepresentation and/or misrepresentation by the Defendants, as well as the Defendants' fraudulent conducts and /or negligent acts (which were particularized in the following manner):

Against the 1st* 4th Defendants:

(i) ***Fraudulent Misrepresentation and/or Negligent***

- The cash rebate promotions for the purchase of the Damai Vista project units.

- The cash rebate promotion does not exist.

- The cash rebate promotion is not valid.

- Sale documents namely; SPAs and DMCs signed under the supervision of solicitors/ panel of solicitors of 1st Defendant.

(ii) ***Fraud***

- From the beginning, D1-D4 knew or should have known that D1-D4 would not give vacant possession of the Damai Vista project units to the Plaintiffs.

- D1-D4 had previously planned the actions/behaviour deliberately giving power of attorney/permission /authority to the D4 to sign the sale and purchase documents.

- The D1-D4 since the beginning of dealings with the Plaintiffs do not intend to sell the units of the Damai Vista project and/or give vacant possession of the units of the Damai Vista project.

- The D1-D4 have made a false cash rebate promotion to induce/fish the Plaintiffs to enter into a sale and purchase transaction of Damai Vista project units.

- The D4 has received the Plaintiffs' cash ofRMl, 200,000.00 on behalf of the D1-D3.

As against the 5th- 8th Defendants:

(i) <u>Fraudulent Misrepresentation and/or Fraud and/or negligence</u>

***- D5-D8 knew and/or should have known that the Damai Vista project units purchased by the Plaintiffs had actually* already been sold to other parties.**

- D5-D8 did not disclose the facts about the sale of the Damai Vista project units to other parties, but rather prepared purchase and sale documents for the sale of the Damai Vista project units.

- D5-DS have signed and witnessed all the purchase and sale documents signed between the Dl and the Plaintiffs.

As against the 9th-12th Defendants:

(i) <u>Negligence</u>

- D9-D12 have a duty of care towards the Plaintiffs

- D9-D12has breached the duty of care towards the Plaintiffs and has caused the sale and purchase documents prepared by the D9-D12 to be rejected by the Dl.

- D9-D12 failed to comply with the terms of appointment of the D9-D12.

- Advising the Plaintiffs to sign the purchase and sale documents which were rejected by

the Dl

- Advising the Plaintiffs to accept the purportedly false purchase and sale documents

4.15 By their paragraphs 98, 99, 100, 101 and 102 of the Statement of Claim, the Plaintiffs sought *inter alia* for the following reliefs:

RELIF-RELIF YANG DIPOHON

98. Oleh kerana tindakan-tindakan Defendan Pertama sehingga Defendan Ke-12 (atau salah seorang daripada mereka, mana berkaitan) seperti yang diplidkan di perenggan 25 sehingga perenggan 97 di atas, Plaintif-Plaintif telah mengalami kerosakan dan terus mengalami kerosakan dan kerugian.

GantirugiKhas

99. Plaintif-Plaintif (secara individu dan/atau kolektif) berhak untuk jumlah RM1,200,000.00 itu dikembalikan i.e., wang tunai pembelian unit-unit projek Damai Vista oleh Defendan Pertama sehingga Defendan Keempat disebabkan oleh berikut:-

99.1 perkara-perkara yang diplidkan di perenggan 25 sehingga 97 di atas; dan

99.2 kegagalan untuk memberikan miiikan kosong unit-unit projek Damai Vista kepada Plaintif-Plaintif.

100. Selanjutnya, Plaintif-Plaintif (secara individu dan/atau kolektif) berhak untuk kehilangan keuntungan berjumlah RM1,520,000.00 dalam bentuk rebat tunai pembelian unit-unit projek Damai Vista seperti yang diplidkan di perenggan di perenggan 25 sehingga 97 di atas.

(ii) Gantirugi Teladan

101. Plaintif-Plaintif memplidkan bahawa perlakuan Defendan Pertama sehingga Defendan Ke-12 yang bersifat mencemuh (atau salah seorang daripada mereka, mana berkaitan) telah menyerapkan/menambahkan kerugian dan kerosakan yang dialami oleh Plaintif-Plaintif dan oleh itu, Plaintif-Plaintif berhak untuk gantirugi teladan

102. Oleh kerana perkara-perkara yang diplidkan di atas, Plaintif-Plaintif menegaskan bahawa Plaintif-Plaintif telah mengalami kerugian dan kerosakan yang berterusan, dan Plaintif-Plaintif menuntut daripada Defendan-Defendan seperti berikut:-

102.1 Defendan Pertama sehingga Defendan Keempat membayar gantirugi khas berjumlah RM600.000.00 kepada Plaintif Pertama;

102.2 Defendan Pertama sehingga Defendan Keempat membayar gantirugi khas berjumlah RM300,OOP.00 kepada Plaintif Ke-2:

102.3 Defendan Pertama sehingga Defendan Keempat membayar gantirugi khas berjumlah RM300.000.00 kepada Plaintif Ke-3;

102.4 Defendan Pertama sehingga Defendan Keempat membayar gantirugi khas berjumlah RM350,000.00 kepada Plaintif Ke-4:

102.5 Gantirugi am untuk ditafsirkan terhadap Defendan Pertama sehingga Defendan Ke-12;

102.6 Defendan Pertama sehingga Defendan Ke-12 membayar gantirugi teladan berjumlah RM5,000,000.00 dibayar kepada Plaintif-Plaintif;

102.7 Kos; dan

102.8 Apa-apa relif selanjutnya yang dianggap sesuai, wajar dan atau adil oleh Mahkamah yang Mulia int.

C. THE FIFTH, SIXTH, SEVENTH AND EIGHTH DEFENDANTS' DEFENCES

[5]The 5th to the 8th Defendants had strenuously refuted the Plaintiffs' claim. In their Statement of Defence, they *inter alia* raised the following defences:

(i) (Save and except for the facts that the 8th Defendant was appointed as one of the 1st Defendant panel solicitors for the said project and the 4th Defendant was the COO of the 1st Defendant at the material time) D5-D8 have no knowledge of what had transpired between the 4th Defendant and the 1st Plaintiff at the 1st Defendant's Sales Gallery which has led to the Plaintiffs' purchase of the units. Therefore, D5-D8 have no knowledge of the facts pleaded by the Plaintiffs in paragraphs 28 to 40 of the Statement of Claim in respect of the alleged misrepresentation or fraudulent misrepresentation;

(ii) D5-D8 were never involved or have never participated in any of the discussion with Plaintiffs in relation to the units purchased by the Plaintiffs from the 1st Defendant. Therefore, D5-D8 have no knowledge of the Plaintiffs' allegations of misrepresentation or fraudulent misrepresentation pleaded in the Statement of Claim;

(iii) there was no instruction from the 1st Defendant for D5-D8 to prepare the SPAs in respect of the units purchased by the Plaintiffs. There has never been any record and/or email conversation and/or formal letter and/or documents pertaining to the execution of the SPAs between the Plaintiffs, D5-D8 and 9th till 12th Defendants (the Plaintiffs' solicitors). Hence D5-D8 have no knowledge of the facts pleaded by the Plaintiffs in paragraphs 49 to 58 of the Statement of Claim;

(iv) the Plaintiffs were represented by the 9th till 12th Defendants in the sale and purchase transactions and D5-D8 are not the conveyancing solicitors for the Plaintiffs in respect of the said units. D5-D8 therefore do not owe any duty of care towards the Plaintiffs; and

(v) the Plaintiffs have not sufficiently pleaded their claim for misrepresentation or fraudulent misrepresentation against D5-D8 in their pleadings.

D. THE SECOND AND THIRD DEFENDANTS' DEFENCES

[6]In resisting the Plaintiffs' claims, the 2nd and 3rd Defendants have raised the following defences:

(i) save and except that the 2nd and 3rd Defendants were the directors of the 1st Defendant from 11.4.2011 to 1.7.2020, the 2nd and 3rd Defendants have no knowledge of any invitation made to the Plaintiffs to visit the 1st Defendant's Sales Gallery and to purchase units of the said project;

(ii) it is impossible and/or unreasonable that the 1st Defendant's letter dated 1.3.2017 signed by the 3rd Defendant was issued for the purpose of committing fraudulent misrepresentation and/or misrepresentation and/or fraud against the Plaintiffs as the Plaintiffs had not been introduced to the said project;

(iii) the Plaintiffs' Statement of Claim does not demonstrate that the 2nd and 3rd Defendants had expressly or impliedly known or had constructive knowledge of the Plaintiffs' rightful /beneficial rights to the units allegedly purchased by the Plaintiffs.;

(iv) the Plaintiffs' Statement of Claim does not demonstrate / does not show that the 2nd and 3rd Defendants in any way had by their conducts individually and/or personally and/or collectively and/or as the directors of 1st Defendant had committed fraudulent acts and / or fraudulent misrepresentation.

(v) the Plaintiffs have not sufficiently pleaded their claim for misrepresentation or fraudulent misrepresentation and/or fraud against D2-D3;

(vi) there are no facts appearing in the Plaintiffs' Statement of Claim to justify the lifting up of the corporate veil.

E. THE PRINCIPLE OF LAW RELATING TO STRIKING OUT APPLICATION UNDER ORDER 18 RULE 19 ROC 2012

[7]Before embarking to determine both the Defendants' applications in Enclosures 35 and 41, it is only apt for this Court to first briefly set out the relevant principle of law in respect of a striking out application pursuant to Order 18 rule 19 of the RoC 2012.

[8]Order 18 rule 19 of the RoC 2012 provides as follows:

> ***"Striking out pleadings and endorsements (***O. 18 r. 19***)***
>
> *19. (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that:*
>
> (a) *it discloses no reasonable cause of action or defense, as the case may be;*
>
> (b) *it is scandalous, frivolous or vexatious;*
>
> (c) *it may prejudice, embarrass or delay the fair trial of the action; or*
>
> (d) *it is otherwise an abuse of the process of the Court,*
>
> *and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.*
>
> ***(2) No evidence shall be admissible on an application under subparagraph (1)(a).***
>
> ***(3) This rule shall, as far as applicable, apply to an originating summons as if it were a pleading,"***

[9]Order 18 rule 19 of the RoC 2012 confers the Court a discretionary power to strike out any action on the grounds set out under rule 19 (1) (a), (b), (c) and (d) at any stage of the proceedings. However, such discretionary power must be exercised judiciously and in accordance with established legal principles.

[10]In the case of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7**,** the legal principles of the court's discretionary powers under Order 18 Rule 19 have been explained so eloquently by Mohamed Dzaiddin HMA (as he was then) as follows:

> ***"It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd), and this summary procedure can only be adopted when it clearly seen that a claim or answer is on the face of it "obviously unsustainable" (see AG of Duchy of Lancaster v L & NWRly & Co). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (see Wenlock v Moloney & Ors). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under*** Order 33 r 3 ***(which'is in pari material with our*** Order 33 r 2 of the RHC***) (see Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd). Thecourt must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.".***

[11]Vincent Ng J (as he then was) in the case of *Suppuletchemi a/p Karpaya v Palmco Bina Sdn Bhd* [1994] 2 AMR 1191, at page 1205 of his judgment had stated that:

> ***"But in an application under*** Order 18 r 19 or Order 14***, it is still incumbent upon the court to determine whether issues could more appropriately have been decided, without the expence of a full trial with* a *witnesses and expenditure of the court's invaluable time. No party in a proceeding is entitled to require the court to accord them valuable time of several days open court viva voce trial only upon mere or bare assertions in their affidavits.***
>
> ***The crucial question the court would have to ask itself in applications under*** Order 14 or Order 18 r 19(1) to (d) ***is firstly, whether the piece or pieces of evidence essential to make out the reasonable prima facie cause of action or a prima facie triable issue of fact are of the nature such that they are adduceable by affidavit evidence; and secondly - if the answer to this question is in the positive - whether such essential prima facie evidence had been so adduced in the supporting affidavits. Such affidavits ought not to contain bare averments but must condescend or come definitely into particulars for serious argument such that they are sufficient to satisfy the court that there is a reasonable prima facie cause of action or triable issue or issue of fact or law in the defence as the case may be.***

...the court must and ought to look at the whole situation and ask itself whether the plaintiff (in an application to strike off a claim) has satisfied the court that he has a bona fide or prima facie cause of action...".

[12]In the case of *Mooney & Ors v Peat Marwick Mitchell & Co & Anor* [1967] 1 MLJ 87 Raja Azlan Shah J (as His Royal Highness then was) at page 88 had stated as follows:

"It is firmly established that the power exercisable under r. 4 "is only appropriate in cases which are plain and obvious so that a judge can say at once that a statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to the relief of which he ask for": See the judgment of Lindley MR in Hubbuck & Sons v Wilkinsons Heywood & Clark Ltd. Where the situation arises, the pleadings and particulars alone shall be considered and all the allegations in it shall be presumed to be true, and it is only on that assumption that any statable case can be made for this application: see Peck v Russell. The court cannot and indeed is not empowered to look behind the pleadings and particulars if it discloses a reasonable cause of action. So long as the statement of claim discloses some ground of action, the mere fact that the plaintiff is not likely to succeed on it at trial is no ground for it to be struck out: (see Boater v Holder) A recent exposition of the law is afforded by the judgment of Danckwerts LJ in Wenlock v Moloney:

> ***"Under the rule (ie.*** O. 25 r. 4***) it had to appear on the face of the plaintiffs pleadings that the action could not succeed or was objectionable for some other reason. Not evidence could be filed... But, as the procedure was of a summary nature the party was not to be deprived of his right to have his case tried by a proper trial unless the matter was clear."***

After stating that the former rules are now incorporated in the revised Rules of the Supreme Court, O.18 r. 19**, he continues:**

> ***"But this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge."..."***

[13]In the case of *Small Medium Enterprise Development Bank Malaysia Berhad v Sigma Pelangi Systems Sdn Bhd* [2016] MLJU 1770, the Court of Appeal summarised the principles relating to striking out a claim as follows:-

"[6] Before we deal with the issues raised, perhaps it is useful to briefly state the principles relating to striking out of a claim.

[7] The principles to be applied are clear and established. They may be summarised as follows -

(a) ***A striking-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. That is so even where they are not or may not be admitted.***

(b) ***It is well settled that before the Court may strike out a claim, the Court must be satisfied that the cause of action is clearly and obviously unsustainable.***

(c) ***This summary process must be exercised sparingly and only in a clear case and the Court is satisfied that the claim is so clearly untenable that they cannot possibly succeed.***

(d) ***The claim cannot be struck out summarily if the statement of claim discloses a reasonable cause of action, however weak the claim is. In other words, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven out from judgment seat". (See*** *Bandar Builder Sdn. Bhd. v United Malayan Banking Crop Bhd* [1993] 3 MLJ 36 ***(SC);*** *M.K Associates Sdn Bhd. v Tetuan Ganesan K & Muhammad Asri (sued as a firm)* [2012] 7 MLJ 583**,** *Hunt v Carey* [1990] 2 SCR 959 ***(SC of Canada))***

(e) ***The Court may allow this summary process if it considers that:-***

(i) ***the claimant has no real prospect of succeeding on the claim; or***

(ii) ***the defendant has no real prospect of successfully defending the claim, e.g. the action is barred by the doctrine of res judicata.***

(f) ***Where there is a dispute as to the factual matrix of the case, the Court would not strike out the statement of claim and the plaintiff is entitled to have his or her day in Court to prove its claim. (See*** *Meeriam Rosaline a/p Edward Paul v William Singam all Raja Singam* [2010] 4 MLJ 541***) and***

(g) ***Where there are issues to be determined by way of discovery or by way of cross-examination, the summary process of striking out is not appropriate (See*** *Metroplex Holdings Sdn Bhd v Commerce International Merchant Banker Sdn Bhd* [2013] 4 MLJ 520***)***

(See also: (i) *Sivakumar a/l Varatharaju Naidu v. Ganesan a/l Retanam* [2010] 9 CLJ 825; [2011] 6 MLJ 70 ***(ii)*** *Dilantha Ranjula Bandara Malagamuwa & Ors v ADM Ventures (M) Sdn Bhd & Ors* [2018] MLJU 1383***).***

[14]As the Plaintiffs' pleaded case against the Defendants includes the claim for fraud and /or fraudulent misrepresentation, it also pertinent to highlight that Order 18 Rule 8(1) and Order 18 Rule 12(1) of the ROC 2012 and require the Plaintiffs to sufficiently set out the particulars of fraud and /or fraudulent misrepresentation and/ or misrepresentation in their pleadings.

[15]Order 18 Rule 8(1) of the ROC 2012 provides as follows:

*Matters which shall be specifically pleaded (*O.18, r. 8*)*

8. (1) A party shall in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality -

(a) *which he alleges make any claim or defence of the opposite party not maintainable;*

(b) *which, is not specifically pleaded, might take the opposite party by surprise; or*

(c) *which raises issues of fact nor arising out of the preceding pleading.*

(2) Without prejudice to paragraph (1), a defendant to any action for the recovery of immovable property shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the immovable property by himself or his tenant is not sufficien t.

[16]Whilst Order 18 Rule 12(1) of the ROC 2012 prescribes as follows:

*Particulars of pleading (*O.18, r.12*)*

12.(1) Subject to paragraph (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words -

(a) *particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies; and*

(b) *where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.*

See: **(i)** *Wong Yew Kwan v Wong Yu Ke & Anor* [2009] 2 MLJ 672; [2010]2 CLJ 703 **CA**

Per Gopal Sri Ram JCA (as he then was):

The defendant alleged that the transfer to the plaintiffs by their father was by way of fraud, but no particulars were pleaded in the statement of defence or the counterclaim, it is trite law that particulars of fraud must not only be pleaded, but must be specifically pleaded. In the High Court case of *Malayan Banking Bhd v Lim Tee Yong & Ors* [1994] 3 MLJ 715; [1994] 4 CLJ 558 ***it was held by the High Court that it is established law that the expression fraud cannot be generally or vaguely pleaded, in*** *Lee Kim Luang v*

Lee Shiah Yee (1988) 1 MLJ 193; [1988] 1 CLJ 619; [1988] 1 CLJ (Rep) 717 ***the High Court held that a general allegation of fraud is insufficient event to amount to averment of fraud. There is good reason why fraud must be specifically pleaded and required in*** O 18 r 8(1) of the RHC***. It is not to take the other party by surprise. In fact*** *Lord Denning MR in Associated Leisure Ltd (Phonographic Equipment Co Ltd) And Others v Associated Newspapers Ltd;* [1970] 2 QB 450 ***at p 677 said that 'it is the duty of the counsel not to put a plea of fraud on the record unless he has clear and sufficient evidence to support it.***

(i) *Zung Zang Wood Products Sdn Bhd & Ors v Kwang Chee Hang Sdn Bhd & Ors* [2014]2 MLJ 799, **FC *At para [24]:***

We need say no more on s 18 of the ILA 1908***. In relation to pleadings in general, the rules of court require a pleading of fraud to contain particulars of the fraud on which the party pleading relies (see*** O 18 r 12(1)(a) of the Rules of the High Court 1980***, now Rules of Court 2012). 'When fraud is alleged it must be specifically pleaded. The mere allegation of fraud without showing facts to support it is not a matter to which the court will pay serious attention (****Wallingford v Mutual Society and Official Liquidator* (1880) 5 App Cas 685 ***at p 697. The party need not use the word 'fraud' if he pleads, in unambiguous language, acts which amount in law to fraud (****Myddleton v Lord Kenyon* (1794) 2 Ves 391 ***at p 412). Whenever fraud or misrepresentation is alleged in a pleading, or any affidavit, full particulars of the alleged fraud or misrepresentation must be given' (Spenser Bower, Turner and Handley, Actionable Misrepresentation, (4th Ed), at pp 384-385).***

(See also:Pentadbiran Tanah Daerah Daerah Seberang Perai Tengah, *Pulau Pinang v Jugajorthy Visvanathan dan Satu Lagi* [2022] MLRU 153 **,CA)**
F. ENCLOSURE 35 and ENCLOSURE 41 TO BE DETERMINED TOGETHER

[17]Since there are two applications before this Court, for ease of reference, the Defendants in these two striking out applications will be referred to as D5-D8 (Enclosure 35) and D2-D3 (Enclosure 41). Enclosures 35 and 41 will be dealt together, as the grounds in both of these applications are essentially the same.

[18]in the present case, the Plaintiffs have mounted their claim against D8 and its partners who (at the material time) was the 1st Defendant's panel solicitors for the said project. The Plaintiffs' cause of action against D5-D8 is founded on the tort of negligence (breach of duty of care) as well as on the tort of deceit. This Court must highlight that the Plaintiffs' allegations against D5-D8 are in two-folds; **(i)** that D5-D8 had breached their duty of care towards the Plaintiffs in failing to ensure that the Plaintiffs become the lawful owners of the units and in failing to ensure that vacant possession of the units be delivered to the Plaintiffs; and **(ii)** that D5-D8 together with the 4th Defendant by their fraudulent misrepresentation had deceived the Plaintiffs into entering into the sale and purchase agreements of the said units with the 1st Defendant. The Plaintiffs alleged that they were induced / enticed to purchase the units in reliance of the false representations made by the 4th and 1st Defendants.

[19]Meanwhile, the Plaintiffs' cause of action against D2-D3 is premised on the allegation that D2-D3 (as directors and shareholders of the 1st Defendant) together with the collusion of the 4th Defendant, had defrauded / deceived the Plaintiffs to enter into the sale and purchase transactions of the said units. The Plaintiffs stand on the position that D2-D3 (being the directors of the 1st Defendant) are responsible for the management and operation as well as the day to day running of the 1st Defendant's business. The 1st Defendant had issued a letter of authorisation dated 1.3.2017 (signed by D3) to reflect this arrangement. The 1st Defendant had authorised the 4th Defendant to take conduct of all of the dealings pertaining to the sales transactions and to execute the representations made by the 4th Defendant to the Plaintiffs via the said letter.

D2-D3 & D5-D8's grounds in striking out the Plaintiffs' claim

[20]Essentially, the defence contended by D2-D3 and D5-D8 to thwart the Plaintiffs' claim is that, they have no knowledge of the sales transaction entered into between the Plaintiffs and the 1st Defendant. They staunchly denied the Plaintiffs' claim of the alleged fraudulent misrepresentation and/or

misrepresentation and/or negligence and/or fraud, and instead contended that they were never at all involved in the sales transaction right from beginning until the completion of the sales transactions.

[21]It was submitted on behalf of D5-D8 that there were no allegations that D5-D8 had made any fraudulent misrepresentation and/or misrepresentation. D5-D8 further argued that they have got nothing to do with the alleged representations made by the 4th Defendant regarding the alleged purchases of the five units in the said project by the Plaintiffs.

[22]Likewise, D2-D3 similarly mounted the same contention that they are entirely uninvolved, and had no knowledge whatsoever regarding the 4th Defendants' alleged representations or dealings with the Plaintiffs. D2-D3 contended that they only discovered the alleged dealings and conducts of the 4th to 12th Defendants upon receiving the service of the cause papers of the present suit.

[23]Against the Plaintiffs' allegation that D5-D8 had breached their duty of care towards the Plaintiffs (in failing to ensure that the Plaintiffs become the lawful owners of the units and in failing to ensure that vacant possession of the units be delivered to the Plaintiffs) it was submitted by the counsel for D5-D8 that D5-D8 are not the solicitors appointed by the Plaintiffs to manage the conveyancing matters pertaining to the alleged purchases of the said five units. It was further argued that the Plaintiffs were legally represented by the 9th-12th Defendants as the conveyancing solicitors and therefore, no duty of care can arise or be levied against D5-D8.

[24]D5-D8 further denied any liability towards the Plaintiffs and stand on the footing that they are not at all involved in (and had no knowledge of) the alleged sales transactions. D5-D8 contended that merely being one of the panel solicitors of the project appointed by the 1st Defendant does not automatically gives rise to a duty of care or imposition of any obligation against D5-D8 to the Plaintiffs. D5-D8 also contended that they did not participate in any of the negotiations in the sales transactions nor were they the Plaintiffs' conveyancing solicitors. D5-D8 further claimed that they had nothing to with whatever that had been represented by the 4th Defendant to the Plaintiffs and therefore, they could not in any way be a party at fault for inducing and enticing the Plaintiffs into executing the SPAs.

[25]The Plaintiffs insisted on the 5th Defendant's involvement considering the fact that the 5th Defendant's signatures appear or were present in all the SPAs and DMCs (as witness to the SPAs and DMCs executed between the Plaintiffs and the 1st Defendant). Against this contention, the counsel for D5-D8 submitted that the mere fact that the 5th Defendant bears witness to all of the SPAs and DMCs does not automatically substantiate the Plaintiffs allegations of fraudulent misrepresentation and/or misrepresentation and/or fraud against D5-D8. It was further argued that since D5-D8 were not the parties to the SPAs and DMCs, they are neither privy to the contracts nor do they owe any contractual obligations towards the Plaintiffs.

[26]D5-D8 further argued that the Plaintiffs did not produce any correspondence in the form of letter and/or email and/or WhatsApp's (pertaining to the SPAs and/or DMCs) between the Plaintiffs and D5-D8 (to link D5-D8 to the sales transaction entered by the Plaintiffs). Additionally, the counsel for D5-D8 contended that the signatures appearing in the SPAs and DMCs were not even the 5th Defendant's signature as the 5th Defendant's signature was allegedly forged.

[27]It was also submitted by the counsel for D5-D8 that the Plaintiffs have failed to plead any particulars or details to sufficiently constitute a pleaded case of fraud. It was argued that considering the facts that D5-D8 neither communicated with the Plaintiffs nor did they even knew of the Plaintiffs, D5-D8 can never be said to have committed a fraud against the Plaintiffs.

[28]The counsel for D2-D3 contended that based on the Plaintiffs' Statement of Claim, it appears that the Plaintiffs had initiated this action against D2-D3 on the premise that D2-D3 (as the 1st Defendant's Directors) had authority over the management and control of the 1st Defendant and its executives inclusive of the 4th Defendant (who was the 1st Defendant's COO at the material time). The Plaintiffs

argued that considering D2-D3's authority and power, they must have had colluded with the 4th Defendant to concoct the alleged representations given by the 4th Defendant to the Plaintiffs.

[29]On the contrary, D2-D3 submitted that it is manifestly clear (from the narrative of the Plaintiffs' case itself) that D2-D3 had nothing to do with sales transaction between the 1st Plaintiff and the 4th Defendant. The entire dealings pertaining to the alleged sale and purchase of the units were exclusively conducted between the Plaintiffs and the 4th Defendant. Since D2-D3 played no part in the sales transaction, it was argued that the Plaintiffs clearly have no reasonable cause of action against D2-D3.

[30]Regarding the 1st Defendant's letter dated 1.3.2017 (signed by D3 authorising the 4th Defendant to *"execute and sign on behalf of the 1st Defendant'),* it was submitted by D2-D3 that this letter was issued specifically in relation to Mastamina Sdn Bhd only and not for any other sale and purchase agreements beyond Mastamina Sdn Bhd.

[31]It was also argued that the Plaintiffs have failed to show any evidence to corroborate their allegation of fraud and/or fraudulent misrepresentation in relation to the Letter of authorisation. It was submitted that the mere fact that D2-D3 are directors of the 1st Defendant does not automatically prove fraud or fraudulent misrepresentation.

[32]D2-D3's counsel also submitted that the Plaintiffs' pleading failed to lay out sufficient particulars to stake a case for fraud and fraudulent misrepresentation as prescribed under Order 18 rule 12(1)(a) of the Rules of Court 2012. D2-D3's counsel argued that there is not a single statement in the pleadings that had specified, particularised, or demonstrated any overt acts and representations by D2-D3 or the manner in which D2-D3 were involved in the alleged fraudulent misrepresentation or misrepresentation or fraud. It was therefore submitted that the Plaintiffs' Statement of Claim is nothing more than a mere recitation of the legal ingredients or elements of the said allegations (which is devoid of any particulars).

[33]Based on the above contentions, both the counsels for D2-D3 and D5-D8 submitted that the Plaintiffs' claims against D2-D3 and D5-D8 are plainly unsustainable, frivolous, and vexatious and is an abuse process of Court and therefore, must be struck out.

G. THE COURTS ANALYSIS AND DECISION

[34]The Plaintiffs' pleading in respect of the alleged breach of duty, fraudulent misrepresentation, and fraud can be found in paragraphs 59, 60, 61, 89, 90, 91, 92, 93 and 94 of the Plaintiffs' Statement of Claim:

> ***(v) Obligasi-Obligasi dan Tanggungjawab-Tanggungjawab Defendan Ke-5 sehingga Defendan Ke-8***
>
> ***59. Plaintif-Plaintif memplidkan bahawa ada setiap masa yang material, kewajipan-kewajipan Defendan Ke-5 sehingga Defendan Ke-8 berkenaan dengan Perjanjian-perjahjian Jual Belt adalah seperti berikut:***
>
> ***59.1 bahawa Plaintif-Plaintif adalah pemilik-pemilik sah unit-unit tesebut; dan***
>
> ***59.2 bahawa Defendan Ke-5 sehingga Defendan Ke-8 sebagai Panel Peguamcara Defendan Pertama hendaklah memastikan Defendan Pertama memberikan milikan kosong unit-unit tersebut kepada Plaintif-Plaintif.***
>
> ***60. Pada setiap masa yang material, Defendan Ke-5 sehingga Defendan Ke-8 tahu bahawa Plaintif-Plaintif adalah pemilik-pemilik sah unit-unit tersebut. Plaintif-Plaintif mengulangi dan menggunapakai keseluruhan perenggan 57 di atas sebagai butir-butir di sini.***
>
> ***61. Dalam pacta itu, ianya merupakan tanggungjawab Defendan Ke-5 sehingga Defendan Ke-8 untuk memastikan bahawa milikan kosong unit-unit tersebut diberikan kepada Plaintif-Plaintif.***
>
> ***E. <u>SALAH NYATA FROD DAN/ATAU FROD OLEH DEFENDAN KE-5 SEHINGGA DEFENDAN KE-8</u>***

89. Plaintif-Plaintif mengulangi dan menggunapakai perenggan-perenggan 21 sehingga perenggan 88 di atas sebagai butir-butir di sini.

90. Plaintif-Plaintif memplidkan bahawa Defendan Ke-5 sehingga Defendan Ke-8 telah menegaskan kepercayaan mereka terhadap representasi-representasi yang dibuat oleh Defendan Pertama sehingga Defendan Ke-4 sedangkan Defendan Ke-5 sehingga Defendan Ke-8 tidak mempunyai kepercayaan sedemikian.

91. Plaintif-Plaintif memplidkan bahawa pada setiap masa yang material, Defendan Ke-5 sehingga Defendan Ke-8 tahu/sedar bahawa Defendan Pertama sehingga Defendan Ke-4 tidak mampu untuk memberikan milikan kosong unit-unit projek Damai Vista kepada Plaintif-Plaintif.

92. Secara alternatif, Defendan Ke-5 sehingga Defendan Ke-8 telah menegaskan kepercayaan mereka bahawa Defendan Pertama sehingga Defendan Ke-4 mampu memberikan milikan kosong unit-unti projek Damai Vista kepada Plaintif-Plaintif apabila mereka tidak mempunyai kepercayaan tersebut sejak awal lagi.

93. Secara alternatifnya, Defendan Ke-5 sehingga Defendan Ke-8 telah mengesahkan representasi-representasi yang dibuat oleh Defendan Ke-4 secara cuai dalam keadaan/secara keseluruhan.

Butir-butir

93.1 Perenggan-perenggan 21 sehingga 88 diulangi dan digunapakai di sini sebagai butir-butir;

93.2 Defendan Ke-5 sehingga Defendan Ke-8 tahu dan/atau seharusnya tahu bahawa unit-unit projek Damai Vista yang dibeli oleh Plaintif-Plaintif sebenarnya telah pun dijual kepada pihak-pihak yang lain;

93.3 Defendan Ke-5 sehingga Defendan Ke-8 tidak mendedahkan fakta tentang penjualan unit-unit projek Damai Vista kepada pihak-pihak yang lain, sebaliknya telah menyediakan dokumen-dokumen jual beli untuk penjualan unit-unit projek Damai Vista; dan

93.4 Defendan Ke-5 sehingga Defendan Ke-8 telah menandantangani dan menjadi saksi kepada semua dokumen-dokumen jual beli yang ditandatangani di antara Defendan Pertama dengan Plaintif-Plaintif.

94. Berikutan daripada perkara-perkara yang dinyatakan terdahulu dan akibat daripada salah nyata frod dan/atau representasi-representasi cuai dan/atau frod Defendan Ke-5 sehingga Defendan Ke-8, Plaintif-Plaintif telah mengalami kerugian dan kerosakan yang teruk

[35]Based on the above pleadings, it is apparent that the Plaintiffs' causes of action against D5-D8 are founded on 2 branches of tort namely **(i)** tort of negligence (breach of duty of care); and **(ii)** tort of deceit (fraudulent misrepresentation and fraud). Therefore, it is opportune at this juncture that this Court indulges in the two branches of tort which makes up the Plaintiffs' case against D5-D8.
Tort of Negligence

[36]The concept of duty of care is a substantive branch of the law of negligence which has existed or emerged in England in the nineteenth century as a result of the industrial revolution and urbanization. When one speaks of duty of care, the celebrated case of *Donoghue v Stevenson* [1932] AC 562 must come into one's mind. It was in this landmark decision that Lord Atkin had propounded the neighbour principle in which His Lordship so eloquently put as, *"when one is a neighbour of another, he has a duty care to make sure no harm shall be done to his neighbour".*

[37]In the present case, the Plaintiffs have pleaded that D5-D8 had acted for the 1st Defendant in the sales transactions in the said Project. Being the solicitors of the 1st Defendant, D5-D8 ought to be responsible in the preparation and execution of the SPAs for the 1st Defendant. The Plaintiffs further alleged that (as the 1st Defendant's solicitors) D5-D8 knew and/or should have known that the Damai

Vista project units purchased by the Plaintiffs had actually previously been sold to other parties. Despite knowing that the units were no longer available for sale, D5-D8 not only failed to disclose the fact that the reserved units had been sold to other parties, but also went as far as proceeding with the preparation of the SPAs. On top of that fact, D5-D8 have signed (as witness) all the SPAs signed between the Plaintiffs and the 1st Defendant.

[38]This Court is indeed minded that D5-D8 were not the solicitors appointed by the Plaintiffs (as the Plaintiffs were represented by the 9th-12th Defendants). Nonetheless, the irrefutable fact remains that the Plaintiffs had relied on the SPAs prepared by D5-D8 in which the same SPAs indeed represented to the Plaintiffs that the Plaintiffs would be entitled to make their purchases, receive ownership and vacant possessions of the units purchased by them (upon execution of the SPAs and payments to the 1st Defendant through the 4th Defendants). It is common place in a sale transaction of a property that two different sets of lawyers may represent the opposite ends of the transaction. And true enough, the Plaintiffs were represented by the 9th to 12th Defendants while the 1st Defendant was represented by D5-D8. Thus, it cannot be said that D5-D8 is entirely divorced from any duty of care to ensure the legitimacy and truth of the SPAs just because they were not appointed by the Plaintiffs. D5-D8's involvement in the preparation and witnessing of the SPAs is already a glaring admission and indication that indeed D5-D8 were involved and personally owed a duty of care against the parties of the SPAs (of the truth and legitimacy of the SPAs). Hence the reason why lawyers ought not to take their signature or involvement as witnesses to documents lightly.

[39]Thus, the questions here would be; does the Plaintiffs' reliance on the representations in the SPAs (allegedly prepared by D5-D8 as solicitors for the 1st Defendant) effectively created a special relationship between D5-D8 and the Plaintiffs as neighbours? And if they are indeed neighbours, would it mean that a duty of care can exist between a solicitor and a non-client (a third party)?

[40]To answer these harrowing questions, this Court needs only refer to the celebrated English case of *H.L Hedley Byrne & Co. Ltd v Heller & Partners* [1963] 2 ALL ER 571, The House of Lords in **H.L Hedley Byrne,** held that a solicitor would be liable for negligence against a non-client in the instance where a solicitor had given any advice or given material information negligently (whether gratuitously or not) to a non-client, and the consequence of acting on such negligent advice, the non-client thereafter suffered loss or damage. Lord Denning MR astutely held that:

> **"Nowadays...it is clear that a professional man who gives guidance to others owes a duty of care, not only to the client who employs him, but also to another who he knows is relying on his skill to save him from harm. It is certain that a banker or accountant is under such a duty. And I see no reason why a solicitor is not likewise. The essence of this proposition, however, is the *reliance* ...The professional man must know that the other is *relying* on his skill and the other must in fact rely on it."**

[41]The House of Lords in **H.L Hedley Byrne** had also held that a professional's duty of care may extend beyond or outside contractual confines if he is aware that the other person trusts or relies upon that professional (alike how the Plaintiffs relied upon the SPAs which were prepared and witnessed by D5-D8):

> **"If, in the ordinary course of business or professional affairs, a person seeks information or advice from another, who is not under contractual or fiduciary obligation to give the information or advice, in circumstances in which a reasonable man asked would know that he was being trusted, or that his skill judgment was being relied on, and the person asked chooses to give the information or advice without clearly so qualifying his answer as to show that he does not accept responsibility, then the person replying accepts a legal duty to exercise such care as the circumstances require in making his reply; and for a failure to exercise that care an action for negligence will lie if damage results."**

[42]The principles propounded in Hedley Byrne were applied locally in the case of *Bank Bumiputra Malaysia Berhad v Yeoh Ho Huat* [1979] 1 MLJ 30, Ajaib Singh J. who had cited the judgment of Lord Morris of Borth-y-Gest, had stated:

"...Independent of contract, there may be circumstances where information is given or where advice is given which establishes a relationship which creates a duty not only to be honest but also to be careful."

Fraudulent misrepresentation

[43]On the other hand, fraudulent misrepresentation falls under the tort of deceit. At para 14.01, Clerk and Lindsell on Torts (17th Edition), tort of deceit was described as follows:

"The tort involves a false representation made by the defendant, who knows it to be untrue, or who has no belief in its truth, or who is reckless as to its truth. If the defendant intended that the plaintiff should act in reliance on such a representation and the plaintiff in fact does so, the defendant will be liable in deceit for the damage caused."

[44]Apart from their contention on the alleged absence of duty of care, D5 had also contended that his signatures in the SPAs and DMCs were not his or were forged signatures. To support this contention, D5 referred to a Statutory Declaration made by the 4th Defendant (Tong Kah Hoe). The 4th Defendant, in his statutory declaration had admitted and declared that (during the period from year 2016 till 2018) he had among others, fabricated the rubber stamp of D8, and forged D5's signature. But it is thoroughly perplexing here that despite D5's serious contention that his signature was forged, D5 himself had never exerted any effort to lodge a police report to clear his name (save and except the police report dated 22.10.2018 lodged on behalf of D8 in denying D8's involvement in several sale and purchase transactions).

[45]Be that as it may, the issues (i) whether or not the SPAs or DMCs were prepared by D5-D8 or (ii) whether or not the signature appearing on the SPAs and DMCs were genuinely D5's signature, are all material and complex issues of fact and evidence which should only be ventilated in a full trial.

[46]Considering all the facts and circumstances of this case, this Court is of the considered view that this present case is not at all a plain and obvious case to warrant this Court to exercise its discretionary power to strike out the Plaintiffs' claim. It is glaringly obvious that the pleadings filed herein have raised serious issues to be tried which must be ventilated in a full trial and with the assistance of *viva voce* evidence. The issues to be tried (more relevant to D5-D8) has been set out in detail in the Plaintiffs' written submission (which are reproduced here):

(i) **Whether the Sale and Purchases Transaction documents were prepared by the Defendants whilst acting as the 1st Defendant's solicitors;**

(ii) **Whether the Deed of Mutual Covenant as signed by Plaintiffs was prepared by the Defendants whilst acting as the 1st Defendant's solicitors;**

(iii) **Whether the Defendants had, at all material times, obtained the Plaintiffs' information for the purposes of preparing the Sale and Purchase Transaction documents between the Plaintiffs and the 1st Defendant;**

(iv) **Whether the 5th Defendant (whom is a partner of the 8th Defendant) went on to sign and witness all the Sale and Purchase Transaction documents between the 1st Defendant and the Plaintiffs;**

(v) **Whether the 5th Defendant (whom is a partner of the 8th Defendant) witnessed the Deed of Mutual Covenant which was signed by 1st Defendant and the Plaintiffs;**

(vi) **Whether the 4th Defendant had instructed the Defendants to amend/update the Plaintiffs' particulars in the Sale and Purchase Agreements;**

(vii) **Whether the Sale and Purchase Agreements are valid and binding between the Plaintiffs and 1st Defendant; and**

(viii) **Whether the presence of the 5th Defendant's signature and law firm's chop confirms that Defendants had, at all material times, knew that there was a transaction between the 1st Defendant and the Plaintiffs for the sale of the Damai Vista Units.**

[47]In respect of the Plaintiffs' causes of action against D2-D3 for fraudulent representation and/or fraud, the pleaded case of the Plaintiffs can be found in paragraphs 78, 79, 80, 81 and 82 of the Statement of Claim. For ease of reference, the relevant paragraphs are reproduced below:

D. FROD OLEH DEFENDAN PERTAMA SEHINGGA DEFENDAN KE-4

78. Selanjutnya dan/atau secara alternatifnya, Plaintif-Plaintif menyatakan bahawa oleh kerana tingkah-laku Defendan Pertama sehingga Defendan Ke-4 seperti yang diplidkan di perenggan 21 sehingga 58 di atas, Defendan Pertama sehingga Defendan Ke-4 telah melakukan frod sebenar terhadap Plaintif-Plaintif.

Butir-butir frod Defendan Pertama sehingga Defendan Ke-4

78.1 Plaintif-Plaintif mengulangi dan menggunapakai perenggan-perenggan 21 sehingga 76 di atas, termasuk semua sub-perenggan sub-perenggan dengannya, sebagai sebahagian daripada butir-butir yang terkandung di sini;

78.2 Sejak awal lagi, Defendan Pertama sehingga Defendan Ke-4 tahu atau seharusnya tahu bahawa Defendan Pertama sehingga Defendan Ke-4 tidak akan memberikan milikan kosong unit-unit projek Damai Vista tersebut kepada Plaintif-Plaintif;

78.3 Defendan Pertama sehingga Defendan Ke-4 telah terlebih dahulu merancang tindakan-tindakan/kelakuan-kelakuan dengan sengaja memberikan surat kuasa/kebenaran kepada Defendan Ke-4 untuk menandatangani dokumen-dokumen jual beli;

78.4 Defendan Pertama sehingga Defendan Ke-4 sejak permulaan urusan dengan Plaintif-Plaintif tidak berniat untuk menjualkan unit-unit projek Damai Vista dan/atau memberikan milikan kosong unit-unit projek Damai Vista;

78.5 Defendan Pertama sehingga Defendan Ke-4 telah membuat promosi rebat tunai palsu untuk mendorong/memancing Plaintif-Plaintif untuk memasuki transaksi jual beli unit-unit projek Damai Vista; dan

78.6 Defendan Ke-4 telah menerima wang tunai Plaintif-Plaintif sebanyak RM1,200,000,00 bagi pihak Defendan Pertama sehingga Defendan Ke-3.

E. MENYINGKAP TABIR KORPORAT DEFENDAN PERTAMA

79. Pada setiap masa yang material, Defendan Ke-2 dan Defendan Ke-3 merupakan Pengarah Defendan Pertama dan Pengarah dan pemegang saham majoriti ibu syarikat Defendan Pertama.

80.Dalam pada itu, Plaintif-Plaintif memplidkan bahawa Defendan Ke-2 dan Defendan Ke-3 mempunyai penguasaan penuh, pengarahan dan/atau pentadbiran Defendan Pertama.

Butir-butir penguasaan. pengarahan, pentadbiran dan fungsi integriti Defendan Ke-2 dan Defendan Ke-3

80.1 Defendan Ke-2 dan Defendan Ke-3 masing-masing adalah Pengarah Defendan Pertama;

80.2 Defendan Ke-2 dan Defendan Ke-3 juga adalah Pengarah dan pemegang saham majoriti ibu syarikat Defendan Pertama;

80.3 Defendan Ke-2 dan Defendan Ke-3 adalah penguasa minda dan/atau secara keseluruhannya mentadbir/melaksanakan kehendak Defendan Pertama;

80.4 Defendan Ke-2 dan Defendan Ke-3 adalah individu-individu/pihak-pihak yang bertanggungjawab dalam urusniaga harian dan/atau pentadbiran dan/atau operasi harian dan semua perkara-perkara yang berkaitan dengan pembuatan keputusan dan/atau proses membuat keputusan bersamanya; dan

80.5 Defendan Ke-2 dan Defendan Ke-3 juga mempunyai kuasa untuk melantik Defendan Ke-4 untuk menjalankan tugas/tanggungjawab Defendan Ke-2 dan Defendan Ke-3 di Defendan Pertama, antara lain, seperti berikut:

i. **menandatangani dokumen-dokumen jual beli berkenaan/berkaitan dengan projek Damai Vista;**

ii. **memasarkan projek Damai Vista; dan**

iii. **menjalani temuduga dan/atau mewakili Defendan Pertama dalam temuduga berkenaan projek Damai Vista.**

81. Plaintif-Plaintif memplidkan secara kebetulannya, Defendan Ke-4 yang merupakan Ketua Pegawai Operas! ibu syarikat Defendan Pertama. dan Ketua Pegawai Operasi Defendan Pertama pada setiap masa yang material terlibat dalma pentadbiran urusan harian Defendan Pertama.

82. Dalam pada itu, Plaintif-Plaintif memplidkan bahawa pada setiap masa yang material, beberapa kuasa-kuasa pentadbiran dan kuasa-kuasa membuat keputusan seperti yang diplidkan di perenggan 74.5 telah diberikan oleh Defendan Ke-2 dan Defendan Ke-3 kepada Defendan Ke-4.

[48]In view of the Plaintiffs' pleaded narrative against D2-D3, this Court finds great wisdom from the following precedents:

(i) *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 2 MLRA 263 in which the **Federal Court** has held as follows:-

> *"[27] The Court of Appeal, in Sivarasa Rasiah & Ors v. Che Hamzah Che Ismail & Ors* [2012] 1 MLRA 255, *had adopted the well-settled principle of striking out in the following passage "A striking-out order should not be made summarily by the court if there is issue of law that requires lengthy argument and mature consideration. It should also not be made if there is issue of fact that* ***is capable of resolution only after taking viva voce evidence during trial, (see*** *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 1 MLRA 284)*."*
>
> *[28] The* ***basic test for striking out as laid down by the Supreme Court in Bandar Builder (supra) is that the ciaim on the face of it must be 'obviously unsustainable'. The stress is not only on the word 'unsustainable' but also on the word 'obviously', ie the degree of unsustainability must appear on the face of the claim without having to go into lengthy and mature consideration in detail. If one has to go into lengthy and mature consideration in detail of the issues of law and/or fact, then the matter is not appropriate to be struck out summarily. It must be determined at trial.***
>
> *[29] The established rule on this point is that the* ***court should not examine the evidence in this summary proceedings in such a way as to amount to conducting a trial on the conflicting affidavit evidence. As rightly said by*** Lord Diplock in the House of Lords in *American Cyanamid Co v. Ethicon Ltd* [1975] AC 396 *at p 407:*
>
> > *"... The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried. It is no part of the court's function at this stage of the*

> *litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial..."*

(ii) *Hajemi Din & Anor v Elite Agriculture Sdn Bhd* [2022] MLJU 747 in which the **Court of Appeal** has held as follows:-

> *"[36] We are of the opinion that the* ***conflict in affidavit evidence can only be resolved at the trial begun by a writ action and not via a summary procedure*** *under* O 89 ROC 2012*. With respect, the learned High Court Judge erred in law and in fact when he concluded that there were no issues worthy of a trial and that the summary procedure under* O 89 ROC 2012 *was rightly engaged for the purpose of an eviction order by the plaintiff as a registered lessee against the defendants, whom the learned Judge found, are in illegal occupation of the land."*

(iii) *Tan Wei Hong & Ors v Malaysia Airlines Berhad* [2018] MLRA 433 in which the **Federal Court** has *inter alia* held as follows:-:

> *"[63] After hearing both parties, we share the same view with the Court of Appeal that the issues of whether the 3rd defendant owed any duty of care to the plaintiffs and whether there was a breach of that duty in the circumstances of the present case were not straightforward. The issues involve complex questions of law and fact. They require a close and careful examination of evidence from both sides. These issues are triable issues. The plaintiffs' claim against the 3rd defendant cannot be struck out at the preliminary stage under* O 18 r 19 of the ROC*. This is not a plain and obvious case to be struck out.*
>
> *[66]* ***We are also of the view that in dealing with an application for striking out, the court must exercise great care and caution, bearing in mind that the court must not drive away any litigant however weak his case may be from the seat of justice (see:*** *Lee Nyan Choi v. Voon Noon* [1978] 1 MLRA 611)*.* ***On the face of the pleadings against the 3rd defendant, the plaintiffs' claim is not obviously unsustainable. There are triable issues that need to be fully argued at trial. This is a case where the court is not in a position to embark on a minute examination of the documents and the facts of the case at this preliminary stage of striking out application. That is solely reserved for the trial judge."***

[49]Similar with D5-D8, D2-D3 (who were the directors of the 1st Defendant) had also denied their involvement in the sales transactions. D2-D3 had maintained their position that they do not have a legal relationship with the Plaintiffs and they were never involved in any discussion regarding purchase of the units with the Plaintiffs. D2-D3 argued that as Directors of the 1st Defendant, D2-D3 are not legally liable for the tortious conducts of the 4th Defendant (who allegedly was authorised to conduct sales on behalf of the 1st Defendant under a letter dated 1.3.2017). The oft-mentioned Letter of Authorisation dated 1.3.2017 is reproduced below:

> **EUROLAND & DEVELOPMENT SDN BHD (936529-K)**
>
> **42C, Jalan Perdana 10/14,**
>
> **Pusat Perdagangan Tasik Perdana,**
>
> **Pandan Perdana, 55300 Kuala Lumpur.**
>
> **tel + 603 9274 8888 fax + 603 9274 3873**
>
> **Date: 1.3.2017**
>
> **To whom it may concern**

And

Tong Kah Hoe

Group Chief Operating Officer and Managing Officer Dear Sirs,

RE: Authorization Letter

Confirmation of the authorized signatory in relation to the sale and purchase documentation of the Project.

Project: Damai Vista held under the Master Title H.S. (M) 22365, PT 59894 Batu 13, Jalan Cheras, Mukim Cheras, Daerah Hulu Langat, Neger Selangor.

Developer: Euroland & Development Sdn Bhd

1. **Reference made to above matter.**
2. **The Company hereby confirm and authorize Mr. Tong Kah Hoe (NRIC: 650728-10-7113) being the Group Chief Operating Officer and the Managing Representative of the Company to execute and sign on behalf of the Company, from the date herein onwards, all the necessary documents in relation to the sale and purchase of the units under the aforesaid Project, including but not limited to the sale and purchase agreement(s), deed of mutual covenant as well as other related document(s) in relation to the said Project.**

Thank you. Yours faithfully,

For and on behalf of Euroland & Development Sdn Bhd t.t.

Dato Tong Yun Mong cc.

Sale and Marketing Team

[50]As much as this Court is aware and respects the doctrine of separate legal entity, it is an equally prevailing and pertinent principle of company law that fraud unravels all, and that fraud is indeed an exception to the general rule of separation of entities (which would warrant the Court to lift the veil of incorporation). This 'fraud exception' to the general rule is certainly trite and has been followed by celebrated precedents, and in fact has been codified as statute law under Section 540(1) of the Companies Act 2016 (previously Section 304 (1) of the same Act pre-amendment). Suffice that this Court refers to the **Court of Appeal's** decision in *Law Kam Loy v Boltex Sdn Bhd* [2005] MLJU 225; [2005] 3 CLJ 355 ***at p 362*** in which the Court of Appeal held the following:

> *'In my judgment, in the light of the more recent authorities such as Adams v Cape Industries Pic, it is not open to the courts to disregard the corporate veil purely on the ground that it is in the interests of justice to do so. it is also my respectful view that the* ***special circumstances*** *to which Lord Keith referred* ***include cases where there is either actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity...'***

[51]The Plaintiffs had pleaded that the D2-D3 are the alter egos of the 1st Defendant. D2-D3 was inferred to be the decision maker of the 1st Defendant and the actual personas who were responsible for the daily operations, services, and/or business of the 1st Defendant.

[52]D2-D3 tenuously attempted to isolate themselves away from the 1st Defendant (as a corporate entity), and the 4th Defendant as a separate personal individual. However, it is simply outrageous for D2-D3 to expect this Court to interlocutorily make such dry and objective separation especially against the glaring fact that D2-D3's position and involvement is deeply interwoven with the 1st and 4th Defendants. Although objectively the 4th Defendant was the individual directly responsible for his representations to the Plaintiffs, it remains undisputed that it may be compelling and justified for the Plaintiffs to believe and rely

upon the 4th Defendant's representations, as the 4th Defendant was allegedly authorised to represent the 1st Defendant (alter egos being D2-D3) *vide* the Letter of Authorisation (which was issued and signed by D3 himself).

[53]As this Court has mentioned earlier, the 'fraud exception' to the general rule of separation of entities has already been codified into the law under section 540(1) of the Companies Act 2016 **(previously,** Section 304 (1)). This provision in clear terms, stipulates that a director, or any person in control of a company can be made personally liable if he had used (or conducted) the company's business for fraudulent purposes. And very recently, the **Court of Appeal** in the case of *Zamzam Arabic Food Holding Sdn Bhd & Anor v Johanjana Corporation Sdn Bhd* [2022] 5 MLJ 302 held that the word "person" in the provision clearly and unambiguously refers to a 'real person' (not an artificial person or corporate entity) which could well refer to a *"director, managing director, or person in control of the company":*

> *"[27] We agree with the submission of the learned counsel for the 2nd defendant We take the view that* s 3 of the Interpretation Acts *could not be read into* s 540(1) of the Companies Act *as it would give effect to inconsistent meanings to* s 540(1). *The underlying purpose of* s 540(1) *is to impose a personal responsibility and liability on the director and/or the person who controls the company and not the company itself for carrying on the business of the company with intent to defraud a creditor. The wording in* s 540(1) *is plain and unambiguous. The word "person" in* s 540(1) *in its ordinary and natural meaning meant "a real person". He could be a director, managing director* or person in control of the company. Therefore, to give effect to s 540(1)*, the court must apply the ordinary meaning of "person" and not the meaning assigned to it by the plaintiff."*

[54]Until and unless this Court has appropriately determined the Plaintiffs' claims for fraud (and fraudulent misrepresentation), this Court cannot for certain determine whether the veil of incorporation ought to be lifted or otherwise. Thus, D2-D3's contention to strike out the Plaintiffs' claim on the grounds of separation of entities must fail. Furthermore, this Court does not find any merit in D2-D3's argument that the Plaintiffs' pleadings have not sufficiently pleaded the particulars of fraud and/or fraudulent misrepresentation against the D2-D3. Upon close perusal of paragraphs 21-58, 64-77, 78, 78.1-78.6 of the Statement of Claim, this Court is of the view that the Plaintiffs have indeed sufficiently fulfilled the requirements of Order 18 rule 12 of the Rules of Court 2012.

[55]All of the above considered, it is vividly clear that the present case is not a plain and obvious case to warrant this Court to exercise its discretionary power to strike out the Plaintiffs' claim. It is glaringly obvious that the pleadings filed herein have raised serious issues to be tried which must only be ventilated in a full trial by *viva voce* evidence. The issues to be tried (more relevant to D2-D3) has been set out in detail in the Plaintiffs' written submission (which are reproduced here):

(i) **Whether the 3rd Defendant had signed the Letter of Authorization dated 1.3.7.2017 which granted the 4th Defendant the authority to execute the Sale and Purchase Transaction agreements (para 23 of the Statement of Claim (SOC);**

(ii) **Whether the 3rd Defendant had signed the Letter of Authorization which allowed the 4th Defendant to carry out operations relating to the sale of the Damai Vista units (paragraph 28.5 of the SOC);**

(iii) **Whether the Defendants have the obligation to give vacant possession of the said Damai Vista units to the Plaintiffs and/or acknowledge that the Plaintiffs are the rightful owners of the purchased units (para 55 of the SOC);**

(iv) **Whether the Defendants were aware that the Plaintiffs were the actual owners of the said Damai Vista units (para 55 of the SOC);**

(v) **Whether the Defendants had caused and/or made any false representations which induced the Plaintiffs to purchase the said Damai Vista units (para 71 of the SOC);**

(vi) **Whether the Defendants have committed fraud against the Plaintiffs by failing to disclose the fact that the 4th Defendant did not have any actual right to execute the Sale and Purchase Transaction documents, if no such authority was given (para 73 of the SOC);**

(vii) **Whether the Defendants had knowledge about the false representations which induced the Plaintiffs to enter into the Sale and Purchase Transaction agreements with the 1st Defendant (para 74 of the SOC);**

(viii) **Whether the Defendants had defrauded the Plaintiffs since they knew and/or ought to have known that the 1st to 4th Defendant did not have intention of giving vacant possession of the said Damai Vista units to the Plaintiffs {para 78.2 of the SOC); and (ix) Whether the Defendants had intentionally perpetuated the fraud when they purposefully appointed the 4th Defendant to execute the Sale and Purchase Transaction agreements (paragraph 78.3 of the SOC).**

[56]Based on the abovementioned considerations, this Court hereby dismisses Enclosure 35 and 41 with costs. This Court also orders that each of the Defendants do-pay the Plaintiffs the costs of these applications at RM2000.00 subject to allocator.
