MALAYSIAN JUDGMENTS

IN THE COURT OF APPEAL OF MALAYSIA

Coram: Alizatul Khair Osman Khairuddin, JCA; Nallini Pathmanathan, JCA; Zabariah Yusof, JCA

Kee Wah Soong v Yap Boon Hwa and Another Appeal

Citation: [2018] MYCA 293 **Suit Number:** Rayuan Sivil Nos. W-02(NCC)(W)-1286-07/2016 & W-02(NCC)(W)-1328-07/2016

Date of Judgment: 24 August 2018

Contracts & commercial – Purchase of shares – Purchase price – Fraudulent misrepresentation – Entitlement to damages for fraudulent misrepresentation

JUDGMENT

[1] Both Appeals, No: W-02(NCC)(W)-1286-07/2016 (Appeal 1286) and No: W-02(NCC)(W)-1328-07/2016 (Appeal 1328) were heard together. These 2 Appeals arose from one Civil Suit from Kuala Lumpur High Court where Yap Soon Ping and Yap Boon Hwa were the Plaintiffs and Kee Wah Seong was the Defendant.

[2] In this judgment, for convenience we refer to parties as they were in the High Court.

[3] Appeal 1286 is the appeal by the Defendant against part of the decision of the learned trial Judge of the High Court which dismissed his counter claim for a refund of the monies that he had paid to the Plaintiffs and also damages against the Plaintiffs despite finding that the 2nd Plaintiff had committed fraudulent misrepresentation against the Defendant.

[4] Appeal 1328 is the appeal by the 2 Plaintiffs against the whole of the decision of the learned trial Judge which dismissed the claim by the Plaintiffs for a declaration and/or an order to rescind the transfer of shares of the Plaintiffs in Nada Mewah Sdn Bhd with costs of RM10,000.00 to the Defendant.

[5] After having heard submissions from counsel and upon evaluating and considering the learned trial Judge's grounds of judgment, we decided unanimously to:

i) allow Appeal 1286, to the extent that damages be granted for the fraudulent misrepresentation committed by the 2nd Plaintiff on the Defendant, with an Order that such damages be assessed;

and

ii) allow Appeal 1328 partly, to the extent that the Defendant is to pay to the Plaintiff, the balance purchase price of the shares of Nada Mewah Sdn Bhd which is equivalent to RM300,000.00 within 30 days.

We now state our reasons.

Background:

[6] At all material times, the 1st Plaintiff was holding shares on behalf of her brother, the 2nd Plaintiff in Syarikat Nada Mewah Sdn Bhd (Nada Mewah). The 2nd Plaintiff was the person in charge of the day to day running of the business of Nada Mewah since 1996.

[7] The 2nd Plaintiff and the Defendant were introduced by one Gan Juen Keng (PW 3) with a view towards offering the Defendant the option to take up the shares in Nada Mewah for the purpose of undertaking a joint venture in the development of 2 projects which have been referred to as the "the Rawang land" and "1 Prima Terengganu". PW 3 knew that, at that point in time, the 2nd Plaintiff was looking for someone who could fund these projects. PW 3, through the Defendant's wife, knew the Defendant was interested to invest in construction and development. PW 3 further said that to his knowledge, at the material time, the 2 projects were waiting for development approval from the relevant authorities.

[8] PW 3 and the 2nd Plaintiff went to meet up with the Defendant at his office to present a proposal to the Defendant about the 2 projects. The Defendant outlined his conditions in considering the proposals by the 2nd Plaintiff, namely for Nada Mewah to clear all liabilities and encumbrances and the existing bumiputera shareholder must exit the company and the JVA between State Secretary, Permodalan Negeri Selangor Berhad and Nada Mewah must be renewed. Nada Mewah must also obtain development approval from Majlis Perbandaran Selayang for the Rawang land. Further, they must also clear the sale and purchase concerning the 1 Prima Terengganu project. These conditions stated by the Defendant can be found in his scribblings on a piece of paper which is in exhibit D34A (page 104 of CB).

[9] The discussions culminated in an agreement executed between the 2nd Plaintiff and the Defendant on 10.11.2014 premised on an offer and understanding and subsequently acceptance of terms of agreement. However, there appear to be 2 versions of the agreement, as exhibited in P6 and D16 (pages 11 and 48 of the CB). P6 is the copy in the 2nd Plaintiff's possession whilst D16 is the copy in the Defendant's possession. The 2nd Plaintiff contends that P6 is the correct and true version of the agreement whilst the Defendant contends that D16 is the correct one.

[10] P6 was dated 10.11.2014 whilst D16 was undated. It is undisputed that the agreement was prepared by the Defendant at his office after discussions with the 2nd Plaintiff and the Defendant. Both P6 and D16 are similar in most respects, the difference being, the presence of some pencilled hand written notes in P16 which is being strenuously disputed by the Defendant. This is with regards

to the purchase price of the shares of Nada Mewah which is also a disputed issue in the present Appeals between the Plaintiffs and the Defendant. These hand written notes were admittedly written by the 2nd Plaintiff. It was contended by the Plaintiffs that the Defendant had agreed to pay a sum of RM850,000.00 for the purchase price of the shares (as stipulated in P6). The Defendant contended otherwise, i.e. that the agreed price for 85% shareholding was RM680,000.00 (as in D16). It is not disputed that the Defendant, so far, has only paid RM150,000.00 to the 2nd Plaintiff.

[11] There are also disputes between the 2nd Plaintiff and the Defendant as to the date of the agreement. According to the Defendant, the date of the agreement is 10.11.2014 as he recalled that was the date when he gave the 1st cheque of RM20,000.00 (as proven by exhibit P7(a) to the 2nd Plaintiff). The 2nd Plaintiff disagreed that the date of the agreement was 10.11.2014 although he agreed that the agreement was signed on the same day when the cheque P7(a) was given to him by the Defendant. Going by the date as stated in exhibit P7(a), this would mean that the date of the agreement is 10.11.2014.

The Plaintiff's case:

[12] The agreement was prepared by the Defendant after they had agreed to the terms to develop the 2 projects. The 2nd Plaintiff contends that the Defendant failed to insert the correct price of the 85% shares in the agreement as agreed by them. The 2nd Plaintiff, on his own accord had amended the agreement to state the amount as RM850,000.00 instead of RM680,000.00. Hence, according to the 2nd Plaintiff, the true and correct version of the agreement is P6 which is in his possession.

[13] The 2nd Plaintiff contends that he has performed his obligation under the agreement by instructing his sister, the 1st Plaintiff (PW 1) who held 84% shares and one Mohd Hafiz who held 1% of the shares in Nada Mewah, to transfer the said shares to the Defendant. The 2nd Plaintiff said that the Defendant paid a total of RM150,000.00 (exhibit P7 (a) for RM20,000.00 and exhibit P7 (b) for RM130,000.00) and up to 25.11.2014 (which is the date of the cheque for the amount of RM130,000.00) had failed to pay the remaining balance purchase price for the shares.

[14] The 2nd Plaintiff claimed that the Defendant had breached the agreement by his failure to pay the agreed purchase price of RM850,000.00 pursuant to P6. As a result of the breach, the Defendant should return the 85% shares of Nada Mewah held by the Defendant.

[15] The 2nd Plaintiff further argued that it was improbable that the purchase price of 85% shares be RM680,000.00 as the capital of Nada Mewah was RM1,000,000.00 at the price of RM1.00 per share. It did not make sense for them to sell the shares at below par value. In support of his argument, the 2nd Plaintiff referred to the Company's Resolution in exhibit P8 (page 14 of the CCB) which was signed by the Defendant.

[16] After the transfer of the shares of Nada Mewah to the Defendant, he took advantage of his majority control in Nada Mewah by cancelling the 2nd Plaintiff's name as one of the joint signatories of Nada Mewah. The Plaintiffs alleged that, as a result, the 2nd Plaintiff was sidelined by the Defendant in the management of Nada Mewah.

[17] The Defendant's argument that the 2nd Plaintiff committed fraudulent misrepresentation on the Defendant was an afterthought. This can be proven by the conduct of the Defendant, when he failed to respond after receiving the 2 letters of demand, from the solicitors of the Plaintiffs, in P9 and P10 (pages 15-18 and 19-22 of the CB) demanding for the balance purchase price and the return of the 85% shares prior to the suit being filed. By the failure of the Defendant to respond to these letters of demand, it can be inferred that the Defendant has agreed to purchase 85% or 850,000 units out of 1,000,000 units share capital of Nada Mewah at the price of RM1.00 for each unit amounting to RM850,000.00.

[18] The 2nd Plaintiff contends that he was offered the 1 Prima Terengganu project from one company, Pelantar Komponen (M) Sdn Bhd which had done some initial working papers as well as the preliminary works and Nada Mewah is required to pay RM300,000.00 as consultation fees for the said works to Pelantar Komponen (M) Sdn Bhd. Being a majority shareholder, the Defendant had the power to approve the payment to Pelantar Komponen (M) Sdn Bhd. However, the Defendant refused to approve the said payment which resulted in Pelantar Komponen (M) Sdn Bhd giving the 1 Prima Terengganu project to another party.

[19] As the 2nd Plaintiff was no longer a signatory to the account of Nada Mewah, he had no authority to approve any payment. As such, the 2nd Plaintiff alleged that it was the Defendant who had caused the loss of the 1 Prima Terengganu project.

[20] As for the Rawang land project, the 2nd Plaintiff contends that, although Majlis Perbandaran Selayang had rejected his application for the development of the Rawang land project as it failed to comply with the guidelines namely, "Garis Panduan dan Piawai Perancangan Negeri Selangor", this does not amount to a complete rejection. The 2nd Plaintiff further said that at the material time, he was still in the midst of reviving the said project and the project is still within Nada Mewah's grasp. The allegation that the 2nd Plaintiff failed to disclose the rejection by the Majlis Perbandaran Selayang regarding the project to Nada Mewah, as alleged by the Defendant, is therefore not true.

[21] Further, the 2nd Plaintiff contends that there could not be any deceit on the Defendant as the Plaintiffs had transferred their shares in Nada Mewah to the Defendant because the Plaintiffs believed that the Defendant would pay the balance purchase price of the 85% shares. The Defendant, however, failed to settle the balance sum and had restricted the Plaintiff's involvement in any form of business activity in Nada Mewah.

[22] Nowhere was it ever mentioned in the agreement that only upon the placement of the 2 projects would the Defendant make payment for the shares and proceed to make other payments. Neither was there any timeline mentioned for the placement of the projects but the Plaintiffs had acted to their detriment by parting away with the company that they had established. Therefore, it is only appropriate for the Court to order the Defendant to return the shares, and as compensation, the Plaintiff be allowed to keep the money already paid by the Defendant. In addition, the Defendant is to pay the costs of such transfer including restoring the company to its original shareholding.

[23] The 2nd Plaintiff argued that if it is true that the 2nd Plaintiff had deceived the Defendant, surely the Defendant would have repudiated the agreement. However, the Defendant did not do so, instead it was the Defendant who had deceived the 2nd Plaintiff after the Defendant took over the holding of the 85% shares and thereafter, made changes in the composition of the account holding in Nada Mewah. The 2nd Plaintiff stated that whilst this suit was ongoing before the court, the Defendant had approached him several times to resolve the dispute between them but he refused, for he no longer trusted the Defendant, and that the proposed terms of the settlement is much in favour of the Defendant. The proposed settlement agreements sent by the Defendant to the 2nd Plaintiff are exhibited in P11, P12, P13 and P14 (pages 376-378, 379-380, 381-384, 385-388 of the CB respectively).

[24] As for the counterclaim by the Defendant, there is a total failure by the Defendant in proving the element of fraud in view of the fact that:

(i) the loss of the 1 Prima Terengganu project which was due to the Defendant's own inaction in refusing to approve the payment to Pelantar Komponen (M) Sdn Bhd; and

(ii) the Rawang land project is still in existence.

Hence the Defendant's counterclaim ought to be dismissed.

The Defendant's case:

[25] The 2nd Plaintiff approached the Defendant to assist him to undertake the 2 development projects which the 2nd Plaintiff said were going to be awarded to his company, Nada Mewah. The said projects comprised 350 units situated on a Malay Holding Land on Lot 1813 Batu Rakit, Kuala Terengganu known as 1 Prima Terengganu (1 Prima Terengganu) and the other known as Projek Perumahan Sederhana Kos Rendah on part of Lot 4366, Taman Kanching Jaya (the Rawang land). When the 2nd Plaintiff and PW 3 came to meet with the Defendant at his office to present a proposal to the Defendant about the 1 Prima Terengganu project and the Rawang land projects, the Defendant outlined his conditions in D34A (page 104 of the CB).

[26] It ended with the Plaintiffs and the Defendant executing an agreement dated 10.11.2014. The Defendant agreed to buy 85% of Nada Mewah subject to the 2 projects being placed in Nada Mewah. The Defendant's contribution to 85% of the shareholding would be RM680,000.00 based on the value of RM800,000.00 for 100%. The 2nd Plaintiff would ultimately hold 15%. The rest of the terms of the agreement are the methods of payment for the shares. However, the precondition of the 2 projects mentioned must be complied first. This was essential for the Defendant to put monies in Nada Mewah.

[27] The Defendant contends that there was fraudulent misrepresentation by the Plaintiffs as the 2 projects were never going to be placed in Nada Mewah when the agreement was entered into between him and the Plaintiffs. After signing the agreement, the Defendant discovered that the Rawang land project had been rejected by the Majlis Perbandaran Selayang long before the

agreement was signed and that the 1 Prima Terengganu project was never intended nor contemplated for Nada Mewah, as it had been awarded to a 3rd party.

[28] It has been the Defendant's stand all along that he had agreed to buy the 85% shares in Nada Mewah subject to the pre-condition as in D34A namely, the placing of the 2 projects. The placement of these 2 projects in Nada Mewah is essential and was the primary consideration when he invested his monies in the company. It was represented to him that the 2 projects would be awarded to Nada Mewah, hence he found that investing in Nada Mewah was very attractive as the profits were almost guaranteed as the owners of the projects were the State Government and that being the case, payment would never be an issue.

[29] A search report on Nada Mewah as at 8.12.2014 (D36-at page 160 of the CB) disclosed that it had no value as a going concern. It had a net loss of RM2,587.00. However, if the 2 projects were to be awarded to Nada Mewah, it would be an about turn for the company to make handsome profits. He would not have agreed to fork out RM680,000.00 for a company which had nothing to offer without the 2 projects.

[30] The Defendant testified that, after the agreement was signed, the 2nd Plaintiff kept avoiding answering his queries about the progress of the 2 projects. The 2nd Plaintiff told him not to get involved as he was handling it. This kept going on for a few months.

[31] Sometime in the first week of January 2015, the 2nd Plaintiff arranged for a meeting with the Town Planner AR Rancangbina, who is the consultant for Nada Mewah. At this meeting the 2nd Plaintiff promised the Defendant that the necessary approvals for the Rawang land project would be obtained within a month or so.

[32] The Defendant waited for the 2nd Plaintiff to confirm the progress of the approvals until late February 2015. However, on 15.3.2015, prior to the meeting with the Town Planner, the Defendant received text messages through a WhatsApp from a friend named Leong Kheng Sun (DW 2), who informed the Defendant that a project in Rawang behind Tesco Rawang, which was up for sale. DW 2 sent out the layout and details of the project to the Defendant. The Defendant discovered that it was the same Rawang land project which was supposed to be placed with Nada Mewah.

[33] Feeling uneasy about the whole matter, the Defendant, on his own, met up with the Town Planner. At the meeting with the Town Planner, the Defendant was shown some documents which indicated that the approval from the Majlis Perbandaran Selayang for the Rawang land project had expired in 2009. A letter, D37 (page 161 of the CCB) from Nada Mewah dated 9.4.2014 to Permodalan Negeri Selangor stated as follows:

> "...Permohonan kebenaran merancang yang dikeluarkan oleh MPS telah luput pada 8 Oktober 2009 dalam masa mungkin mengalami kerugian dari pelancaran projek ini.
>
> Ia itu pihak kami telah mula berurusan dengan Majlis Perbandaran Selayang MPS untuk mendapatkan kelulusan kembali yang perlu bagi memulakan pembinaan projek ini..."

This letter shows that the approval for development for the Rawang land project had lapsed on 8.10.2009. The Defendant claimed that this fact was never made known to him when he signed the agreement.

[34] The Defendant further sought clarification directly from Majlis Perbandaran Selayang on the Rawang land project. There, he met an officer from the department (DW 1) who showed him some letters and documents. From the letters and documents, the Defendant discovered that the proposal for the development of the Rawang land project had been rejected on 5.6.2014 and this was communicated by Majlis Perbandaran Selayang to the Town Planner, AR Rancangbina by letter dated 30.7.2014 (exhibit D17 at Page 49 of the CB). This happened 4 months before the agreement was signed and the Defendant was never informed about this rejection by the Plaintiffs.

[35] The Defendant testified that prior to the discovery, apart from RM130,000.00, he had paid a further sum of RM200,000.00 into Nada Mewah's account. After the discovery, despite the 2nd Plaintiff pestering for the balance of the monies to be released to him, the Defendant refused to abide by the request of the 2nd Plaintiff. Given the situation, and to protect his funds, the Defendant changed the composition of the Board of Directors and the cheque signatories in Nada Mewah, as by that time he already had majority control of the company. He later took back the RM200,000.00 that he had earlier deposited, from Nada Mewah's account. The Defendant said that he did this because the 2nd Plaintiff was a joint signatory and clearly he would have refused to sign any cheque for him (Defendant).

[36] There was a meeting when the Defendant informed the 2nd Plaintiff of his discoveries which made the 2nd Plaintiff very angry. The 2nd Plaintiff accused the Defendant of not trusting him.

[37] The 2nd Plaintiff attempted to return the RM150,000.00 to the Defendant. However the Defendant refused to accept the refund at the material time, as he believed and was confident that he could get the approval for at least 150 units from another project from the Selangor Government. The Defendant said he already had a good rapport with the relevant officers at the State level. However, the 2nd Plaintiff refused to agree to this and kept insisting that he (2nd Plaintiff) could get approval for 361 units. Matters reached an impasse when the Defendant received letters of demand from the Plaintiff's solicitors as in P9 and P10.

[38] The Defendant said that further checks showed that there are no records in Nada Mewah showing that Nada Mewah had ever filed any appeal to Majlis Perbandaran Selayang after the rejection of the application for development approval for the Rawang land project.

[39] As far as the 1 Prima Terengganu project is concerned, it had been awarded to another company after the agreement was signed and this was also never told to the Defendant. This, the Defendant said is another misrepresentation practiced by the Plaintiffs on the Defendant.

[40] The 2nd Plaintiff had handed over to the Defendant certain documents, D20 (pages 56-60 of the CB) and D21 (pages 61-63 of the CB) prior to the signing of the agreement. The Defendant said in

evidence that D20 represents the projected profits that would have been made for the 1 Prima Terengganu project. From page 56 of the CB, the net profits that could be generated is RM7,034,919.08. The Defendant was of the view that this figure is reasonable after taking into account the size of the project. Pages 57-60 are the breakdown for the costs involved for the project. D21 contains the projected gross profits for the Rawang land project, which is RM47,127,471.00. These were the factors that induced the Defendant to enter into the agreement with the Plaintiffs. D20 and D21 form the basis of the Defendant's counterclaim against the Plaintiffs for the loss of profits opportunity.

[41] The Defendant subsequently discovered that in March 2015, the 2nd Plaintiff was in the midst of searching for another joint venture partner notwithstanding the existence of the agreement with the Defendant.

The Reliefs prayed for:

[42] The Plaintiffs claimed against the Defendant for the following reliefs:

(a) A Declaration and/or an Order to rescind Form 32A/"Instrumen Pindah Milik Saham" to transfer the 85% shares to the Defendant;

(b) An Order that the Defendant transfers the 85% shares owned by him to the 1st Plaintiff within 7 days from the date of Order failing which the Registrar to execute the documents on behalf of the Defendant;

(c) Exemplary Damages to be assessed by the Court;

(d) Costs of 5% from the date of filing of the Writ until full and final settlement; and

(e) Any other order that the Court may deem fit and suitable.

[43] The Defendant, in turn, counter claimed against the Plaintiffs for the following

(a) A refund of RM150,000.00 paid to the Plaintiffs;

(b) Interest on the said sum of RM150,000.00 due to the loss of usage of the said sum paid from 10.11.2014 until the date of full and final settlement as a result of misrepresentation by the Plaintiffs;

(c) Damages for the loss of profits opportunity amounting to RM36 million due to the fraudulent misrepresentation by the Plaintiffs or in the alternative, damages to be taxed by the Senior Assistant Registrar;

(d) Costs for the counterclaim on a client and solicitor's basis.

Findings of the Learned High Court Judge:

[44] The learned trial Judge made the following findings:

(a) The 2nd Plaintiff had breached the agreement by failing to comply with his undertaking to place the 2 projects in Nada Mewah. As such there was a clear breach of the pre-condition by the 2nd Plaintiff. Therefore the Defendant does not need to pay the balance payment as agreed;

(b) The 2nd Plaintiff had deceived and induced the Defendant to sign the JVA despite the fact that the Rawang land application had been rejected four months prior to parties signing the agreement and that the 2nd Plaintiff did not produce any evidence to show any appeal had been made to Majlis Perbandaran Selayang with regards to the rejection;

(c) The 2nd Plaintiff had failed to call any witness to corroborate his testimony that Nada Mewah will be taking over the 1 Prima Terengganu project from Pelantar Komponen (M) Sdn Bhd;

(d) The 2nd Plaintiff had committed an act of fraudulent misrepresentation against the Respondent by inducing him to sign the agreement with a view to getting handsome profits on the supposed placement of the two development projects into Nada Mewah;

(e) The copy of the agreement produced by the Defendant (D16) is the genuine agreement and the 2nd Plaintiff's copy of the agreement (P6) has been amended subsequently after parties had signed the agreement and as such D16 is the correct agreement;

(f) The Plaintiffs are not entitled to any form of damages as no evidence was led to show why exemplary or any damages ought to be paid and further held that it was the 2nd Plaintiff's own fraudulent conduct in inducing the Defendant to sign the agreement which clearly vitiates any award in the Plaintiff's favour.

The issues before the court:

[45] We have evaluated and considered the issues canvassed before us which are as follows:

(a) Whether the agreement dated 10.11.2014 is conditional upon the 2nd Plaintiff ensuring that the 2 projects are placed in Nada Mewah or whether it is independent of the Defendant's obligation to pay the full purchase price of the shares;

(b) Which is the genuine agreement; P6 or D16?;

(c) Whether the full purchase price of the shares is RM680,000.00 or RM850,000.00;

(d) Whether there is fraudulent misrepresentation on the part of the 2nd Plaintiff; and

(e) Whether the Defendant is entitled to his counterclaim namely, damages for the fraudulent misrepresentation.

OUR DECISION:

Whether the agreement is conditional upon the 2nd Plaintiff ensuring that the 2 projects are placed in Nada Mewah or whether it is independent of the Defendant's obligation to pay the full purchase price of the shares:

[46] For convenience, we reproduce verbatim the agreement dated 10.11.2014 that was executed between the Plaintiffs and the Defendant herein below. This would be the version as in D16:

"A) Mr. Yap Boon Hwa, herein addressed as Mr. Yap and Nada Mewah Sdn. Bhd paid-up Capital-RM1,000,000

B) Offer Basing on:

1) The two projects of Terengganu Prima & The Rawang land are both placed in Nada Mewah Sdn. Bhd.

2) RM800,000 for 100% of Nada Mewah Sdn. Bhd as

a) Repayment of infra and ground works for the JV

b) We will come in as 85% shareholder and balance 15% with Mr. Yap

c) 85% purchase price x RM800,000=RM680,000

3) Additional RM1,000,000 will be needed to increase the working capital of company to RM2.0 MIL paid-up with about RM1.0 MIL remain for cash flow and working capital.

4) Mr. Yap's share in the company will be fixed at 15% with his share of subsequent paid-up capital to be advanced by Mr. Kee Wah Soong and group.

We will proportionately pay our share of additional RM1.0 MIL.

C) payment of RM680,000 in stages before increase of another RM1.0 MIL capital

1) Sign the form as commitment of Agreement	- RM20,000
2) Admit Kee Wah Seong and Chong Poh Leng as Directors of company	- RM48,000
3) Transfer of company shares and admit one more director and change of bank account to include Kee Wah Soong	- RM232,000
4) Assignment letter on Prima Project to Nada Mewah Sdn Bhd	- RM120,000
5) Commencement of Prima Project launch	- RM60,000
6) Rawang Land contract renewal	- RM200,000
7) Additional RM1,000,000 upon (5) and (6) completed (within one	

month period)

I, Yap Boon Hwa ...as the majority shareholders of Nada Mewah Sdn Bhd, undertake and agree to the above proposal presented by Mr. Kee Wah Soong...

I hereby agree to sell 85% of Nada Mewah Sdn Bhd shares to Mr. Kee Wah Soong and undertake to commence and complete the Terengganu Prima Project and the Rawang Land JV under Nada Mewah Sdn Bhd.

Thank You.

Signed by	Witnessed by	Signed by
KEE WAH SOONG	Guen Juen Kheng @ Gan Juen Keng	Yap Boon Hwa"

[47] The learned trial Judge found that there exists a pre-condition to the agreement premised on the specific statements found in Clause B of the agreement, and the penultimate paragraph in the agreement which expressly states that the 2nd Plaintiff is to commence and complete the 2 projects under Nada Mewah.

[48] The Plaintiffs submit that the learned trial Judge erred as she failed to consider that this was not the intention of the parties when executing the agreement. If ever it was the intention of the parties that the 2nd Plaintiff is obliged to place the Rawang land project and the 1 Prima Terengganu project in Nada Mewah as a pre-condition, this would have been clearly laid down/ specifically stated by the parties when executing the agreement. The Defendant would have also specifically stated that he will only make the payment after the projects were placed under the Company. However, this was not the case. It is the contention of the Plaintiffs that a plain reading of the agreement clearly suggests that the Defendant is required to fulfill his obligation by making the payments. The Plaintiffs referred to his solicitor's letter of demand in P9 (page 15 of the CB) as support, namely that the Defendant never objected to its contents which essentially states the failure of the Defendant in making payments for the transfer of 85% shares of Nada Mewah to the Defendant. Even after almost 8 months and having further waited until August 2015, the Defendant was still keen on fulfilling his obligation. The Plaintiffs do not deny that the agreement entered into by both parties had certain terms and conditions to be fulfilled before payment is to be made. However these are only pre-conditions that had been agreed upon by both parties and nothing more. In actual fact there exists a process of assigning and obtaining renewal for the said projects. This cannot be done immediately and more so without money being pumped into the company's joint account first. The Plaintiffs submit that the learned trial Judge failed to take into account this pertinent term when making her findings.

[49] On this issue which turns on the construction of the agreement which was entered between the Plaintiffs and the Defendant, we are guided by the principles of construction of a contract which has

been set out by Lord Hoffman in the House of Lord's case of **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1 WLR 896. In interpreting or constructing a contract, it is the determination of the meaning, which the document would convey to a reasonable person having all the background knowledge, which would reasonably have been available to the parties in the situation in which they were at the time of the contract. It is not for the court to improve upon the instrument of the contract which it is called upon to interpret. We also find support in the Federal Court case of **Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd** [2010] 1 MLJ 597 wherein Gopal Sri Ram FCJ said that:

> "The court has no power to improve upon the instrument which it is called upon to construct, whether it be a contract, a statute or article of association. It cannot introduce terms to make it fairer or more reasonable. However, that meaning is not necessarily or always what the authors or parties to the documents would have intended. It is the meaning to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed; See Investors Compensation Scheme Ltd v West Bromwich Building Society. It is this objective meaning which is conventionally called the intention of the parties, or the intention of parliament or the intention of whatever person or body was or is deemed to have been the author of the instrument."

[50] Guided by the above cases, what would the words in the agreement mean to a person who had background knowledge of the facts which would reasonably be available at the time when the agreement was entered into. As far as the intention of the Defendant is concerned when he entered into the agreement, it was in evidence that his main concern was to have the 2 projects emplaced within Nada Mewah. This is evidenced by D34A which was indicated to the 2nd Plaintiff before the signing of the agreement dated 10.11.2014. The intention of the Defendant entering into the agreement with the Plaintiffs was with the ultimate aim of making profits out of his money which he would be investing in Nada Mewah, through the development of the 2 projects. This was specifically pleaded by the Defendant in his Defence and counterclaim at paragraph 35 namely that:

> "Defendan memasuki kontrak dengan Plaintif-plaintif untuk tujuan komersil dan meraih keuntungan dam sekiranyaa kontrak-kontrak tersebut memang telah diperolehi oleh Nada Mewah Sdn. Bhd. seperti yang telah direpresentasi oleh Plaintif-plaintif dimana Kontrak 1 Prima adalah kontrak quasi Kerajaan dan Kontrak Rawang adalah kontrak Kerajaan Negeri Selangor, isu keuntungan adalah sesuatu yang sememangnya terjamin kerana kontrak-kontrak Rumah Mampu Milik tersebut sememangnya mempunyai ramai pembeli yang sedia ada dan boleh dipilih oleh pemaju."

[51] It was the evidence of the Defendant that he would not have entered into the JVA had it not been for the 2 projects emplaced in Nada Mewah as Nada Mewah is a dormant company. It was purely for a commercial reason that he was willing to purchase the shares of Nada Mewah despite the fact that the company is not a going concern (page 338 of the RR Jilid II (I)).

[52] A perusal of the agreement shows that it consists of 3 main parts, namely Clause A, Clause B and Clause C. Clause (B) states that the offer was premised on the statement that *"The two projects*

of 1 Prima Terengganu & The Rawang Land are both placed in Nada Mewah Sdn Bhd". The other terms in relation to payments follow thereon. The 2 projects appear to be the primary basis upon which the proposal was made and the agreement was entered into. The words in Clause (B) reads:

> "Offer Basing on:
>
> 1) The two projects of Terengganu Prima & The Rawang land are both placed in Nada Mewah Sdn. Bhd.",

The wording is clear so as to enable a literal meaning to be applied, i.e. that the basis of the offer for the agreement was the 2 projects. This is fortified by the wording in the last 2 paragraphs of the agreement which states that the 2nd Plaintiff expressly undertake and agrees to the proposal presented by the Defendant (whereby the offer was based on) and the 2nd Plaintiff *"agree to sell 85% of Nada Mewah Sdn Bhd shares to Mr. Kee Wah Soong and undertake to commence and complete the Terengganu Prima Project and the Rawang Land JV under Nada Mewah Sdn Bhd."* By this phrase, it cannot be interpreted that the agreement is merely for the sale of shares of Nada Mewah to the Defendant. Without the 2 projects, there would not have been any sale of the shares of the company. The sale of the shares is merely co-incidental and secondary to the 2 projects, as the Defendant had put in monies in Nada Mewah. That would be the reasonable construction if one is to give the agreement its ordinary and plain meaning.

[53] The next consideration would be what are the background facts or the factual matrix when the agreement was entered into between the Plaintiffs and the Defendant. It is in evidence that the Plaintiffs were in need of funds to carry out the 2 projects in Nada Mewah. The Defendant was found to be the very person who suited the Plaintiffs' need for the purpose of injecting funds into Nada Mewah. As far as the Defendant is concerned, as pleaded and as evidenced from his testimony, his reason for entering into the agreement was purely commercial and the profits to be derived, after injecting his monies into the company.

[54] It was also in evidence by the Defendant that a search report on Nada Mewah as at 8.12.2014 disclosed that it has no value as a going concern. The placement of the 2 projects in Nada Mewah, would make a huge difference, in that the company would turn into a profitable one. It was in evidence that the 2nd Plaintiff had given to the Defendant, D20 and D21 which show projected profits for both projects if it were undertaken by Nada Mewah. That spurred the Defendant to enter into the agreement with the Plaintiffs.

[55] From the evidence, the Defendant would not have entered into the agreement had there been no project in the company, given that Nada Mewah had no revenue but with liabilities of RM114,600.00 and a net loss of RM2,587.00 as at 8.12.2014 based on the search report (exhibit P3 at pages 3-8 of the CB). These facts were known or were available to both parties at that point when they entered into the agreement.

[56] Thus, in construing the words in Clause (B) of the agreement and the penultimate paragraph of the same, from the literal and ordinary meaning of the words in the agreement, together with the

factual matrix at the time when the agreement was entered into, the reason why the agreement was entered into was primarily due to the 2 projects to be emplaced in Nada Mewah. The learned trial Judge had addressed these relevant factors in her judgment in paragraphs 33-41 and we are of the view that she was not plainly wrong in her assessment of the facts and evidence that was before her.

[57] Therefore, the agreement was conditional upon the Plaintiffs ensuring that the 2 projects were placed in Nada Mewah and the Defendant's obligation to pay the full purchase price of the shares was secondary to the placement of the 2 projects in Nada Mewah.

Which is the genuine agreement; P6 or D16?

[58] The learned trial Judge came to the conclusion that D16 was the genuine agreement (refer to paragraph 52 of the grounds). Her reasons for coming to such a conclusion were that:

(i) the agreement was prepared at the Defendant's office. If indeed the amendments had been genuine, surely a simple retyping of the JVA would have been carried out at the Defendant's office;

(ii) there were no counter signatures by the side of the amendments by the Defendant;

(iii) it was inconceivable that the amendments were made in pencil which suggest that the amendments could not be presumed to be permanent; and

(iv) the 2nd Plaintiff failed to explain the discrepancy between P6 and D16.

[59] The learned trial Judge made findings of fact that as P6 had hand written notes in pencil, it cannot be the genuine agreement. We concur with the learned trial Judge as she was not plainly wrong in her findings in this respect. It is highly improbable that an amendment to the agreement was done in pencil, which suggests that it cannot be taken to be permanent or final. Even if there is to be any amendment, surely it can be retyped again, as it was in evidence that the agreement was prepared in the Defendant's office at the material time. Given that the amendments are with regard to the price of the shares, which is a crucial term (and quite substantial), it does not make sense for the amendments to be done unilaterally by the 2nd Plaintiff in pencil.

[60] The evidence of the Defendant (in his exact words from the notes of proceedings) supports this fact:

"Q: Mr Yap said in court, in re-examination I believe that he also made the same amendment on your copy D16, what do you say? He said he made the same amendment on your copy, what is your answer?

A: Can I explain?

Q: Of course, please explain.

A: YA, I think in the earlier trial the plaintiff had confirm this agreement is sign in my office and

the witness also Mr Edward Gun is also there. My office I have staff, my office also had a computer and soft copy of the list there. So it is if we are to sign an agreement and if they are to make payment to same date, there is no reason that we sign on a copy that mark with pencil mark, how can a document be sign if it is mark with pencil mark and to sign. If it is totally unacceptable for me are deals many contracts, so there is no way could sign a contract and sign that with pencil mark.

Q: Hold on. Everything was done in your office, can I suggest that if you want it done in your office if there was amendment it could have been done immediately.

A: Correct. That is the point."

[61] As far as the copy which is in the possession of the Defendant, his copy does not contain any amendment to the purchase price in the JVA. Surely, there must be some form of acknowledgment or agreement by the Defendant in the form of countersignatures by the side of the amendments. As far as the present case is concerned there was no evidence that such amendments (if any) were agreed to, by the Defendant. Therefore, the learned trial Judge did not err when she inferred from the facts that the 2nd Plaintiff made the amendments not at the material time when the JVA was executed but at a later date, and that is the reason as to why there is D16, the un-amended version in the possession of the Defendant.

[62] It has not been shown by the Plaintiffs as to where the learned trial Judge had gone plainly wrong in her assessment of the evidence and the facts. Therefore, we do not see any reason to intervene with her findings in this respect.

Whether the full purchase price of the shares is RM680,000.00 or RM850,000.00:

[63] Exhibit P6 is the Plaintiff's document of the agreement dated 10.11.2014. Pursuant to this P6, the Plaintiffs contend that the actual purchase price was RM850,000.00 and not RM680,000.00. P6 is the agreement which contains the pencil amendments, to which the learned trial Judge had found (which we affirm) that it is not the genuine agreement.

[64] Since there is already a finding of fact by the learned trial Judge that P6 is not the genuine agreement, the purchase price should be as stated in D16 which is RM680,000.00.

[65] The 2nd Plaintiff referred to the Company Resolution at P8 (page 14 of the CCB), which was signed by the Defendant to support his contention that it does not make sense for the Plaintiffs to sell at RM680,000.00 which was below par value as the capital of the company was RM1,000,000.00. However, a perusal of P8, the Company Resolution, does not disclose the date when the Resolution was made and it does not state the purchase price for the transfer of the shares from the Plaintiffs to the Defendant. Hence P8 does not assist the 2nd Plaintiff in this respect.

Whether there was fraudulent misrepresentation on the Defendant by the Plaintiff

[66] The cause of action by the Defendant is premised on fraudulent misrepresentation by the 2nd

Plaintiff to induce the Defendant to enter into the Agreement dated 10.11.2014. This was pleaded in paragraphs 13 and 14 of the Defence and Counterclaim (pages 52-53 of the RR Jilid I).

[67] Section 18 of the **Contracts Act 1950** defines "misrepresentation" as:

> "Misrepresentation" includes-
>
> > "(a) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
> >
> > (b) Any breach of duty which, without an intent to deceive, gives an advantage to the person committing it, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; and
> >
> > (c) Causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement."

[68] The situation which falls under "misrepresentation" is wide and open ended. 'The expression "misrepresentation" is merely descriptive of a false pre-contractual statement that induces a contract or other transaction' (Refer to **Sim Thong Realty Sdn Bhd v Teh Kim Dar** [2003] 3 MLJ 460). The burden is on the representee to show that the misrepresentation induced him to enter into the agreement (**Kuppusamy v Arumugan Chettiar** AIR 1967 SC 1395).

[69] In the instant case, there is more than ample evidence from which the learned trial Judge was entitled to conclude that the 2nd Plaintiff's representation on the availability of the 2 projects had induced the Defendant to enter into the agreement with the Plaintiffs. It was in evidence that the 2nd Plaintiff specifically approached the Defendant for assistance to undertake the 2 development projects which the 2nd Plaintiff represented to be awarded to Nada Mewah. There was evidence from PW 3 (pages 97-98 of the RR Jilid II(I)) and the 2nd Plaintiff (pages 123, 154, 155 in RR Jilid II(I)) which, when taken together with the evidence given by the Defendant (pages 230, 335, 336, 338 in RR Jilid II(I)) show evidence of pre-agreement statements amounting to an inducement emanating from the 2nd Plaintiff. This is fortified by the presence of exhibits D34A, D20 and D21 which show projection of profits for the 2 projects. D20 and D21 were provided by the 2nd Plaintiff to the Defendant. The basis of the agreement between the Plaintiffs and the Defendant finally found its way in Clause B (1) of the agreement dated 10.11.2014.

[70] As such, the learned trial Judge did not err when she found that from the facts disclosed, there was fraudulent misrepresentation on the part of the 2nd Plaintiff. The learned trial Judge was satisfied that the 2 projects were never going to be placed in Nada Mewah, as represented by the 2nd Plaintiffs when the agreement was entered into.

[71] We affirm these findings by the learned trial Judge as the offer to enter into the agreement was based on the Rawang land project and 1 Prima Terengganu project being emplaced in Nada Mewah (Refer to Clause B (1) of the agreement). The agreement is conditional upon the Plaintiffs ensuring

that the 2 projects are placed in Nada Mewah and the Defendant's obligation to pay the full purchase price of the shares is secondary to the placement of the 2 projects.

[72] From the evidence thus shown, as far as the application for approval for the Rawang land project is concerned, it had been rejected by the Majlis Perbandaran Selayang 4 months prior to the execution of the agreement. This fact which was within the knowledge of the Plaintiffs was never disclosed to the Defendant at the time of signing of the JVA, when the Defendant had made payment to the Plaintiffs in the amount of RM150,000.00.

[73] D17 is the letter dated 30.7.2014 and Borang C from Jabatan Perancang Bandar, Majlis Perbandaran Selayang addressed to AR Rancangbina which stated that the application for "Kebenaran Merancang" was rejected (refer to page 49-52 of the CCB). The letter stated that the reason for the rejection of the approval was that the proposal for the development "tidak mematuhi kelulusan Majlis Mesyuarat Kerajaan Negeri Selangor". DW 1, Pegawai Perancang Bandar in Majlis Perbandaran Selayang, in his evidence said that any application in contravention of the guidelines of the Majlis Perbandaran Selayang would never be approved by Majlis Perbandaran Selayang (refer to page 203 of the RR Jilid 1). Be that as it may, the 1st Schedule attached together with the letter also provides for an avenue of appeal within one month from the date the decision of the rejection was conveyed to the Plaintiffs (refer to paragraph 3 of the 1st Schedule). There was no evidence to show that there was any appeal submitted by the Plaintiffs within one month after the letter D17 was sent. This was also not disclosed to the Defendant when the agreement was signed. In fact, the Defendant made the discovery way beyond the one month period for appeal on the rejection by the Majlis Perbandaran Selayang. The 2nd Plaintiff in his evidence said that he would be able to get approval for the Rawang land project. However he failed to explain how that is possible, given the fact that the appeal period had long gone. The 2nd Plaintiff said in evidence that the project still exists. That may be so, but it was never given to Nada Mewah in the first place. It was stated expressly in the agreement that the 2nd Plaintiff undertakes to commence and complete the 2 projects. How is the project to even commence when the project had slipped through the hands of Nada Mewah at the time the agreement was executed.

[74] Further, it was submitted by the Plaintiffs that the JVA dated 30.6.2006 between the Plaintiffs, the State Secretary Selangor (Incorporation) and Permodalan Negeri Selangor Berhad (refer to page 106 of the CB), in relation to the Rawang land project, although has expired, is subject to renewal. This was stated in Clause C (6) of the agreement dated 10.11.2014 between the Plaintiffs and the Defendant. A perusal of the JVA between the Plaintiffs and the State Secretary Selangor (Incorporation) and Permodalan Negeri Selangor Berhad at Clause 4.18 wherein it states:

> "Section 8.17 - PERIOD OF AGREEMENT
>
> This Agreement shall be for a period of five (5) years from the date hereof which period may be extended by the mutual agreement in writing of both parties under the Agreement."

How could there be an application for approval for development when the JVA with the State Secretary Selangor (Incorporation) and Permodalan Negeri Selangor Berhad had already expired in

2011. As the JVA has expired, there was no issue of the Rawang land project contract being renewed as stated in Clause C (6) of the agreement between the Plaintiffs and the Defendant. Apart from Clause C (6) of the agreement between the Plaintiffs and the Defendant, there was no evidence to show that the Defendant knew that the JVA with the State Secretary Selangor (Incorporation) and Permodalan Negeri Selangor Berhad had expired when he entered into the agreement with the Plaintiffs. This was clearly another misrepresentation on the part of the Plaintiffs.

[75] Further, it was in evidence that the Defendant's friend, Leong Kheng Sun (DW 2) had sent text messages which conveyed that the Rawang land project was for up for sale, although at the material time there was a valid and a subsisting agreement between the Defendant and the Plaintiffs. DW 2 had sent the layout and the details of the project which were one and the same as the Rawang land project, the subject matter of the agreement. Hence the evidence of the 2nd Plaintiff when he said that he would still be able to get approval for the Rawang land project is contradicted by the evidence that the project was already out for sale to the public at the material time.

[76] With regards to 1 Prima Terengganu project, the learned trial Judge had considered exhibits D18 and D19 (pages 53 and 55 of the CB) and concluded that the project was "never faintly in contemplation to be placed in Nada Mewah". Firstly, D18 is a letter from Perbadanan Prima Malaysia which was addressed to Pelantar Komponen (M) Sdn Bhd dated 4.9.2014 whilst D19 is a letter from the office of the Menteri Besar of Terengganu dated 17.7.2014 which was addressed to Puan Hashimah binti Hashim, the Vice President of the Planning & Development Division of PRIMA Corporation. These 2 letters were never addressed nor did they make any reference to the Plaintiffs or Nada Mewah. There was no explanation as to how these 2 letters came into the possession of the Plaintiffs.

[77] The 2nd Plaintiff failed to explain D39 and D40 which are crucial documents on 1 Prima Terengganu project. D39 is a draft agreement purportedly appointing Nada Mewah as project management consultant of the 1 Prima Terengganu project. Whereas D40 is a draft agreement for the en bloc sale of all the units constructed in the 1 Prima Terengganu project from Pelantar Komponen (M) Sdn Bhd to Nada Mewah. D39 and D40 are not dated and neither were they ever executed. The 2nd Plaintiff could not provide any explanation for D39 and D40 although he attempted to explain by saying that a payment of RM300,000.00 from Nada Mewah is to be made first to Pelantar Komponen (M) Sdn Bhd. Save for this bare assertion, there was no evidence from Pelantar Komponen (M) Sdn Bhd to support his testimony or any corroborative evidence for that matter. The 2nd Plaintiff is of the view that there was no necessity for him to call anyone from Pelantar Komponen (M) Sdn Bhd to corroborate his testimony. Hence, the assertion by the 2nd Plaintiff that a payment of RM300,000.00 from Nada Mewah was to be made first to Pelantar Komponen (M) Sdn Bhd for the project to be emplaced within Nada Mewah, is not proven, as the Plaintiffs failed to call witnesses to corroborate his testimony that Nada Mewah will be taking over 1 Terengganu Prima project from Pelantar Komponen (M) Sdn Bhd. As such, there is no logical explanation as to how 1 Prima Terengganu project would be emplaced with Nada Mewah.

[78] From the factual matrix, clearly there was fraudulent misrepresentation by the 2nd Plaintiff with

regards to the placement of the 2 projects into Nada Mewah when the agreement was entered into between the Plaintiffs and the Defendant.

[79] As far as the payment by the Defendant in Clause C of the agreement is concerned, those are the payment milestones which are consequential upon the 2 projects being placed in Nada Mewah. As stated in the evidence of the Defendant the agreement was not an agreement to purchase shares of Nada Mewah. He would not have agreed to pay RM680,000.00 for a company which had no value as a going concern without the 2 projects. (refer to Q 12 at page 338 of the RR Jilid II (I)). Hence the submission of the Plaintiffs that the Defendant had breached his obligation when he failed to make full payment after the transfer of the shares is without merits.

[80] The Plaintiffs pleaded in paragraph 14 of the Statement of Claim that the Plaintiffs were rescinding the agreement and had instructed their solicitors to issue a demand letter dated 19.8.2015 demanding for the return of the 85% shares to the 1st Plaintiff and that the Plaintiffs claim for exemplary damages. In this instance, as it is the Plaintiffs who committed the fraudulent misrepresentation, it does not lie with the Plaintiffs to rescind the agreement. The option lies with the Defendant whether to rescind or affirm the agreement. This is provided for under section 19 of the **Contracts Act 1950** which provides that:

> "(1) When consent to an agreement is caused by coercion, fraud, or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.
>
> (2) A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true."

Hence when the 2nd Plaintiff had committed fraudulent misrepresentation on the Defendant, the option lies with the Defendant whether to rescind the agreement or to affirm it.

The proposals in P11 and P14:

[81] The 2nd Plaintiff submits that just before filing his defence the Defendant made some proposal to settle the matter. (P11, P12, P13 and P14). The 2nd Plaintiff doubted the sincerity of the Defendant in attempting to seek settlement and maintained that the Defendant had "been up to something and is not affected at all" by the alleged fraudulent misrepresentation, i.e. there was no evidence that the Defendant suffered loss at all as a result of the so called fraudulent misrepresentation.

[82] From the conduct of the Defendant, it was clear that he had no intention of rescinding the agreement. In fact the Defendant chose to affirm the agreement, when he proposed to continue with the agreement by introducing P11-P14, notwithstanding the misrepresentation committed on the Defendant, but with a pre-condition attached as stated therein, meaning the Rawang land project was still important and formed an integral part of the JVA. The proposal for settlement made it conditional that there be a renewal of the JVA between the Selangor State Secretary, Permodalan Negeri Selangor Berhad and Nada Mewah Sdn Bhd and subsequently a fresh application for approval is to be made. It

was also in evidence that the 2nd Plaintiff in re-examination had agreed to the proposal of the Defendant in the proposed agreement in exhibits P11 and P14 (refer to page 115 and 116 of the CCB). However the proposal of the Defendant were never followed up by the 2nd Plaintiff. This was addressed by the learned trial Judge.

[83] The learned trial Judge had ordered that the sum of RM150,000.00 which had been advanced by the Defendant pursuant to the agreement be returned to him with interest from the date of the agreement i.e. 10.11.2014 (para 54 of the grounds).

[84] We take the view that the learned trial Judge erred in this respect as she failed to take into account that not all of the amount of RM150,000.00 was paid by the Defendant to Nada Mewah on 10.11.2014. RM20,000.00 was paid on the date of execution of the agreement i.e. 10.11.2014 (refer to P7 (a)) and RM130,000.00 was paid vide cheque dated 25.11.2014 (Refer to P7(b)). Further, the order of the learned trial Judge would have the effect of the Plaintiffs transferring 85% of the shares in Nada Mewah to the Defendant without any consideration being paid. As such the Plaintiffs stand to lose by transferring the shares to the Defendant and admitting the Defendant and his representative as directors of Nada Mewah despite not been paid the full amount for the shares which is the sum of RM300,000.00 (under Clause C (1-3) of the agreement; RM20,000.00 + RM48,000.00 + RM232,000.00). As the Defendant had opted to affirm the agreement and the Defendant and his representatives had been admitted as directors, in accordance to the payment milestone, the Plaintiffs should be paid RM300,000.00 as stipulated under the agreement.

Whether the Defendant is entitled to his counterclaim namely, damages:

[85] We take note that the learned trial Judge had made findings of fact that the 2nd Plaintiff had committed fraudulent misrepresentation on the Defendant, but did not grant any damages in favour of the Defendant, although it was specifically prayed as an alternative relief in the counter claim. Although we agree with the learned trial Judge's findings on the fraudulent misrepresentation, the learned trial Judge had erred in her refusal to grant damages for the same. Damages ought to be allowed after a finding of fraudulent misrepresentation on the part of the 2nd Plaintiff. Lord Denning MR in his judgment in **Doyle v Olby (Ironmongers) Ltd** [1969] 2 WLR 673, 680 set out the relevant law governing the grant of damages for fraudulent misrepresentation:

> "In fraud, the defendant has been guilty of a deliberate wrong by inducing the plaintiff to act to his detriment. The object of damages is to compensate the plaintiff for all the loss he has suffered, so far, again, as money can do it. In contract, the damages are limited to what may reasonably be supposed to have been in the contemplation of the parties. In fraud, they are not so limited. The defendant is bound to make reparation for the actual damages directly flowing from the fraudulent inducement. The person who has been defrauded is entitled to say:
>
> > "I would not have entered into this bargain at all but for your representation. Owing to your fraud, I have not only lost all the money I paid you, but, what is more, I have been put to a large amount of extra expense as well as suffered this or that extra damages."

> All such damages can be recovered: and it does not lie in the mouth of the fraudulent person to say that they could not reasonably have been foreseen. For instance, in this very case the plaintiff has not only lost the money which he paid for the business, which he would never have done if there had been no fraud; he put all that money in and lost it; but also he has been put to expense and loss in trying to run a business which has turned out to be a disaster for him. He is entitled to damages for all his loss, subject, of course, to giving credit for any benefit that he has received. There is nothing to be taken off in mitigation: for there is nothing more that he could have done to reduce his loss. He did all that he could reasonably be expected to do."

[86] In **Smith New Court Securities Ltd v Scrimgeour Vickers** [1996] 3 WLR 1051, the claimant, Smith New Court was induced by fraudulent misrepresentation by an employee of Scrimgeour Vickers to purchase shares in a company, and subsequently the share price fell considerably resulting in a loss of £11,353,220. The claimant brought an action against Scrimgeour Vickers for deceit. The House of Lords held (on the damages issue) that "the primary rule was that a victim of fraud was entitled to compensation for all the actual loss, including consequential loss, directly flowing from the transaction induced by the deceit of the wrongdoer". Lord Browne-Wilkinson held that Smith New Court was entitled to the full loss of £11,353,220. He laid down seven principles to be followed in awarding damages in fraudulent misrepresentation, which would be relevant in assessing damages.

[87] The Defendant in the present appeals, submits that his loss was a direct result of the fraudulent misrepresentation by the 2nd Plaintiff which induced him to enter into the JVA. He premised his loss of chance to make profits by applying the estimated gross development costs in exhibit D21 for the Rawang Land project and sales revenue and return of investment to developer for the 1 Prima Terengganu project in exhibit D20. The learned trial Judge found that those projections of profits as found in documents D20 and D21 were insufficient evidence to prove damages to be awarded to the Defendant. In any event those were the projections and calculations of the Plaintiffs. That may be so, but we take the view that the learned trial Judge erred when she dismissed entirely the claim of the Defendant for damages, even if the documents D20 and D21 were insufficient to prove the damages suffered by the Defendant. The learned trial Judge ought to have ordered damages be granted to the Defendant for the fraudulent misrepresentation committed by the 2nd Plaintiff, such damages to be assessed.

[88] This is in line with the decision taken by the Federal Court in the case of **SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor** [2016] 1 MLJ 464 (SPM Membrane), where the Federal Court reversed the decision of the High Court and the Court of Appeal on the central issue on the interpretation of an Agreement and held that the termination of the Agreement therein was wrongful pursuant to clause 8 of the same. It further held that the breach of the Agreement may give rise to damages for loss of profits premised upon section 74 of the **Contracts Act 1950**. The Federal Court reaffirmed the principle of **Hadley v Baxendale** [1854] 9 Ex 341 that "the damage or loss suffered must be within the contemplation of parties whether actual or constructive, that the loss suffered was a natural and probable result of the defendant's breach and that it included loss of profits". What is relevant for the purpose of our present appeals is that, in **SPM Membrane**, the appellant (who was entitled to damages as a result of the wrongful termination of the Agreement by

the respondent) had provided a formula for the calculation of the loss of profits which the Federal Court disagreed, as the same would have the result of putting the appellant in a position well beyond that what it would rightfully be in, had the contract been properly performed. In dealing with damages for fraudulent misrepresentation courts normally will award a claimant full compensation for the loss they have suffered, but not to award compensation above and beyond that (See **Smith New Court Securities Ltd v Scrimgeour Vickers**). The Federal Court in **SPM Membrane** further held that:

> "[130] ...However, contrary to the respondent's submission and the judgment of the trial judge, the mere fact that the formula was the appellant's own formulation (presumably in contradistinction with a formula provided for within the contract) is not a ground for rejecting the formula, the agreement did not stipulate a formula for calculating loss of profits, and as such the general principles of the common law will apply and a formula that best estimates the future loss of profits will be preferred by the court.
>
> [131] Therefore, contrary to the respondent's submission, we do not think that proper consideration on quantum was allowed for at trial. There were no clear submissions made as to the expenses incurred and a very loose use of the words *pendapatan* and *kutipan*, which shed no light on the actual loss of profits. The respondent should also take the opportunity to submit on whether the formula is a proper representation of the loss of profits, that is to say whether or not there are any other factors that could reasonably have been expected to increase or reduce the collections, and corresponding commissions, be it a significant reduction in remaining arrears or for any other reason. The challenge by the respondent exclusively on the basis that loss of profits was not expressly stated in cl 8.5 was wholly inadequate."

The Federal Court found that there were less than satisfactory evidence and submissions with regard to the expenses incurred and the evidence adduced shed no light on the actual loss of profits by the appellant, and consequently, the Federal Court deemed it fit to order that the case be remitted back to the High Court for damages to be assessed.

[89] Similarly, in the appeals before us, the learned High Court Judge erred when she rejected the projections and calculations in D20 and D21 as insufficient to prove damages. We are of the view that, although D20 and D21 represented the formula of calculation of projections of profits by the Plaintiffs, that should not be a ground for rejecting it entirely in assessing damages. We found that the learned Judge erred in failing to give a proper or adequate consideration on the issue of damages at trial. Hence, we are of the view that, following the course taken by the Federal Court in **SPM Membrane**, the appropriate order would be to remit the case back to the High Court for assessment of damages. Parties are free to prove, argue and submit on the proper calculations on the actual loss of the Defendant at the hearing of the assessment of damages.

Conclusion:

[90] Therefore, premised on the foregoing, we unanimously make the following order:

i) For Appeal 1286, we allow the appeal, in that, damages be granted for the fraudulent

misrepresentation committed by the 2nd Plaintiff on the Defendant and that such damages is to be assessed. We remit the case back to the High Court for assessment of damages; and

ii) For Appeal 1328, we allow the appeal in part to the extent that the Defendant to pay to the Plaintiffs the amount of RM300,000.00 for the balance of the price of the Nada Mewah shares within 30 days.

[91] Each party to bear their own costs and deposit refunded.

Signed by:

Zabariah Mohd Yusof
Judge
Court of Appeal
Putrajaya

Date: 24.8.2018

COUNSEL

For the Appellant in Appeal 1286 and For the Respondent in Appeal 1328: Avinder Singh Gill [Messrs A S Gill & Salina]

For the Respondent in Appeal 1286 and For the Appellant in Appeal 1328: P Rajasundram and Kamala Saraswathy [Messrs Raja S Devan & Veni]

LEGISLATION REFERRED TO:

Contracts Act 1950, Sections 18, 19, 74

JUDGMENTS REFERRED TO:

Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd [2010] 1 MLJ 597

Doyle v Olby (Ironmongers) Ltd [1969] 2 WLR 673, 680

Hadley v Baxendale [1854] 9 Ex 341

Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896

Kuppusamy v Arumugan Chettiar AIR 1967 SC 1395

Sim Thong Realty Sdn Bhd v Teh Kim Dar [2003] 3 MLJ 460

Smith New Court Securities Ltd v Scrimgeour Vickers [1996] 3 WLR 1051

SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1 MLJ 464