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## SEACERA DEVELOPMENT SDN BHD

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## NEWLAKE DEVELOPMENT SDN BHD & ANOR; ANTARA VISTA SDN BHD (THIRD PARTY)

High Court Malaya, Shah Alam  
Yaacob Md Sam J  
[Civil Suit No: 22NCVC-927-2011]  
29 August 2013

*Civil Procedure: Striking out — Application for — Third party's application to strike out third party notice and 1st defendant's claim against third party — Whether contract existed between third party and 1st defendant for sale of land — Whether any contractual duties arose from third party*

*Contract: Sale and purchase of land — Privity of contract — Third party's application to strike out third party notice and 1st defendant's claim against third party — 1st defendant's claim against third party based an allegation of false representation — Whether contract existed between third party and 1st defendant for sale of land — Whether any contractual duties arose from third party*

This was the third party's application to strike out a third party notice and the 1st defendant's claim against it. The plaintiff under this suit was claiming vacant possession of an area in lot 13850 and damages for trespass against the 1st defendant. The 1st defendant, had constructed an access road over lot 13850 ('affected area') connecting to the 1st defendant's land in lot 13849 without the plaintiff's permission. The third party was the previous owner of lot 13849 and lot 13850 that were part of a development project. The 1st defendant contended that the third party had made false representation to it; that the construction of the access road was approved as part of the development project, and that the sale of lot 13850 to the plaintiff did not include the affected area. The 1st defendant submitted that it was based on such representations that it purchased lot 13849 from Yom Ahmad, the current owner of the said lot, and proceeded with the construction and completion of the access road.

**Held:**

(1) The evidence showed that the 1st defendant's claim against the third party was premised on some alleged false representation that the affected area at lot 13850 could be used as an access road to lot 13849, which resulted in the purchase of lot 13849 by the 1st defendant from one Yom Ahmad. The evidence also showed that the third party had sold lot 13849 to Yom Ahmad. Subsequently Yom Ahmad sold and transferred lot 13849 to the 1st defendant. Clearly, the third party was no longer the owner for lot 13849 after it was sold to Yom Ahmad. The 1st defendant, therefore, could not rely on any representation by the third party as the 1st defendant had no privity of contract with the third party in respect of the purchase of lot 13849. If there were any contractual



duties here, it was between Yom Ahmad as the vendor and the 1st defendant who had purchased the land from Yom Ahmad. Conclusively, this was a plain and obvious case for the application to be allowed. (paras 10, 11 & 14)

*Third party's application allowed with costs.*

**Case(s) referred to:**

*Abdul Ghani Abdullah v. Eon Bank Berhad; HHB Holdings Berhad (Third Party)* [2010] 16 MLRH 704 (refd)

*Adib Mokhtar & Ors v. Jason Chan Chee Khong & Anor* [1999] 2 MLRH 462 (refd)

*Balakrishnan Devaraj & Anor v. Admiral Cove Development Sdn Bhd* [2010] 2 MLRA 1 (refd)

*Frederick Ting Hua San v. Ban Guan Thye Sawmill Sdn Bhd* [2002] 4 MLRH 50 (refd)

*Renault SA v. Inokom Corporation Sdn Bhd & Anor And Other Applications* [2008] 3 MLRA 504 (refd)

*United Malayan Banking Corp Bhd v. Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1982] 1 MLRA 174 (refd)

**Legislation referred to:**

Rules of Court 2012, O 18 r 12

**Counsel:**

*For the plaintiff: BH Yap; M/s Bell Heng & Aliman*

*For the 1st defendant: Nathan Narayanasamy; M/s Kumar Jaspal Quah & Aishah*

*For the 2nd defendant: Ng Chia How; M/s Richard Wee & Yip*

*For the third party: Alvin Lai (Teoh Chen Yee with him); M/s Justin Voon Chooi & Wing*

**JUDGMENT**

**Yaacob Md Sam J:**

[1] This is the third party's application dated 5 July 2013 (encl 118) to strike out the third party notice dated 26 February 2013 and the 1st defendant's claim against the third party, Antara Vista Sdn Bhd (in liquidation).

**Brief Facts**

[2] The plaintiff under this suit is claiming for vacant possession of the affected area at Lot 13850 from the 1st defendant, injunction and damages against the 1st defendant on the loss suffered by the plaintiff as a result of the trespass by the 1st defendant on the affected lot which belongs to the plaintiff.

[3] The plaintiff claims that the 1st defendant, by constructing a fully tarred road as an access road over the affected area on Lot 13850 connecting to the 1st defendant's land Lot 13849 via the affected lot to the public road, without the permission of the plaintiff has committed trespass.

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[4] The third party was the previous owner of Lot 13849 and Lot 13850 that were part of a scheme of development project known as "Cadangan Pembangunan Penempatan Semula Setingan Di Atas Tanah Kerajaan Lot Penempatan Sementara CP-51554 Kg Sungai Ara, Mukim Sungai Buloh, Daerah Petaling, Negeri Selangor." The third party was given the planning/development order by Majlis Perbandaran Petaling Jaya vide Layout Plan dated 9 August 1999 and planning permission dated 8 June 1999 to develop the lands.

[5] On 5 May 2005 the 1st defendant entered a Joint Venture Development Agreement ("JVDA") with the third party to develop Lot 13849. However, the JDVA was terminated and was not performed by the parties concerned. Lot 13849 was subsequently sold by the third party to one Yom Ahmad vide sale and purchase agreement dated 8 February 2004.

[6] On or about 11 April 2007 Yom Ahmad sold and transferred Lot 13849 to the 1st defendant, Newlake Development Sdn Bhd. Based on the planning permission dated 8 June 1999 and layout plan dated 9 August 1999 that was obtained by the third party, the 1st defendant constructed and completed its project known as "10 Boulevard Damansara" on Lot 13849 and proceeded to construct and complete the access road as a general access road for common and public use.

#### The 1st Defendant's Case

[7] It is the 1st defendant's case that sometime in early June 1999 the third party had knowingly or recklessly made false representation to the 1st defendant that the construction of an access road of the affected area of Lot 13850 has been approved by MBPJ as one of the conditions in the planning permission. It was also contended by the 1st defendant that the third party had also made false representation to the 1st defendant that the sale of Lot 13850 by the third party to the plaintiff does not include the affected area that has already been designed as a public access. It was based on such representations the 1st defendant purchased Lot 13849 from Yom Ahmad on 11 April 2008 and proceeded to construct and complete the access road as a general access road for common and public use. As a result the plaintiff alleged that the 1st defendant has committed trespass on Lot 13850 which belongs to the plaintiff. By the third party notice dated 26 February 2013, the 1st defendant claims that it has a right of action against the third party to recover contribution and indemnity from the third party over the fault created by the third party in the event that the 1st defendant is liable to the plaintiff's claim for damages.

#### The Third Party's Submission

[8] At the outset, learned counsel for the third party submitted as follows:

- (a) the third party was no longer the owner of Lot 13849 since 6 February 2008;



- (b) since the JVDA was terminated and subsequent purchase of Lot 13849 by the 1st defendant from Yom Ahmad, the 1st defendant as the registered owner of Lot 13849 developed the land on its own and it was not developed based on the JVDA with the third party;
- (c) the third party is not a party to the transaction for sale and purchase of Lot 13849 between the 1st defendant and Yom Ahmad. Thus, only Yom Ahmad as a contracting party and vendor has contractual obligations towards the 1st defendant as the purchaser;
- (d) the 1st defendant as the land owner of Lot 13849 own duty to make proper enquiry whether the affected area at Lot 13850 (adjacent land) can be used to construct an access road;
- (e) if there is any contractual duties, the third party only had contractual duties towards Yom Ahmad who purchased Lot 13849 from the third party, However, Yom Ahmad had never made any allegation of misrepresentation against the third party;
- (f) there is no existing contract between the 1st defendant and the third party in relation to the sale of Lot 13849 and therefore the third party has no contractual duty or any duty towards the defendant;
- (g) in the absence of any contract between the 1st defendant and the third party, the purported false representation cannot be used or relied on by the 1st defendant against the third party in this suit for any damages. Thus, the 1st defendant has no valid cause of action against the third party for indemnity and/or contribution.

[9] It was also contended by the third party that the 1st defendant has failed to plead in the statement of claim the particulars, nature and element of each alleged misrepresentation by whom it was made and whether verbally or in writing as required by O 18 r 12 of the Rules of Court 2012.

### Decision Of The Court

[10] A careful perusal of the third party notice dated 26 February 2013 and the 1st defendant's statement of claim shows that the 1st defendant's claim against the third party is premised on the alleged false representation that the affected area at Lot 13850 can be used as an access road to Lot 13849, which resulted the purchase of Lot 13849 by the 1st defendant from Yom Ahmad bin Ngah Ahmad. It clearly shows from the sale and purchase agreement (exh "PK1" of the third party's affidavit) that on 8 February 2004 the third party has sold Lot 13849 to Yom Ahmad. Subsequently Yom Ahmad sold and transferred Lot 13849 to the 1st defendant vide sale and purchase agreement dated 7 November 2007 (exh "PK3"). Clearly the third party was no longer the owner for Lot 13849 after it was sold to Yom Ahmad. The 1st defendant therefore cannot possibly rely on any representation by the third party as the term of contract when there is no existing contract between the third party and the

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1st defendant for the sale of Lot 13849. It is trite law that there cannot be any misrepresentation when there is no underlying contract between contracting parties (see *Abdul Ghani Abdullah v. Eon Bank Berhad; HHB Holdings Berhad (Third Party)* [2010] 16 MLRH 704).

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[11] Having considered the background facts and the submission, I am in agreement with the learned counsel for the third party that the 1st defendant has no privity of contract with the third party in respect of the purchase of Lot 13849 by the defendant from Yom Ahmad, the registered owner. If there is any contractual duties here, it is between Yom Ahmad as the vendor and the 1st defendant who purchase the land from Yom Ahmad. As stated earlier, it is trite that misrepresentation must have been made either by the other contracting party, or by an agent acting within the scope of his authority. It is not a pleaded facts that the third party is an authorised agent of Yom Ahmad to make any representation on behalf of Yom Ahmad to the 1st defendant to induce the 1st defendant to purchase Lot 13849 from Yom Ahmad. It is my considered view that the 1st defendant has no reasonable cause of action against the third party.

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[12] It was also contended for the third party that there is no detail of how the alleged misrepresentation was made by the 3rd party. Learned counsel further contended that the 1st defendant has failed to plead in the statement of claim the particulars, nature and element of the alleged misrepresentation. I agree with him on this aspect. It is my considered opinion that the 1st defendant has failed to provide the particulars of representations which require to be pleaded in the pleadings as provided under O 18 r 12 of the Rules of Court 2012. Paragraph 8 of the 1st defendant's affidavit affirmed by one Dato' Abdul Aziz bin Yom Ahmad merely stated as follows:

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"8. Seterusnya, defendan pertama dan pihak ketiga telah memasuki suatu perjanjian pembangunan usahasama (JVDA) untuk membangunkan Lot 13849 pada 5 Mei 2005. Sebelum defendan pertama memasuki perjanjian usahasama dengan pihak ketiga, terdapat perbincangan dan rundingan yang diadakan di antara saya dan Puan Ong Koay Guat, selaku wakil defendan pertama dengan Encik Ismail bin Othman selaku wakil pihak ketiga mengenai jalan akses umum yang akan dibangunkan di kawasan terbabit tersebut."

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[13] It is trite law that the particulars of misrepresentation ought to be pleaded in detail in the pleadings (see *Frederick Ting Hua San v. Ban Guan Thye Sawmill Sdn Bhd* [2002] 4 MLRH 50; *Renault SA v. Inokom Corporation Sdn Bhd & Anor And Other Applications* [2008] 3 MLRA 504). Any defect on the pleading cannot be made good by affidavit evidence (*United Malayan Banking Corp Bhd v. Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1982] 1 MLRA 174; *Adib Mokhtar & Ors v. Jason Chan Chee Khong & Anor* [1999] 2 MLRH 462; *Balakrishnan Devaraj & Anor v. Admiral Cove Development Sdn Bhd* [2010] 2 MLRA 1).



[14] For the reasons as stated above, it is my considered opinion that this is a plain and obvious case for the application ought to be allowed. I accordingly allowed the third party's application as per (encl 118) with costs.

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