

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

CIVIL DIVISION

CIVIL SUIT NO. S1-22-1116-2007

BETWEEN

**1.ALFINA SDN BHD
2.ABDULLAH BAKRI BIN ABDUL WAHAB
3. ALIAS SHAH BIN ABDULLAH BAKRI PLAINTIFF**

AND

TERENCE DEREK LAI CHIN SIEW DEFENDANT

GROUND OF JUDGMENT

This is the Defendant's application to strike out the Plaintiffs' Statement of Claim under 0 18 r 19 (1) of the RHC

The Plaintiffs' cause of action against the Defendant is on an allegation of fraud.

Allegation by the Plaintiffs against the Defendant

- a) According to the Statement of Claim by the Plaintiffs, the Plaintiffs allege that the Defendant had made fraudulent misrepresentation to the 2nd and 3rd Plaintiffs so as to persuade the 2nd and 3rd Plaintiff to jointly venture with the

Defendant to invest in a gold mining company in China (China Company).

It is not disputed that the 2nd and 3rd Plaintiff had agreed with the Defendant to acquire 24 % each of the shares in the China Company. These shares are to be issued to Mr. Wee Woon Tian who shall act as their trustee.

b) The 2nd and 3rd Plaintiff allege that pursuant to the representation by the Defendant;

- the 2nd and 3rd Plaintiffs have remitted to the Defendant a sum of RM750,000.00 to acquire their 24% shares in the Chinese Company.
- The Defendant later on stated that an additional sum of RM900,000.00 from the Plaintiff so that with a total investment of RM 1.6 million by the Plaintiff and a similar amount by the Defendant, the Plaintiffs and the Defendant would have majority interest in the China Company and would be able to operate the mining company. The Defendant had agreed to advance on the Plaintiff's behalf for this RM 900, 000.00, upon being informed that the Plaintiffs have no more funds.
- As security for this advance of RM900,000.00, the Plaintiff executed the sale and transfer documents on a piece of property (said property) to the Defendant in escrow. The Defendant never advance this RM900,000.00, no shares were issued to them and therefore the Defendant has by

fraud caused the Plaintiff to execute all the transfer documents of the said property.

- Subsequently a search on the China Company by the Plaintiffs shows that there were no record to show any monies paid by the Defendant for the said investment.

The Plaintiffs alleged that the Defendant fraudulently misrepresented that the consideration to be paid by the 2nd and 3rd Plaintiff to acquire 24% share in the China Gold mine company was RM 1.6 million.

The Court's Findings

Section 17 and 18 of the Contracts Act, 1950 explains “fraud” and “misrepresentation”. The difference between the two is that in “fraud” the person who makes the representation does not believe in its truth, whilst in “misrepresentation” the person who makes the representation may believe in its truth.

[1] The Defendant in Enclosure 5 of his affidavit states that these allegations of fraudulent misrepresentation by the Plaintiffs are not true and state that the said shares in the gold mine were in fact issued and is being held under trust by Mr. Wee Woon Tian, a Singapore citizen, for the respective parties as agreed by the Plaintiffs. To substantiate this averment, Mr. Wee Woon Tian had executed a statutory declaration and this is exhibited in “TD-1” in enclosure 5. In the statutory declaration Mr. Wee Woon Tian had confirmed that he had received USD 250, 000.00 from the defendant on two occasions and these two amounts had been remitted into the bank account of the Joint Venture Company. In

return for the said payments, he was given shares certificate stating that he is the shareholder of 50% shares of the Joint venture Company. The Shares Certificate and the trust deeds were also exhibited in the statutory declaration.

[2] The Joint Venture Agreement in “TD-5” of enclosure 8 contains a provision in Clause 2 which states that the register capital of the joint venture was USD 500,000.00 not RM 1.6 million as alleged.

[3] In the statutory declaration of Mr. Wee Woon Tian in exhibit “TD-1” of enclosure 5, he states that the Defendant and the Plaintiffs will have to come up with USD250,000.00 each (totaling USD500,000.00) to acquire 50% share in the Chinese Company. The other 50% will be owned by the Chinese party.

[4] The solicitors of the 2nd and 3rd Plaintiffs i.e. Messrs. Joanne Long & Co have acted for the Plaintiffs and they had vetted the Joint Venture Agreement and given their comments, and these facts were not denied by the Plaintiffs. Thus from the documents i.e. the statutory declaration of Mr. Wee Woon Tian and the Joint Venture Agreement, the total investment by the Plaintiffs was only USD 250, 000.00. The Plaintiffs have not shown any independent evidence to rebut these documentary evidence which had been forwarded by the Defendant.

[5] The Defendant had admitted receiving USD 250, 000.00 from the Plaintiffs. However the Defendant denied the existence of the alleged advance of RM 900, 000.00 or the requirement for such advance. From the documents that is before the court there is no provision for such requirement. Since no such advance was

required, then the execution of the transfer documents of the said property to the Defendant could not have been done as security or in escrow as alleged by the Plaintiffs.

[6] The Plaintiffs have not shown any documentary evidence or any independent evidence to support their allegations of fraud against the Defendant which have been contradicted by the documents produced by the Defendant.

[7] Therefore the alleged fraudulent acts by the Defendant was bare assertions by the Plaintiff without support in their affidavits.

[8] As far as the transfer of the property is concerned, the contention of the Plaintiffs that it was as a security for the RM 900,000.00 advanced by the Defendant was not supported by any documentary documents. Therefore the contention is baseless. The said property had been duly transferred in June 2005. Hence this property transaction was a different transaction altogether from the Joint Venture Agreement.

[9] Further, the Plaintiffs have acted in a manner inconsistent with what they are now alleging.

The sale and purchase of this said property has been completed. The solicitor who acted in this sale and purchase (Mr. Poh Ban Chuan from Messrs. T.C. Chong & Rakan Rakan) has filed an affidavit stating that the sale and purchase was done by him and the sale has been completed.

The Memorandum of Transfer of the property has been duly executed with the Common Seal of the 1st Plaintiff and attested by the 2nd and 3rd Plaintiffs being its directors and the original title had

been given to the Defendant's solicitors. The Plaintiffs have acknowledged receiving the sum of RM 900, 000.00 from the Defendant for the purchase of the land, and there was the company resolution approving of the same.

The Plaintiff had applied to the authority to obtain consent for the transfer of the said property and the authority has given its consent. (Refer to exhibit PBC-4 in Enclosure 5).

The Plaintiffs had earlier lodged a caveat on the said property, however did not state the grounds for the said caveat. The Defendant applied to set aside the caveat which is pending hearing in suit No S3-24-1404-2007.

[10] The Plaintiffs submit that since nothing has materialized as far as the investment in the China company is concerned, that is consistent with the Plaintiffs' contention that the Defendant's representation was fraudulent, and these fact is sufficient for it to be further investigated in a full trial.

I disagree with this contention. A business venture which does not show promising returns does not necessarily points to fraudulent misrepresentation. The Plaintiff has to show some evidence to support this fraudulent accusations, not bare assertions, bearing in mind that the standard of proof required where there is an allegation of fraud in civil proceedings is beyond reasonable doubt. (Refer to ***Asean Securities Paper Mills Sdn Bhd v CGU Insurance Berhad*** [2007] 2 MLJ 302

Thus based on the above, the Plaintiffs have not shown any documentary evidence to support their allegation of fraudulent

misrepresentation against the Defendant. The allegation of fraud and the facts to support the fraud as alleged by the Plaintiffs are inconsistent with the documentary evidence produced by the Defendant. Thus, on the evidence both in affidavits and documentary, there is no basis for the matter to proceed for full trial.

Thus the claim by the Plaintiff against the Defendant is devoid of merits and is an abuse of process of court and is scandalous, frivolous or vexatious.

Therefore, the application of the Defendant to strike out the Plaintiffs' Statement of Claim is allowed with costs.

Datin Zabariah Mohd Yusof

Tarikh 29.6.2009