Shencourt Sdn Bhd
v
Prima Ampang Sdn Bhd & 4 Ors

High Court, Kuala Lumpur – Summons No S-22NCVC-231-2011
Zabariah Mohd Yusof J

April 29, 2011

Civil procedure *– Action – Cause of action – Misrepresentation – Defendants alleged to have misrepresented to public at large – Whether misrepresentation a cause of action – Whether action ought to be struck off – Housing Development (Control and Licensing) Regulations 1989*

Civil procedure *– Injunctions – Interlocutory injunction – Application for – Whether application could proceed whereupon there was no longer any questions to be tried – Housing Development (Control and Licensing) Regulations 1989*

Civil procedure *– Striking out – Application for – Defendants improperly cited as parties – No contractual relationship between parties – Whether plaintiff has locus standi to file suit – Housing Development (Control and Licensing) Regulations 1989*

The plaintiff claimed to be the beneficial owner of a land, on which a nine-storey shopping complex and car park was constructed on. The plaintiff alleged that despite not having obtained the developer's licence and the advertising permit, the first defendant, together with the second to the fifth defendants, had advertised to the public of the sale of units of the property, vis-a-vis several websites. Subsequently, the defendants held a signing ceremony between the defendants and several partners who represented themselves as the vendors of the complex and the buyers of the property. It was alleged that at the signing ceremony, the defendants had unveiled the model of the property as designed by the plaintiff. However, based on this model, the design of the building had been manifestly altered without the permission of the plaintiff. The plaintiff alleged that this projection was totally contrary to the existing design and/or the plans of the plaintiff. The plaintiff alleged that the advertisements through the websites were intended to entice the public at large, specifically to encourage and/or to cause the public to consider and to book the said units. The plaintiff argued that there was misrepresentation by the defendants as there was a divergence and alteration in relation to the design of the property. The plaintiff alleged that the defendant had no authority to advertise the alterations and to solicit the registration of the said units from the public and therefore, was in breach of the Housing Development (Control and Licensing) Regulations 1989. The plaintiff contended that as a result of the advertisement, it had faced much embarrassment and that there was an expectation placed on them that the design of the property would reflect that as represented by the defendants to the public. The plaintiff further argued that it may face legal proceedings for misrepresentation from the public. Following this, the plaintiff filed an action for misrepresentation as well as an application for

injunction against the defendants. The first and third defendants, in turn, each filed their respective application to strike out the plaintiff's action

Issues

1. Whether the plaintiff's writ and statement of claim should be struck out.
2. Whether the plaintiff was entitled to damages.
3. Whether the plaintiff's application for interlocutory injunction should be granted.

Held, allowing the first and third defendant's application to strike out with costs

1. (a) The defendants were not properly cited as the parties in the present suit. It is pertinent that the correct names of the parties be cited especially, on the facts, when the plaintiff intended to file an injunction application against all the defendants. As such, the plaintiff's writ and statement of claim ought to be struck out. [*see p 454 para 31 line 40 - p 455 para 33 line 20*]

   (b) Based on the statement of claim, the plaintiff alleged that the defendants had misrepresented to the public at large. Hence, the rightful party to sue the defendant was the public at large and not the plaintiff. It was clear from the pleadings that it was not the plaintiff who had been misrepresented. Misrepresentation is not a cause of action and only arises when there is an underlying contract. For it to be made a cause of action, it has to be either fraudulent misrepresentation or negligent misrepresentation. The plaintiff had failed to state in its statement of claim of any existing contract between the parties. [*see p 455 para 37 line 35 - p 456 para 39 line 11; p 457 para 42 lines 15-17*]

   (c) On the facts, there was no contractual relationship between the parties. It was evidenced that the plaintiff had sold all its rights, interests and ownership on the development of the complexes to Damai Kemayan Sdn Bhd, who later assigned the development rights to the first defendant. The plaintiff thus had no right or locus standi to bring the present suit. It was clear that there was neither nexus nor privity as far as the plaintiff and the defendants were concerned. [*see p 457 para 43 line 19 - p 458 para 53 line 24*]

   (d) The plaintiff had chosen to sue the third defendant although the plaintiff was aware that the third defendant was no longer a director of the first defendant. There was no proof that the third defendant was responsible for the advertisement in the websites. Therefore logically, the third defendant could not be liable for misrepresentation to the public at large as alleged. [*see p 458 para 55 line 30 - p 459 para 61 line 16*]

2. There was no evidence to show that the plaintiff had suffered any damages as a result of the liability of the defendants. No liability attached against the defendants. An allegation of misrepresentation, without more would not attract damages. There was no allegation of any fraud in the case. [*see p 461 para 77 lines 8-12*]

3. As the application for striking out was allowed, the plaintiff's application for injunction failed for as it no longer had a cause of action against the defendants anymore. It is trite law that before granting an interlocutory injunction there must be a pre-existing cause of action. It is an established principle that an interlocutory injunction is to safeguard the interests of one of the parties until his rights can be finally determined at the main trial of the action. Therefore, as the striking out application by the defendants was allowed, the question of a serious issue to be tried between the parties no longer arose. The application for interim injunction thus could not be sustained. [*see p 461 para 83 line 31 - p 462 para 88 line 40*]

Cases referred to by the court

American Cyanamid Co v Ethicon Ltd (No. 1) [1975] AC 396, HL *(ref)*
Kanawagi s/o Seperumaniam v Penang Port Commission [2002] 1 AMR 195; [2001] 5 MLJ 433, HC *(ref)*
Lim Chong Construction Co Sdn Bhd v Silam Quarry Sdn Bhd [1990] 2 MLJ 423, HC *(ref)*
Proton Parts Centre Sdn Bhd v Mohamed b Zainal (and Another Appeal) [2010] 3 AMR 815; [2010] 2 MLJ 207, CA *(ref)*
Siskina, The; Owners of Cargo Lately Laden on Board v Distos Compania Naviera SA [1979] AC 210, HL *(foll)*

Legislation referred to by the court

Companies Act 1965
Housing Development (Control and Licensing) Regulation 1989
Rules of the High Court 1980, Order 18 r (19)(1)(a), (b), (d)

Victoria Martin (Victoria Martin Chambers) for plaintiff
V Kumar (VK Val & Co) for first defendant
YS Leong (Hong & Lee) for third defendant
Justin Voon and *Alvin Lai* (Sidek Teoh Wong & Dennis) for fourth and fifth defendants

Judgment received: May 13, 2011

Zabariah Mohd Yusof J

Grounds of judgment

[1] Enclosure 11 is the first defendant's application to strike out the plaintiff's writ and statement of claim under Order 18 r 19(1)(a), (b) and (d) of the Rules of the High Court 1980.

[2] Enclosure 6 is the application by the third defendant to strike out the plaintiff's writ and statement of claim under Order 18 r 19(1)(a), (b) and (d) of the Rules of the High Court 1980.

[3] Enclosure 4 is the plaintiff's application for an injunction against the defendants.

Background

[4] Gleaning from the statement of claim, the following facts are pleaded:

(a) The first defendant is a limited company incorporated under the Companies Act 1965;

(b) The second defendant was a former director of the first defendant;

(c) The third defendant is an architect by profession operating under the name of LL Architect and is also a former director of the first defendant.

[5] The fourth defendant is a lawyer by profession operating under the name of KS Lim & Ong, which is the fifth defendant. At all times the fourth defendant was acting in his capacity as a lawyer representing Vistana Pancaran Sdn Bhd and also as a former director of the first defendant.

[6] The plaintiff claims to be the beneficial owner of land title held under HS(D) 121280, PT No. 12054, Mukim Ampang, District Ulu Langat, Selangor (under the master title "HS(D) 28688, No. PT 15752, Mukim Ampang, District of Ulu Langat, State of Selangor") (hereinafter referred to as "the land"), wherein a nine-storey shopping complex and car park called Galaxy Shopping Complex was constructed on.

[7] The plaintiff alleged that the first defendant has proceeded to apply for its developer's license and advertising permit. However till the issuance of this writ and statement of claim and the statement of claim the first defendant has yet to obtain its developer's licence and advertising permit.

[8] It was further alleged that, despite not having obtained the developer's license and the advertising permit, the first defendant together with the second to fifth defendants have advertised vis-à-vis websites known as http:www.facebook.com, http://laprimaampang.com and several other websites and Facebooks (hereinafter referred to as "the websites").

[9] Subsequently, on November 28, 2010, at a signing ceremony at Renaissance Hotel, the defendants (collectively) purportedly held a signing ceremony with several partners known as green strategic partners, marketing partners and represented themselves as the vendors of Phase 2.

[10] It was alleged that, at this signing ceremony, the defendants unveiled the model of the plaintiff and according to this model, the facade of the podium of the building of the plaintiff has been manifestly altered without the permission of the plaintiff.

[11] The plaintiff alleged that this projection of the plaintiff's podium by the defendants is totally contrary to the existing podium and or to the plans of the plaintiff in refurbishing the said complex.

[12] The plaintiff had repeatedly informed the defendants to remove the said websites but the defendants have failed or ignored to do so. According to the plaintiff one of the directors of the first defendant said that these advertisements were "a sort of announcement".

[13] The plaintiff alleged that these advertisements were intended by the defendants for the purpose of enticing the public at large specifically to encourage and or to cause the public at large to register and to book the said units, it was noted that in the North Tower alone, 80 units have been sold. In the South Tower, 37 units have been booked.

[14] In paragraph 14 of the statement of claim, the plaintiff avers that the defendants may have begun to collect a booking fee of RM5,000 to be held in the solicitors-client account of the fifth defendant.

[15] The plaintiff alleged that the defendants, through their actions, have continued and are still soliciting the sales of these units.

[16] The plaintiff alleged that there was misrepresentation by the defendants when there was a divergence and alteration from the existing model of the podium.

[17] The plaintiff alleged that the defendants have no authority to advertise the alterations and to solicit the registration of the said units and is thus in breach of the Housing Development (Control and Licensing) Regulation 1989.

[18] As a result of the advertisement purportedly done by the defendants, the plaintiff said that the plaintiff has been put to much embarrassment and are now committed to the public at large on the facade as projected and presented by the defendants.

[19] The plaintiff also alleged that in the event that these websites are not removed and withdrawn from the public immediately, the plaintiffs will continue to be committed and may be forced to defend legal proceedings for misrepresentation by one from the public.

[20] The reliefs that are being prayed for by the plaintiff in the statement of claim against the defendants are:

(i) The said websites be removed immediately:

(ii) The defendants hold a meeting at the Renaissance Kuala Lumpur to inform all the persons who have registered and paid booking fees that the facade of the plaintiff's will not be changed as projected by the defendants;

(iii) In the event the booking fees and or purchase price has been collected the same to be returned to the respective persons;

(iv) Damages to be assessed and costs.

[21] The injunction application by the plaintiff against the defendants in encl 4 similarly is seeking for the same relief as prayed for in the statement of claim.

The courts findings

[22] It is to be noted that there are three applications of striking out, i.e.:

(i) by the first defendant (encl 11);

(ii) by the third defendant (encl 6); and

(iii) by the fourth and fifth defendants (encl 19).

[23] Enclosure 4 is the plaintiff's application for an injunction against all the defendants to remove the advertisement on the said website.

[24] I have indicated to parties that I will hear the striking out applications first. The injunction application in encl 4 will greatly depend on the outcome of the striking out applications by the defendants.

[25] After hearing the submissions and perusing through the written submissions of the parties, I decided to allow the striking out applications by the respective defendants of the plaintiff's writ and statement of claim, i.e. I allowed encls 6, 11 and 19 with costs.

[26] The injunction application by the plaintiff in encl 4 fails as there is no more writ for the plaintiff to stand on against the respective defendants.

Application in encls 6, 11, 19

[27] My reason for allowing the striking out application by the defendants herein are as follows:

Preliminary objection

[28] Before I proceed with the merits of the application of striking out by the defendants herein, counsel for the defendants raised a preliminary issue, i.e. that the first defendant's and the fourth defendant's names are wrongly cited. In other words, they have not been properly cited as parties in the suit herein.

[29] This has been indicated to the plaintiff's solicitors before the hearing of the striking out, however until the date of the said hearing the names of the first and the fourth defendants have not been amended and are still the same.

[30] The first defendant's name is Prima Ampang Sdn Bhd and the so called fourth defendant should be Lim Kean Sheng.

[31] It is pertinent that the correct names of the parties be cited especially in this case when the plaintiff intends to file an injunction application against

all the defendants. How can such an application be maintained when the plaintiff is not even sure of the parties' correct names.

[32] This point has been stated by the Court of Appeal in the case of *Proton Parts Center Sdn Bhd v Mohamed bin Zainal (and Another Appeal)* [2010] 3 AMR 815 at p 819; [2010] 2 MLJ 207 at p 212 where the Court of Appeal in its judgment said that:

> As for the third defendant, there is yet another reason why the action against them ought to be struck out. They have not been properly cited in the writ and statement of claim. The registered name of the third defendant, as a company is "Perusahaan Otomobil National Berhad". But they have been wrongly cited in the writ and statement of claim as "Proton Berhad". The plaintiff maintains-that he has amended the writ and statement of claim so as to correct the misnomer. However, the truth is that there has been no proper and legally effective amendment at all. Till the date of the hearing of this appeal … the amended writ and statement of claim filed are not even sealed and signed by the registrar of the High Court …

[33] Similarly, in our case it has been shown that the names of the first and the fourth defendants are wrong. On this issue alone, the plaintiff's writ and statement of claim and statement of claim ought to be struck out on the application by the first and the fourth defendants.

The nature of the statement of claim

[34] It is to be noted that the manner the statement of claim was pleaded is that it alleges that *all the defendants* have advertised on Facebook and had misrepresented to the public at large which resulted in *the defendants* collecting booking fees of RM5,000 which are being held in the solicitors-clients account of the fifth defendant.

[35] It was also stated in the statement of claim that the defendants in advertising on Facebook had misrepresented to the public at large.

[36] The plaintiff further states in paragraph 18 of the statement of claim that in the event the defendants are allowed to continue to advertise on the websites, the plaintiff "will continue to be committed" and may be forced to defend legal proceedings for misrepresentation by any one from the public. This is purely speculative; besides it is an argument without merits at all.

[37] Further, what is alleged by the plaintiff against the defendants is misrepresentation to the public at large. Then the rightful party that should be suing the defendants (if proven that the defendants herein have misrepresented) should be the "public at large" not the plaintiff. From the pleadings, it is not the plaintiff who had been misrepresented here. In what way is the plaintiff affected by the so called "misrepresentation".

[38] As submitted by counsel for the fourth and fifth defendants, paragraph 15 of the statement of claim mentioned about the particulars of misrepresentation.

Misrepresentation is not a cause of action. It must be pleaded whether it is a fraudulent misrepresentation, which is actually deceit in tort, or negligent misrepresentation under the *Hedley Byrne* principle. However the plaintiff merely pleaded "misrepresentation". Misrepresentation is only used when there is an underlying contract, where one can avoid the contract if the contract is voidable in the claim of misrepresentation.

[39] The plaintiff, in the statement of claim, is not saying that there was any contract between the plaintiff or any of the defendants or misrepresentation to the plaintiff, but they are saying of misrepresentation to the public at large, which means that it is not the plaintiff who should be bringing this suit, if that is so.

Issue of locus standi

[40] All the defendants claim that the plaintiff does not have locus standi to bring this action against the defendants. In fact this is the main ground for the striking out applications by all the defendants herein.

[41] The defendants contended that the plaintiff failed to disclose material facts to the case herein. The facts which were not disclosed are:

(a) The land title held under HS(D) 121280, PT No. 12054, Mukim Ampang, District Ulu Langat, Selangor (under the master title "HS (defendant) 28688, No. PT 15752, Mukim Ampang, District of Ulu Langat, State of Selangor") (hereinafter referred to as "the land") is registered under the name of "Perbadanan Kemajuan Negeri Selangor" as the registered owner. The plaintiff herein claims to be the beneficial owner of the land and the Galaxy Ampang Shopping Complex.

(b) The plaintiff had sold all its development rights for the air space of the land including the rights to construct service apartments (on top of the podium) to another company known as Damai Kemayan Sdn Bhd vide the sale and purchase agreement dated August 7, 2006 (exh LKS1 of encl 20);

(c) Pursuant to the sale and purchase agreement dated August 7, 2006 and for Damai Kemayan Sdn Bhd to carry out the development, the plaintiff had entered into:

    (i) A deed of novation dated August 7, 2006 between the plaintiff, Damai Kemayan Sdn Bhd and Apoly Construction and Engineering Sdn Bhd whereby all the development rights for the land to be taken over and assigned absolutely to Damai Kemayan Sdn Bhd;

    (ii) A power of attorney dated August 7, 2006 whereby the plaintiff had appointed Damai Kemayan Sdn Bhd as "attorney" to execute all power given under the sale and purchase agreement dated August 7, 2006.

Exhibit LKS2 of encl 20 is referred.

(d) Thereafter Damai Kemayan Sdn Bhd entered into a joint development agreement dated July 14, 2010 (exh LKS5 of encl 20) with Prima Ampang Sdn Bhd (the correct named first defendant) which is a joint venture to construct the service apartments (hereinafter referred to as "the first joint venture agreement").

(e) Subsequently this fist joint venture agreement had been terminated vide a letter dated September 3, 2010 (LKS6 encl 20) from Victoria Martin Chambers representing Damai Kemayan Sdn Bhd;

(f) Damai Kemayan Sdn Bhd and Prima Ampang Sdn Bhd (the first defendant) entered into another joint development agreement dated October 20, 2010 (LKS7 of encl 20) to construct the service apartments (the second joint venture agreement).

[42] The above facts were never pleaded by the plaintiff in its statement of claim. From the above facts what is clear is this; there is no contractual relationship between the plaintiff and the defendants.

[43] Since August 7, 2006, the plaintiff sold all its rights, interests and ownership on the development rights for Phase 2 of the complexes to Damai Kemayan Sdn Bhd for the price of RM10 million. This was evidenced from the sale and purchase agreement in exh LAG1 of encl 7.

[44] On July 14, 2010, Damai Kemayan Sdn Bhd had appointed the first defendant to develop Phase 2 of the complexes.

[45] Pursuant to clause 5.1 of the joint development agreement dated July 14, 2010, all the development rights as to Phase 2 have been assigned to the first defendant by Damai Kemayan Sdn Bhd including any amendment to the layout plan, buildings plans and the specification of the building which had been approved earlier.

[46] From the agreement, the plaintiff has no rights or locus standi to bring this suit. Pursuant to clause 5.5 of the joint development agreement, Damai Kemayan Sdn Bhd had also assigned rights to the first defendant to revamp the existing Ampang Galaxy Mall's interior and exterior fittings. This means that the first defendant has the right to alter the design especially the facade of the podium of the complexes as the first defendant wishes.

[47] The first joint development agreement dated July 14, 2010 was terminated. However, a subsequent second joint development agreement was signed between Damai Kemayan Sdn Bhd and the first defendant dated October 20, 2010 that reiterates the rights of the first defendant to develop the complexes, (refer to LAG3 of encl 7).

[48] Pursuant to clause 9(a) of the joint development agreement dated October 20, 2010, Damai Kemayan Sdn Bhd gave an undertaking to the first defendant that no civil proceedings will obstruct the development of Phase 2 of the complexes.

[49] Further clause 9(c) of the same states that Damai Kemayan Sdn Bhd gave an undertaking to help the first defendant to obtain development licence and permit to advertise and to indemnify the first defendant at all times against any claims from third parties with regards to the development of the complexes.

[50] On November 11, 2010, Damai Kemayan Sdn Bhd had given a power of attorney to the first defendant or its directors to execute all that is necessary in accordance to the joint development agreement dated October 20, 2010 including signing the sale and purchase agreement with individual purchasers for the units.

[51] The effect of the joint development agreements is this: the first defendant was given the right to change the facade of the podium. This right which was given to the first defendant encompasses all development.

[52] Therefore, if there is to be any suit on any misrepresentation or tort, that should be, either Damai Kemayan Sdn Bhd suing the first defendant or the plaintiff suing Damai Kemayan Sdn Bhd for the purported change of the facade or the collection of the booking fees.

[53] Based on the above, it is clear that there is no nexus nor privity as far as the plaintiff and the defendants herein are concerned. The plaintiff has relinquished its rights to Damai Kemayan Sdn Bhd.

[54] Since the plaintiff has no locus to bring an action against the defendants herein, the action against the defendants is clearly an abuse of process.

The third defendant is no longer the director of the first defendant

[55] It has been averred in the affidavit of the third defendant in encl 7 that the third defendant was no longer a director of the first defendant effective from September 8, 2010. This is clear from form 49 which is exhibited in LAG5 of encl 7. In fact this was also averred by the plaintiff in its statement of claim at paragraph 2.

[56] Paragraph 9 of the statement of claim averred that the third defendant had advertised the development of the project on Facebook. However, no details was provided as to when this advertisement was done.

[57] Paragraphs 10 and 11 of the statement of claim averred that there was a signing ceremony held at the Renaissance Hotel on November 28, 2010 where the plaintiff alleged that all the defendants were involved. However the third defendant denied that it was a signing ceremony but it was a seminar on "green concept" or "eco building" for development of buildings.

[58] In any event, it is clear that the third defendant was no longer the director of the first defendant as of November 28, 2010, if any liability is to be attached to the first defendant.

[59] What is odd is that the plaintiff chose to sue the third defendant here although the plaintiff is aware that the third defendant is no longer the director of the first defendant on the date of the alleged signing ceremony which is the subject of the suit herein, but did not sue any of the remaining existing directors of the first defendant, especially Teh Gim Gek, which was mentioned specifically by the plaintiff in its statement of claim at paragraph 12.

[60] But what is essential is that there is no proof that the third defendant was responsible for the advertisement on Facebook.

[61] Since the plaintiff did not provide proof that the third defendant was somewhat responsible for the advertisement, then logically speaking how could the third defendant be liable for misrepresentation to the public as alleged in the statement of claim.

[62] As far as the allegation on the booking fee is concerned it has no relation to the third defendant. The third defendant had never at any point of time collected any booking fee from the purchasers. It is more relevant to the fourth and the fifth defendants.

[63] Even if it is true that the third defendant is to be made responsible for the collection of the booking fee (which in this case, it is not), the plaintiff is certainly not the right entity to sue the third defendant. It lies on the purchaser to make such claim, if any.

As against the fourth and the fifth defendants

[64] In the aforementioned paragraph, I did refer to the fact that the fourth defendant's name was wrongly cited. On that ground alone the claim against the fourth defendant can be struck out.

[65] Besides suing the first defendant, the plaintiff brought an action against the third, fourth and fifth defendants (the legal firm) which drafted the joint development agreement. This is one step beyond the reach of the plaintiff.

[66] KS Lim & Ong is only a firm of solicitors who did the previous joint development agreement. They are not liable because even though they are agents, the principal is their clients.

[67] There is no proof that the fourth and the fifth defendants are responsible for the posting of the advertisement on Facebook. The plaintiff must establish that it was the defendants who published the advertisement on the website. Hence it is misconceived for the plaintiff to sue the fourth and fifth defendants for the said posting on the website when the issue as to who posted it has not been proven at all.

[68] As to the booking fee, this fee was paid as an intention to purchase by the purchasers which are being kept in the fifth defendants solicitors-clients account. The parties are Prima Ampang Sdn Bhd and the purchasers. If there is any complaint, the aggrieved parties should be the purchasers and it is for them to bring any action; not the plaintiff. Thus the plaintiff has no business to sue the third and fourth defendants in relation to the booking fee. As far as refund is concerned it is for the purchasers to sue. It is beyond the plaintiff to sue for the refund of such booking fee.

[69] On the issue of the podium, which was allegedly to be the misrepresentation in a model which was shown at the ceremony at Renaissance Hotel: there was no specific allegation against the fourth or fifth defendant as being responsible for the misrepresentation of the podium.

[70] Moreover, the fourth defendant resigned as director of the first defendant in September 2010 before the alleged signing ceremony at the Renaissance Hotel. The fourth defendant was invited to attend but he said that he did not participate in designing the particular podium. Mere presence at the signing ceremony does not make the fourth defendant liable for the posting of the advertisement on the websites.

Conclusion

[71] What is clear is that the contractual nexus of the plaintiff is with Damai Kemayan Sdn Bhd where the plaintiff entered into an agreement where it had divested all its rights to Damai Kemayan Sdn Bhd.

[72] The plaintiff alleged that the public had been mislead by the defendants. Despite the public being mislead, not one complaint arose from the public that said that the facade has been changed.

[73] As far as the prayers of the statement of claim is concerned, since it has not been proven prima facie that the defendants are owners of the websites or are responsible for posting the advertisement on the websites, they do not have control of the websites. If they have no control of the websites, how can they be ordered to remove the said websites immediately as prayed by the plaintiff in its relief.

[74] Further, it has been shown that the third, fourth and fifth defendants have nothing to do with the alleged signing ceremony which was held at the Renaissance Hotel. Moreover, the third and fourth defendants are no longer directors of the first defendant. Hence they have no power or authority to hold a meeting at the Renaissance Kuala Lumpur to inform all the persons who have registered and paid booking fees that the facade of the plaintiff's will not be changed.

[75] As far as the first defendant is concerned, the plaintiff has no nexus with the first defendant; the plaintiff is in no position to obtain the relief prayed

for against the first defendant. In fact as far as locus standi is concerned, the plaintiff has no locus standi to sue against all the defendants herein.

[76] Similarly, on the issue of refunding of booking fees and/or purchase price which has been collected, it is not for the plaintiff to seek an order from the court for it to be returned to the respective purchasers, since the purchasers are not complaining.

[77] On the prayer of damages to be assessed, there is no evidence to show that the plaintiff has suffered any damages as a result of the liability of the defendants. No liability attached against the defendants. An allegation of misrepresentation, without more would not attract damages. No allegation of any fraud here.

[78] The statement of claim is speculative. Refer to paragraph 18 of the statement of claim. The podium was already completed. Whether somebody changes the facade (since it has not been shown that it was the defendants) is not for the plaintiff to sue the defendants here.

[79] In fact, the plaintiff in its submission agreed that there is no contractual nexus between the plaintiff and the defendants. The plaintiff also agreed that it does not know who advertised on the websites. It is for the plaintiff to find out the correct person to sue, in any event, if it thinks that there is a cause of action.

[80] There was an allegation at paragraph 17 that the said advertisements have put the plaintiff to much embarrassment. Embarassment cannot amount to a defamation action.

[81] At the end of it all, there is no cause of action, i.e. by contract, fraud, misrepresentation, defamation.

[82] Hence I allowed the application of striking out by the defendants in encls 6, 11 and 19 with costs.

Application by the plaintiff in encl 4

[83] As has been stated in the earlier part of my judgment that if the striking out is allowed, the application for an interim injunction in encl 4 pending the disposal of the main suit, fails.

[84] It is trite law that before granting an interlocutory injunction, there must be a pre-existing cause of action, i.e. there must be a main suit. Interlocutory injunction is ancillary to a cause of action. This has been explained in the cases of

- *Kanawagi Seperumaniam v Penang Port Commission* [2002] 1 AMR 195; [2001] 5 MLJ 433
- *American Cyanamid Co v Ethicon Ltd* [1975] AC 396

[85] The case of *American Cyanamid* established the principle that an interlocutory injunction which is a discretionary relief granted by the court is to safeguard the interests of one of the parties until his rights can be finally determined at the main trial of the action. So long as there are serious issues to be tried and the plaintiffs claim is not frivolous and vexatious, the court should consider whether on the balance of convenience it tilts in favour of granting or refusing the interlocutory relief.

[86] This principle in *American Cyanamid* in granting interlocutory injunction has been followed in the case of *Lim Chong Construction Sdn Bhd v Silam Quarry Sdn Bhd* [1990] 2 MLJ 423 at p 424 where Zakaria Yatim J said:

> …One of the essential requirements for granting an interlocutory injunction, as laid down in *American Cyanamid Co v Ethicon Ltd* at p 510, is that the court must be satisfied that there is a serious question to be tried. Lord Diplock in his speech in the *American Cyanamid* case envisaged a trial of the action. In *Cayne v Global Natural Resources*, May LJ said at p 237:
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> > " In the *American Cyanamid* case [1975] 1 All ER 504, there was a serious question to be tried between the parties, which could only be resolved by a trial. It was clearly contemplated that there would be a trial. The application for the interlocutory injunction was merely a holding operation pending that trial."
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> Since a trial is envisaged the plaintiff must show that he has a cause of action. The grant or refusal of an interlocutory injunction therefore depends on whether there is a cause of action.
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> … *In the present case, since there is no cause of action, there is no serious question to be tried*. (Emphasis added.)

[87] Lord Diplock has also stressed the requirement of a pre-existing cause of action before the relief of interlocutory injunction may be granted, in the case of *Siskina v Distos Compania Naviera SA* [1979] AC 210 at 256 in his judgment, in which he said:

> A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependant upon there being a pre existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles, which may or may not include a final injunction.

[88] Therefore, applying the above principles to the application in encl 4 herein, the fact that the striking out by the defendants herein have been allowed means that there is no serious issues to be tried as between the plaintiff and the defendants. The application for the interim injunction thus cannot sustain.

[89] Further what can be seen in the case herein, is that the plaintiff came to court with unclean hands. The plaintiff failed to disclose material facts with regards to the joint development agreements which was entered between the plaintiff and Damai Kemayan Sdn Bhd where the plaintiff had divested its rights to Damai Kemayan Sdn Bhd.

[90] In fact, the plaintiff had gone beyond their pleaded case in their affidavit. Refer to encl 21, paragraph 7 where the fourth and fifth defendants have stated the situations where the plaintiff had averred facts which were never pleaded in their statement of claim. All these shows that plaintiff has not come to court with clean hands.

[91] Therefore the application by the plaintiff in encl 4 is dismissed with costs.