

5 **MALAYSIA**  
**IN THE HIGH COURT OF SABAH AND SARAWAK AT SANDAKAN**  
**SUIT NO. SDK-22NCvC-10/11-2021**

10 **BETWEEN**

15 **HABIB ABDUL RAHMAN BIN HABIB MAHMUD ... PLAINTIFF**  
**(NRIC No: 631006-12-5391)**

**AND**

20 **GROWTH ENTERPRISE SDN BHD ... DEFENDANT**  
**(Company No: 52423-M)**

25 **BEFORE THE HONOURABLE HIGH COURT JUDGE**  
**JUSTICE CELESTINA STUEL GALID**

30 **JUDGMENT**

35 **Introduction**

[1] By this action, the Plaintiff sought to rescind the sub-lease agreement dated 05.12.2019 entered between him and the Defendant ("the Sub-Lease Agreement") on the ground of misrepresentation, mistake of fact and/ or inequality of

bargaining power. The Plaintiff also alleged that the Sub-Lease Agreement has been frustrated. The Defendant counterclaimed for specific performance of the Sub-Lease Agreement.

45

**[2]** After a full trial, this Court dismissed the Plaintiff's claim and allowed the Defendant's counterclaim. I now provide the grounds thereto.

## 50 **The Plaintiff's contentions**

**[3]** The Plaintiff testified that prior to signing the Sub-Lease Agreement, he was given a draft copy of the agreement by the Defendant. He said that he had signed the Sub-Lease Agreement in the honest belief that the terms were as per the draft. However, about a week later, he found out that the terms in the Sub-Lease Agreement differed from those stated in the draft, specifically on the rental amount payable by the Defendant to the Plaintiff.

60

**[4]** According to the Plaintiff, the rental was stated in the draft as RM150,000.00 for the whole of the 30 year lease term.

However, in the Sub-Lease Agreement, it was only RM74,300.00. He said he would not have signed the Sub-Lease Agreement had he known about this.

**[5]** The Plaintiff said he went to see a Mr. Tan who was the Defendant's manager at the material time to complain and request that the rental amount be amended but that the Defendant did nothing at all resulting in him commencing the present action.

### **The Defendant's contentions**

**[6]** The Defendant on the other hand contended that apart from the Sub-Lease Agreement, the Plaintiff and the Defendant had also executed a Deed of Variation on the same date to vary the rental amount of RM74,300.00 stated in the Sub-Lease Agreement to RM118,880.00 and also as to the manner of payment of the rental amount. This was following the Plaintiff's dissatisfaction of the rental amount of RM74,300.00. The parties had also simultaneously executed a Memorandum of Sub-Lease in escrow.

85    **[7]**    The Defendant through its director, DW2, testified that the  
 Memorandum of Sub-Lease could not be registered as it was  
 subject to the permission by the Director of Lands and  
 Surveys Department and that the Plaintiff who bore the  
 obligation to obtain the said permission under the Sub-Lease  
 90    Agreement refused to do so. Hence, the counterclaim for  
 specific performance of the Sub-Lease Agreement.

### **This Court's decision**

95    *Deficiencies in the pleading*

**[8]**    A good starting point on a discussion pertaining to a claim for  
 misrepresentation is the decision by the Court of Appeal in  
 the case of **Sim Thong Realty Sdn Bhd v The Kim Dar @**  
 100    **Tee Kim** [2003] 3 MLJ 460 where the court referred to  
 Professor McKendrick's *Contract Law* (3<sup>rd</sup> Ed) on the  
 elements of an actionable misrepresentation:

105            "A misrepresentation may be defined as an unambiguous,  
 false statement of fact which is addressed to the party misled  
 and which materially induces the contract. This definition

may be broken down into three distinct elements. The first is that the representation must be an unambiguous statement of fact, the second is that it must be addressed to the party misled and the third is that it must be a material inducement to entry into the contract.”

110

**[9]** The Court of Appeal also discussed on the nature of remedy available which was held as being dependent ‘entirely on the kind of misrepresentation alleged against the plaintiff’. The court opined that:

115

“...the mere expression ‘misrepresentation’ does not reflect the state of mind of the representor at the time he made the alleged representation to the representee and that it is the particular state of mind of the representor that determines the nature of the remedy available to the representee. In the case of fraudulent misrepresentation, the representee is entitled to rescission and damages flowing from the fraudulent inducement. If the representation was made negligently, the remedy of the representee lies in the tort of negligence under the assumption of responsibility and reliance doctrine laid down in *Hedley Byrne & Co Ltd v Heller*. Lastly in the case

120

125

130 of innocent misrepresentation, the representee could only  
sue for rescission and consequent restitution but he may  
not recover damages.”

**[10]** In the present case, the Plaintiff’s Statement of Claim made  
135 no reference at all as to whether the alleged  
misrepresentation was negligent, fraudulent or innocent in  
nature. Neither were particulars of the alleged  
misrepresentation pleaded contrary to Order 18 rule 12(1)(a)  
of the Rules of Court 2012 which reads:

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

145 (a) particulars of any misrepresentation, fraud, breach of  
trust, wilful default or undue influence on which the party  
pleading relies; ...”

150

**[11]** Notwithstanding the insufficiencies in the pleadings as noted above, I had considered the Plaintiff's evidence and was able to discern that the Plaintiff's claim was neither premised on negligent nor innocent misrepresentation. This was because there was no suggestion that the Defendant was likewise unaware of the alleged discrepancy in the rental amount stated in the draft and the Sub-Lease Agreement.

**[12]** In fact, from the evidence, it could be inferred that the Plaintiff was alleging that somehow the Defendant was not too innocent in the whole transaction. This was based on the Plaintiff's allegation that when confronted, the Defendant's manager did not have any explanation but that the Defendant still refused to rectify the said term in the Sub-Lease Agreement despite his requests. The Plaintiff also testified that he had felt cheated by the Defendant.

**[13]** More pertinently, in his prayers the Plaintiff claimed for rescission and damages to be assessed which, according to the Court of Appeal in *Sim Thong Realty Sdn Bhd* could only be sought for in a claim for fraudulent misrepresentation.

[14] However, if the Plaintiff's claim was indeed for fraudulent misrepresentation, there existed another hurdle as there were no particulars pleaded supporting such claim contrary to Order 18 rule 12(1)(a) of the Rules of Court 2012. Such omission was held to be fatal by the Court of Appeal in **Tan Ah Tong v Parveen Kaur** [2011] 5 MLJ 428 where the court held as follows:

[19] The existence of coercion, undue influence fraud, misrepresentation or mistake (or any of them) if proven, may negate the element of consent by the defendant (as he alleged), in entering into the SPAs. In order to prove any of the elements above, it must first be specifically pleaded by the defendant in his statement of defence as required under O 18 r 8 and r 12 of the Rules of the High Court 1980. Failure to specifically plead any of those elements is fatal to the defendant's case. In the present case, the defendant has failed to specifically plead any of those elements, in his statement of defence. Therefore, the defendant cannot in law rely on any of those defences."



[15] In a similar vein, the Federal Court in **Zung Zang Wood Products Sdn Bhd & Ors v Kwan Chee Hang Sdn Bhd & Ors** [2014] 2 MLJ 799 had this to say about the requirements under Order 18 rule 12(1)(a) of the Rules of Court 2012:

“...In relation to pleadings in general, the rules of court require a pleading of fraud to contain particulars of the fraud on which the party pleading relies (see O 18 r 12(1)(a) of the Rules of the High Court 1980, now Rules of Court 2012). ‘When fraud is alleged it must be specifically pleaded. The mere allegation of fraud without showing facts to support it is not a matter to which the court will pay serious attention (*Wallingford v Mutual Society and Official Liquidator* (1880) 5 App Cas 685 at p 697. The party need not use the word ‘fraud’ if he pleads, in unambiguous language, acts which amount in law to fraud (*Myddleton v Lord Kenyon* (1794) 2 Ves 391 at p 412). Whenever fraud or misrepresentation is alleged in a pleading, or any affidavit, full particulars of the alleged fraud or misrepresentation must be given’ (*Spenser Bower, Turner and Handley, Actionable Misrepresentation*, (4th Ed), at pp 384–385).”

**[16]** Next, the Plaintiff claimed that he had executed the Sub-Lease Agreement by mistake as a result of the Defendant's alleged misrepresentation by the draft agreement earlier provided to him.

220

**[17]** In **Tham Kong v Oh Hiam & Ors** [1968] 1 MLJ 44, it was held that "mistakes" may either be (i) common mistake; or (ii) mutual mistake; or (iii) unilateral mistake. Mistake is common where both parties make the same mistake. Each knows the intention of the other and accepts it, but each is mistaken about some underlying and fundamental fact. The mistake is mutual where the parties misunderstand each other and are at cross-purposes. In unilateral mistake only one of the parties suffers from some mistake. As such different considerations apply in each of the classifications.

225

230

**[18]** It went without saying that the pleadings served as a roadmap for the Court when considering the reliefs available to the Plaintiff in the instant case. For one, if it was an agreement where there was a common or mutual mistake, it was void under section 21 of the Contracts Act 1950 but if

235

caused by a unilateral mistake, it was not voidable under section 23 of the Contracts Act 1950.

240 **[19]** Sections 21 and 23 of the Contracts Act 1950 are reproduced below:

“21. Where both the parties to an agreement are under a mistake as to a matter of fact essential to the  
245 agreement, the agreement is void.

...

23. A contract is not voidable merely because it was caused by one of the parties to it being under a  
250 mistake as to a matter of fact.”

**[20]** As with his claim for misrepresentation however, the Plaintiff’s Statement of Claim was silent as to whether the alleged mistake in the present case was of fact or of law and  
255 whether it was a common, mutual or unilateral mistake.

**[21]** The pleadings being deficient as shown above and based on the authorities cited earlier, there was justification for the

Court to conclude that the Plaintiff's claim was bound to fail.

260 However, as will be seen below, the Plaintiff failed to establish his claims even on their merits.

*Deficiencies in the evidence*

265 **[22]** In essence, the Plaintiff's complaint was that he was misled into signing the Sub-Lease Agreement, Deed of Variation and Memorandum of Transfer in escrow on the mistaken belief that the rental amount stated in the draft given to him earlier was RM150,000.00.

270 **[23]** It was pleaded and the Plaintiff had testified that no one had read out or explained the contents of the Sub-Lease Agreement. However, glaringly, the Plaintiff stopped short of claiming the same about the Deed of Variation. He merely  
275 claimed that he was not given a copy of the draft Deed of Variation before he signed the document (Q/A19, PW1-WS). He did not say that it was not read or explained to him.

**[24]** At the outset it must be noted that the Plaintiff did not plead  
280 *non est factum* and thus, could not rely on it – see **Shak**

**Yong @ Hew Chong & Ors v Hew Sak Yong** [2014] 1 MLJ 562; **Komoco Motors Pte Ltd v Faridah bt Abdullah** [2012] MLJU 967.

285    **[25]**    In any event, the law is clear that in every case, the person who signs the document must exercise reasonable care to read and to understand the document prior to signing the same wherein it is reasonable to expect that more care should be exercised if the document is thought to be of an

290    important character than if it is not – see **Saunders (executrix of the estate of Rose Maud Gallie (Deceased)) v Anglia Building Society (formerly Northampton Town and County Building Society)** [1970] 3 All ER 961; **Thong Guan Co (Pte) Ltd v Lam Kong Co Ltd (No. 2)** [1998] 7

295    MLJ 720 and **Goh Jong Cheng v MB Melwani Pte Ltd** [1991] 1 MLJ 482.

**[26]**    Here, the Plaintiff was a school teacher and was 56 years old when he signed the Sub-Lease Agreement, Deed of

300    Variation and Memorandum of Transfer in escrow. There was no suggestion that despite his profession and age the Plaintiff would have been in such a position that he would

have not appreciated what he had signed so that there would be support for his contention that (i) he had made a mistake of fact or that (ii) there was an inequality of bargaining power. In fact, I had observed him when he testified as PW1 and I did not find him to suffer any infirmity. To the contrary, I found him to be quite able, composed and articulate.

**[27]** Thus, even if what the Plaintiff had alleged that no one had read out or explained the contents of the Sub-Lease Agreement (or the Deed of Variation for that matter) was true, it was highly incredible that someone in the shoes of the Plaintiff would not have been able to ascertain that the figure RM150,000.00 appearing in the draft was not found in the documents he signed. This was because the rental amount which was the only term of the Sub-Lease Agreement which he was unhappy of was only stated in section 3 of the First Schedule in the draft, in the Sub-Lease Agreement and the Deed of Variation. In other words, even if the Plaintiff could not by himself read or understand the rest of the terms in the Sub-Lease Agreement and or the Deed of Variation, he would have been able to see if the figure RM150,000.00 was

325 present or otherwise under the said section 3 of the First  
Schedule.

**[28]** The Plaintiff himself agreed in cross-examination as follows  
(Q/A10 & 11, NOP):

330

“Q10 Do you agree that as the landowner, one of the most  
important terms of sub-leasing the land is the rental amount?

A Setuju.

335

Q11 Do you agree that when you signed the Sublease  
Agreement, you would have paid attention to important  
terms such as the rental amount?

A Setuju.”

340 **[29]** While on this issue, it must be borne in mind that it was not  
the Plaintiff’s case that the Defendant had misrepresented to  
him that *despite* the figures appearing in the Sub-Lease  
Agreement and the Deed of Variation which he had signed,  
he would still be paid RM150,000.00 so that it could be said  
345 that was induced in any way. In any event, as noted above,  
the Plaintiff’s pleaded case is not on fraudulent

misrepresentation. In **Hasham v Zenab** [1960] 2 WLR 374 the court held that in the case of a unilateral mistake, rescission is available only if it was induced by an innocent misrepresentation or misleading conduct by opposing party. Neither of this was supported by the evidence led by the Plaintiff.

350

**[30]** In addition, there was no suggestion that someone, be it from the Defendant and or the solicitors who had prepared the Sub-Lease Agreement and the Deed of Variation had represented to the Plaintiff before he signed the Sub-Lease Agreement that it was as per the draft he relied on. The Plaintiff merely said that the draft was the only draft that was prepared by the Defendant's solicitors and given to him.

355

360

**[31]** DW1 on the other hand testified (Q/A55, NOP) that he had never gotten instruction from Mr. Tan that the draft relied on by the Plaintiff was the final draft. He said that there was a draft copy of the Sub-Lease Agreement with the rental amount stated as RM74,300.00 which he had given to Mr. Tan. As to the suggestion that there was no discussion with the Plaintiff pertaining to the Deed of Variation, DW1 testified

365



that the Deed of Variation was prepared after the discussion  
between the Plaintiff and Defendant at his office (Q/A59,  
NOP).

**[32]** While on this issue, the Plaintiff referred to DW3's evidence  
during cross-examination (Q/A98, NOP) that she had vetted  
the draft which the Plaintiff had relied on before the signing  
of the Sub-Lease Agreement and the Deed of Variation to  
contend that there was indeed a draft incorporating the terms  
as agreed by the parties. I did not find any significance in  
DW3's said evidence as firstly, there was never any dispute  
that the draft existed. The main issue was whether that  
particular draft had misled the Plaintiff. Secondly, DW3's  
evidence did not disprove the fact that the parties had  
subsequently signed the Sub-Lease Agreement and the  
Deed of Variation which terms were not as per the draft. In  
fact, DW3 who was the one who attested the Plaintiff's  
signatures on the Sub-Lease Agreement and the Deed of  
Variation was never challenged on the Plaintiff's  
understanding of the documents he was signing.

390 **[33]** The Plaintiff also claimed that the Sub-Lease Agreement had  
been frustrated due to the Defendant's failure to amend the  
rental amount to RM150,000.00.

**[34]** Section 57(2) of the Contracts Act 1950 provides that:

395

"A contract to do an act which, after the contract is made,  
becomes impossible, or by reason of some event which the  
promisor could not prevent, unlawful, becomes void when  
the act becomes impossible or unlawful."

400

**[35]** The section postulates two supervening events that frustrate  
a contract (see **Yee Seng Plantations Sdn Bhd v Kerajaan  
Negeri Terengganu & Ors** [2000] 3 CLJ 666):

405 (i) The first is an event that makes the contract impossible  
of performance; and

(ii) The second is an event of supervening illegality.

410

**[36]** In the Court of Appeal case of **Guan Aik Moh (KL) Sdn Bhd  
v Selangor Properties Bhd** [2007] 3 CLJ 695, the court held

that to establish frustration, the following elements need to be fulfilled:

415

“(i) the event upon which the promisor relies as having frustrated the contract must have been one for which no provision has been made in the contract. If provision has been made then the parties must be taken to have allocated the risk between them.

420

(ii) Second, the event relied upon by the promisor must be one for which he or she is not responsible. Put shortly, self induced frustration is ineffective.

425

(iii) Third, the event which is said to discharge the promise must be such that renders it radically different from that which was undertaken by the contract. The court must find it practically unjust to enforce the original promise.”

430

**[37] Earlier on in Ramli bin Zakaria & Ors v Government of Malaysia [1982] 2 MLJ 257, the Federal Court held that:**

“...where after a contract has been entered into there is a change of circumstances but the change of circumstances

435

do not render a fundamental or radical change in the obligation original undertaken to make the performance of the contract something radically different from that originally undertaken, the contract does not become impossible and it is not discharged by frustration.”

440

**[38]** As discussed above, the complaint of the Plaintiff was specifically that the terms of the Sub-Lease Agreement and Deed of Variation did not reflect the terms of the draft earlier given to him, not that there had been any event *subsequent* to their executions which made the Sub-Lease Agreement and Deed of Variation impossible to perform. The Plaintiff’s allegation on this matter was clearly misconceived.

445

**[39]** Next, the allegation that there was inequality of bargaining power between the Plaintiff and the Defendant. In submission it was contended that this was because the Defendant’s solicitors took instructions only from the Defendant’s manager when preparing the draft, the Sub-Lease Agreement and Deed of Variation. Firstly, it was never part of the Plaintiff’s pleaded case that the alleged inequality of bargaining power arose from these circumstances.

450

455

Secondly, as correctly submitted by the Defendant, there was no evidence of the Defendant having oppressed, coerced or exerted pressure on the Plaintiff to cause the Plaintiff to execute the Sub-Lease Agreement and Deed of Variation. Just because the Sub-Lease Agreement and Deed of Variation were prepared by the Defendant's solicitors did not therefore mean that there was inequality of bargaining power. As noted earlier, the Plaintiff was not a person who could be said to be suffering from any infirmity so that it could be argued that it was unconscionable to hold him to his bargain.

*Plaintiff's case not proven*

**[40]** There was no dispute that the Plaintiff had signed the Sub-Lease Agreement and Deed of Variation. The Plaintiff only sought to avoid them by alleging that he had done so under a mistake, misrepresentation and or due to inequality of bargaining power. It was further alleged that there was frustration of the Sub-Lease Agreement and Deed of Variation.

480 **[41]** For the reasons explained in this judgment, I found that none  
of the above had been made out. Accordingly, the Plaintiff's  
claim was dismissed with costs.

*The Counterclaim*

485

**[42]** The title to the Land consisted of a special term which  
prohibited its transfer and sublease unless with the written  
permission of the Director of the Lands and Surveys  
Department. This was also provided in Recital C of the Sub-  
490 Lease Agreement.

**[43]** In addition, it was also provided as follows:

495

500

"2.1 The Sub-Lessor shall grant the Sub-Lease and the  
Sub-Lessee shall accept the Sub-Lease in accordance with  
the terms and condition of this Agreement and for a term of  
Thirty (30) years from the date of the registration of the Sub-  
Lease (hereinafter referred to as "the said Term") SUBJECT  
ALWAYS to the terms and conditions as appearing in the title  
deed to the said Land and further subject to relevant  
statutory provisions of the Land Ordinance (Sabah Cap. 68)

and such other relevant laws, rules and regulations as may be in force and subsisting for the time being.”

505   **[44]**   Section 4 of the First Schedule as varied in the Deed of Variation provided that:

510           “(a)    The sum of Ringgit Malaysia Seventy Four Thousand And Three Hundred (RM74,300.00) Only shall be paid by the Sub-Lessee to the said Solicitors as stakeholders within two (2) weeks upon notification in writing by the said Solicitors that permission to sublease the said Land to the Sub-Lessee has been granted by the Director of Lands And Surveys such payment be released to the Sub-Lessor upon the completion of registration of the Sub-Lease; and

515

              (b)    The balance sum of Ringgit Malaysia Forty Four Thousand Five Hundred And Eighty (RM44,580.00) Only shall be paid by the Sub-Lessee to the Sub-Lessor upon completion registration of Sublease in favour of the Sub-Lessee.”

520

**[45]**   It was not in dispute that as at the commencement of the Plaintiff’s action, the Plaintiff had not applied for and obtained

525 the permission from the Director of Lands and Surveys  
Department. The Defendant had by its letter dated  
06.01.2020 reminded the Plaintiff of his obligation to do so  
but the Plaintiff failed to. The Plaintiff testified that the  
Defendant could not insist on this term when the Sub-Lease  
530 Agreement and the Deed of Variation did not reflect the terms  
as per the draft.

**[46]** Given the Court's finding on the Plaintiff's claim, it followed  
that the Plaintiff was bound by the Sub-Lease Agreement  
535 and Deed of Variation. There was no other reason offered  
by the Plaintiff that would disentitle the Defendant to their  
counterclaim.

**[47]** In the premises, I allowed the counterclaim as follows: (i)  
540 prayer (a), (ii) prayer (b), (iii) prayer (c) with an amendment  
to the following words "...the Deputy Registrar or Senior  
Assistant Registrar of the High Court of Sabah and Sarawak  
at Kota Kinabalu" to "...the Senior Assistant Registrar of the  
High Court of Sabah and Sarawak at Sandakan", and (iv)  
545 costs subject to allocatur.



**Dated this 6<sup>th</sup> day of December 2022**

- Sgd -

**CELESTINA STUEL GALID**  
**JUDGE**  
**HIGH COURT, SANDAKAN**

550

555

Date of Grounds of Decision: 06.12.2022

560 Date of Delivery of Decision: 10.11.2022

Date of Hearing: 21.09.2022

565

For the Plaintiff: Sharatha Lincon &  
Ameer Asraaf Khairree  
Messrs. Lincon & Co

570

For the Defendant: Alethia Subil  
Messrs. Grace Chaw & Co

575 Notice: This copy of this Judgment is subject to editorial revision.