IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

IN THE FEDERAL TERRITORY OF KUALA LUMPUR, MALAYSIA

[SUIT NO.: WA-22NCVC-9-01/2017]

BETWEEN

1. ANUAR BIN ROZHAN
(No. K/P: 611029-07-5739)

2. CHE KAMARUDIN BIN MOHD
(No. K/P: 550520-11-5503)

3. CHEW SIANG PENG
(No. K/P: 510304-10-5275)

4. CHONG KWET HIN
(No. K/P: 500716-05-5033)

5. CHOO PIN YAN
(No. K/P: 850612-07-5611)

6. CHOY SOO NGOH
(No. K/P: 580522-10-5584)

7. EMMALINE ASHLEY-WAY CHUA
(No. K/P: 711204-02-5076)

8. FOO KWEE SIM
(No. K/P: 551003-10-6232)

9. GOH KEAT CHOO
(No. K/P: 520910-07-5386)

10. JASMIN VICTORIA A/P EMMANUEL

(No. K/P: 541228-05-5668)

11. **LEE CHENG LEAP**
(No. K/P: 560123-01-6009)

12. **KO KIM FOOK**
(No. K/P: 581213-08-5369)

13. **KONG NGAN YIN**
(No. K/P: 541117-10-5634)

14. **LEE SEOW WAH**
(No. K/P: 600210-10-6540)

15. **LEE YIM FONG**
(No. K/P: 560702-10-5890)

16. **PREMBAJ A/L JANARDANAN**
(No. K/P: 511222-10-5209)

17. **TAN SWEE KENG**
(No. K/P: 620610-10-6900)

18. **SHIP KA HUNG**
(No. K/P: 690316-10-5345)

19. **SUNTHARALINGAM V. VELUPPILLAI**
(No. K/P: 571014-10-5591)

20. **THUM MAY YONG**
(No. K/P: 620408-07-5370)

21. **THUM MEI LING**
(No. K/P: 690910-07-5396)

22. **YAP CHEE KEONG**

(No. K/P: 700520-07-5135) … PLAINTIFFS

AND

WEALTH MENTORS SDN BHD
(Company No.: 661569-D) … DEFENDANT

GROUNDS OF JUDGMENT

INTRODUCTION

[1] 22 Plaintiffs as above named filed this civil suit which is premised on the alleged negligent misstatements made by the Defendant through its Chief Executive Officer, Mr. Aaron Sim Chin Chye [Defendant's Witness ('DW') 1] and its representatives at a seminar held in mid- 2013 where the Defendant had introduced a project known as "*Bosque Residencial Project Brazil*" at No Lugar Guajiru, Sao Goncalo do Amarante, Rio Grande Do Norte ('said Project'), constructed by the EcoHouse Group, to the Plaintiffs.

[2] The Plaintiffs entered into Sale and Purchase Agreements ('SPA') with the vendor cum developer, EcoHouse Brazil Construcoes Ltda., a company incorporated in Brazil ('Developer'), and Escrow Agreements with Derrick Wong & Lim BC LLP ('Escrow Agent'), a legal firm in Singapore on different dates in 2013 for the purchase of their respective units in the said Project.

[3] Unfortunately, the Plaintiffs did not obtain the return on their investments as they had expected and thus, the present claim for, *inter alia*, the purchase price of the units which the Plaintiffs had invested in the said Project.

[4] After hearing the testimony of 21 witnesses for the Plaintiff and 3 witnesses for the Defendant over the course of 10 days of trial from 18.2.2019 until 14.6.2019 and having considered the same together with the pleadings, documentary evidence and written submissions, the Plaintiffs claim was dismissed with costs of RM50,000.00 to the Defendant, subject to allocator.

[5] These are my full reasons for the decision.

SALIENT BACKGROUND FACTS

[6] Based on the pleadings and Case Summaries filed by the parties, the facts leading to this suit is fairly straightforward.

[7] The Plaintiffs are Malaysian citizens, who at the time of filing of the Writ and Statement of Claim ('SoC') were residing in Kuala Lumpur, Selangor and Negeri Sembilan. The Plaintiffs come from diverse background but they have one thing in common, and that is they have attended the Defendant's events at least once before the seminar in which investment opportunities in the said Project was allegedly promoted by the Defendant.

[8] In that fateful seminar, the Defendant had purportedly, through DW1 and its representatives, made certain representations about the said Project, including that it was underwritten by the Government of Brazil to enable those in the middle and lower income groups to own their own houses.

[9] In reliance on the alleged representations, the Plaintiffs had registered their interest in purchasing one or more units in the said Project by filling up the Reservation Forms provided by representatives from the EcoHouse Group Singapore, a company which, according to DW1, was set up by the Developer to

promote, and to deal with potential and confirmed investors of, the said Project within the Asian region.

[10] The Reservation Forms state that those who submit their details will be given a Due Diligence Information Pack via e-mail. This Pack contains the frequently asked questions videos, due diligence documents, newspaper articles and sample contracts. The Reservation Forms additionally state that an appointment can be made to see the representatives from the EcoHouse Group to answer any questions that potential investors may have about the said Project and the important clauses in the contracts.

[11] The Plaintiffs subsequently entered into the respective SPA with the Developer and the Escrow Agreements with the Escrow Agent. DW1 himself, and his family members, bought 16 units in the said Project at a total purchase price of S$736,000.00.

[12] However, the Developer as vendor, failed to transfer or deliver any of the units or properties which were purchased by the Plaintiffs, and DW1 and his family.

[13] The Plaintiffs' claim against the Defendant is premised upon the tort of negligent misstatement, the particulars of which are as pleaded in paragraph 36 of the SoC as re-produced below:

> "*36. Setelah memasuki perjanjian jual beli di dalam projek perumahan tersebut berdasarkan representasi Defendan atau wakil-wakil Defendan dan setelah menunggu lebih kurang 3 tahun, Plaintif-Plaintif berkata Defendan cuai dalam membuat representasi-representasi tersebut yang mengakibatkan Plaintif-plaintif mengalami kerugian.*

Butir-butirkecuaian salahnyata(negligent misstatements) Defendan

36.1 Defendan telah menampilkan dirinya sebagai ejen hartanah yang telah diberikan beberapa unit oleh Kumpulan Syarikat Eco-house untuk dijual kepada Plaintif-Plaintif walaupun Defendan bukanlah ejen hartanah yang sah yang telah didaftarkan mengikut undang-undang di Malaysia.

36.2 Kumpulan Syarikat Eco-house langsung tidak tergolong sebagai salah satu daripada syarikat yang diberi pengiktirafan oleh Kerajaan Brazil untuk menjalankan pembinaan projek tersebut.

36.3 Projek perumahan tersebut yang dijalankan di Brazil tersebut langsung tiada kaitan dengan Kumpulan Eco- house.

36.4 Peguam yang bertindak sebagai Ejen Escrow iaitu Tetuan Derrick Wong & Lim BC LLP, sebuah firma peguamcara di Singapura telah melepaskan wang escrow kepada Eco House Group Pte Ltd menyebabkan wang Plaintif tidak terjamin.".

[14] The particulars of the Plaintiffs' losses can be seen in "***LAMPIRAN A***" of the SoC which is re-produced in its entirety for a better understanding of the reliefs sought by the Plaintiff:

No	Nama	Jumlah Unit	Tarikh Perjanjian	Jumlah Dibayar	Fasa Project	Pulangan yang Dijanjikan	Penalti Bulanan Yang
1	Anuar Bin Ruzhan	1	30.9.2013	SGD46,000.00	Bosque 6	20%	2%
2	Che Kamarudin Bin Mohd	1	27.6.2013	SGD46,000.00	Bosque 2	22%	2%
		0.25	23.10.2013	SGD11,500.00	Bosque 7	15%	1%
3	Chew Siang	3	28.6.2013	SGD138,000.0	Bosque 5	22%	2%
4	Chong Kwet	1	2.5.2013	SGD46,000.00	Bosque 5	20%	2%
5	Choo Pin Yan	1	10.9.2013	SGD46,000.00	Bosque 6	20%	2%
		2	18.11.2013	SGD92,000.00	Bosque 7	20%	2%
6	Choy Soo Ngoh	5	13.8.2013	SGD230,000.0 0	Bosque 6	20%	2%
7	Emmaline Ashley-Way	1	24.9.2013	SGD46,000.00	Bosque 7	15%	2%
8	Foo Kwee Sim	0.25	23.10.2013	SGD11,500.00	Bosque 7	15%	1%
9	Goh Keat Choo	2	28.6.2013	SGD92,000.00	Bosque 2	22%	2%
10. 11.	Jasmin Victoria a/p Emmanuel	1	17.7.2013	SGD46,000.00	Bosque 2	22%	2%
12.	Ko Kim Fook	1	5.8.2013	SGD46,000.00	Bosque 6	20%	2%
13.	Kong Ngan Yin	0.25	23.10.2013	SGD11,500.00	Bosque 7	15%	1%
14.	Lee Seow Wah	0.25	23.10.2013	SGD11,500.00	Bosque 7	15%	1%
15.	Lee Yim Fong	1	2.8.2013	SGD46,000.00	Bosque 6	20%	2%

16. 17.	Prembaj a/l Janardanan & Tan Swee Keng	1	23.10.2013	SGD46,000.00	Bosque 7	18%	2%
18.	Ship Ka Hung	1	17.7.2013	SGD46,000.00	Bosque 3	22%	2%
19.	Suntharalingam v Veluppillai	1	15.5.2013	USD 37,000.00	Bosque 5	20%	2%
20.	Thum May Yong	2	14.8.2013	SGD92,000.00	Bosque 6	20%	2%
21.	Thum Mei Ling	2	18.11.2013	SGD92,000.00	Bosque 7	20%	2%
22.	Yap Chee	1	23.8.2013	SGD46,000.00	Bosque 6	20%	2%
	SUB TOTAL SGD	**28**		**1,288,000**			
	SUB TOTAL USD	**1**		**37,000.00**			

[15] The Plaintiffs therefore prayed for the following reliefs:

(a) the purchase price which the Plaintiffs invested in the said Project as set out in the column titled "*Jumlah Dibayar*" in "***LAMPIRAN A***" of the SoC amounting to a total sum of S$1,288,000.00;

(b) guaranteed return at the respective percentages of the purchase price as per the SPA which are set out in the column titled "*Pulangan yang Dijanjikan*" in "***LAMPIRAN A***" of the SoC;

(c) monthly late interests at the respective percentages as per the SPA which are set out in the column titled "*Penalti Bulanan Yang Dijamin*" in "***LAMPIRAN A***" of the SoC;

(d) exemplary and aggravated damages;

(e) interests; and

(f) costs.

[16] In his Written Submission, Mr. Ravi Nekoo stated that the Plaintiffs are not pursuing the claim for aggravated damages since this is not a case where there is injury to the dignity or pride of the Plaintiffs as a result of reprehensible conduct on the part of the Defendant.

[17] The Defendant's defence is that it is an event/seminar organizer focusing, among other things, in financial and health education and online marketing business, and that DW1 was a speaker at these seminars. The Defendant categorically denies that it had made the alleged or any representation to the Plaintiffs. Instead, the Defendant pleaded that it had disclosed that –

(a) the Defendant is not the developer of the said Project;

(b) the Defendant is sharing its experience as a property investor; and

(c) the investors are contracting directly with the Developer, and not with the Defendant.

[18] The crux of the Defendant's Defence was neatly summarised by its counsel, namely that –

(a) there is no misstatement made by the Defendant and/or its agents;

(b) no duty of care arises between the Plaintiffs and the Defendant; and

(c) even if there is a duty of care, the Plaintiffs have failed to prove their alleged losses; the Defendant did not cause the Plaintiffs' losses; and the Plaintiffs' alleged losses are too remote and are not recoverable in law.

THE TRIAL

[19] Throughout the trial, learned counsels representing the parties conducted their case with exemplary professionalism and the appropriate restraint. The entire legal team on each side was complimented for the well-presented analysis of the evidence adduced at the trial in the written submissions, complete with all the necessary Annexures, as directed by the Court. This has greatly assisted the Court in making its findings on the issues to be tried.

[20] One such Annexure is **Annexure B** in the Defendant's Written Submission which provides a list of the witnesses who testified at the trial in the form of a table, as shown below:

Witness	Name	Occupation	Dates when evidence was given
PW1	Chew Siang Peng (**P3**)	Freelance Advisor	• 18.2.2019 • 19.2.2019 • 10.5.2019
PW2	Chong Kwet Hin (**P4**)	Project Management Consultant	•18.2.2019 • 26.2.2019
PW3	Choo Pin Yan (**P5**)	Logistic Planner	• 18.2.2019 • 9.5.2019 • 13.6.2019

PW4	Choy Soo Ngoh (**P6**)	Retiree	• 18.2.2019 • 19.2.2019 • 10.5.2019 • 11.6.2019
PW5	Emmaline Ashley-Way Chua (**P7**)	Human Resource Manager	• 18.2.2019 • 11.6.2019
PW6	Foo Kwee Sim (**P8**)	Administrator	• 18.2.2019 • 18.2.2019 • 16.4.2019
PW7	Jasmin Victoria a/p Emmanuel (**P10**)	Retired (former employee of the Defendant)	• 18.2.2019 • 13.6.2019
PW8	Lee Cheng Leap (**P11**)	Retiree	• 18.2.2019 • 13.6.2019
PW9	Kong Ngan Yin (**P13**)	Company Director	• 18.2.2019 • 18.2.2019 • 26.2.2019
PW10	Lee Seow Wah (**P14**)	Freelance Interior Consultant	• 18.2.2019 • 16.4.2019
PW11	Lee Yim Fong (**P15**)	Retiree	• 18.2.2019 • 26.2.2019
PW12	Tan Swee Keng (**P17**)	Retiree	• 18.2.2019 • 25.2.2019
PW13	Ship Ka Hung (**P18**)	Real Estate Agent	• 18.2.2019 • 25.2.2019

PW14	Suntharalingam V. Veluppillai (**P19**)	Self-employed & investor	• 18.2.2019 • 11.6.2019
PW15	Thum May Yong (**P20**)	IT Personnel	• 18.2.2019 • 25.2.2019
PW16	Yap Chee Keong (**P22**)	Training Consultant	• 18.2.2019 • 25.2.2019
PW17	Anuar Bin Rozhan (**P1**)	Human Resource Consultant	• 18.2.2019 • 19.2.2019
PW18	Prembaj a/l Janardanan (**P16**)	Retiree	• 9.5.2019
PW19	Goh Keat Choo (**P9**)	Retiree	• 9.5.2019
PW20	Thum May Ling (**P21**)	Finance Manager	• 10.5.2019
PW21 (sub-poena)	Heah Ka Cheng, Jennifer	Advocate & Solicitor at Messrs Teh Kim Teh, Salina & Co.	• 11.6.2019
DW1	Sim Chin Chye, Aaron	The Defendant's CEO	• 13.6.2019 • 14.6.2019
DW2	Tham Chin Heng, Jeremy	Real Estate Agent	• 14.6.2019
DW2	Tham Chin Heng, Jeremy	Real Estate Agent	• 14.6.2019
DW3	Wong Wei Siong, Derrick	Businessman	• 14.6.2019

[21] In delivering my decision, I had, at the outset, pronounced that the claim brought by the following Plaintiffs has to be dismissed and the reasons thereto:

(a) 2nd Plaintiff – On the first day of trial on 18.2.2019, Mr. Ravi Nekoo informed the Court that the late 2nd Plaintiff's claim against the Defendant is withdrawn given his demise on 12.12.2017. No application under O. 15, r. 7 ROC 2012 was ever made;

(b) 12th Plaintiff – This Plaintiff did not testify at the trial. No evidence was thus led by the 12th Plaintiff and he has failed to discharge the legal burden under sections 101 and 102 of the Evidence Act 1950 [*Act 56*] ('EA 1950'); and

(c) 21st Plaintiff – During cross-examination, this Plaintiff admitted that she did not attend any seminar and there were no representations made by the Defendant to her. The 21st Plaintiff's sister had used her name as the purchaser in the SPA. There was no re-examination by the Plaintiffs' counsel. Thus, this Plaintiff did not suffer any loss since she did not utilise her own money for the investment (see pp 5 - 9 of the Notes of Evidence for 10.5.2019).

[22] The 2nd and 12th Plaintiffs are not among the 20 Plaintiffs who are pursuing an appeal against my decision.

[23] The Agreed Facts for purposes of trial consist of only three short paragraphs, namely that (i) the Defendant is an event organizer; (ii) it had organized seminars in 2013; and (iii) Derrick Wong & Lim BC LLP are the escrow agent under the Escrow Agreements between the Plaintiffs, DW1 and his wife and daughter, and the said legal firm.

[24] The Agreed Issues To Be Tried were succinctly drawn up, with, again, three issues as to whether the Defendant –

(a) owes a duty of care to the Plaintiffs when making the alleged representations;

(b) is negligent in making the representations as alleged and caused the Plaintiffs to suffer losses; and

(c) is liable to pay the Plaintiffs the amount which they paid to the Escrow Agent through the Escrow Agreements entered into between the Plaintiffs and the Escrow Agent for the purchase of the house units.

[25] In light of the large number of Plaintiffs who will be testifying in open court, on the first day of trial Mr. Mark La Brooy requested that –

(a) the Plaintiffs be reminded not to discuss the case until they are released as witnesses, and after being so released, they are only to discuss the matter with any other Plaintiff or witness who has been released;

(b) only the Plaintiff whose turn is to give evidence shall be in open court whilst the other Plaintiffs are not to be allowed to sit in the public gallery in view of the nature of the claim and the sensitivity of the cross-examination that will be conducted for each Plaintiff;

(c) the entire cross-examination of the Plaintiffs be reserved and that the Defendant's counsel be allowed to ask one similar question to each Plaintiff in a brief cross-examination immediately after they tender their Witness Statements; and

(d) a segmented cross-examination be conducted according to the different groupings of the Plaintiffs as prepared by the Defendant's counsel.

[26] Mr. Ravi Nekoo did not object to these requests. The Court could appreciate the justification for such application to be made before the first witness takes the stand. Hence, the Court gave the necessary instructions to the Plaintiffs before they left the court room to await their turn to be called, and the trial proceeded in the manner as requested by the Defendant's counsel.

THE ISSUES

[27] In answering the first issue in the Agreed Issues To Be Tried i.e. as to whether the Defendant owes a duty of care to the Plaintiffs when making the alleged representations, the primary question which arises is whether the Plaintiffs have proven, on a balance of probabilities, that the Defendant made the representations as pleaded in the SoC.

(A) Did the Defendant, through DW1 and its representatives, make the representations as pleaded in the SoC?

[28] It is the Plaintiffs' pleaded case that the Defendant, through DW1, had organised a seminar in mid-2013 at the Defendant's Training Centre in Puchong and local hotels where the Plaintiffs were introduced to the said Project (see paragraph 25 of the SoC).

[29] It was further pleaded that the Defendant, **through DW1 and its representatives**, had made the representations as set out in paragraphs 26 and 27 of the SoC in these terms:

"*26. Defendan melalui Sim dan wakil-wakil Defendan, telah membuat representasi-representasi berikut kepada Plaintif-Plaintif, iaitu:-*

26.1 projek perumahan Brazil tersebut ditaja-jamin (underwritten) oleh Kerajaan Brazil di bawah satu projek kebangsaan yang dikenali sebagai Minha Casa, Minha Vida (MCMV) (My Home, My Life) untuk membolehkan golongan pendapatan pertengahan dan rendah memiliki rumah masing- masing.

26.2 Defendan telah melalui wakilnya Sim, secara spesifik membuat pernyataan bahawa projek perumahan Brazil tersebut "...is underwritten by the government".

26.3 sebuah syarikat bernama Eco-House Group yang mempunyai syarikat-syarikat di United Kingdom, Singapura dan Brazil telah dipilih oleh Kerajaan Brazil untuk menjalankan projek perumahan tersebut.

27. Di antara representasi-representasi lain yang dibuat oleh Defendan, menerusi wakilnya Sim dan wakil-wakil Defendan, adalah seperti berikut:-

27.1 ... (The project is a high quality in demand-units for the middle class underwritten by the government).

27.2 ... (Clients funds are protected in escrow with a third party independent lawyer).

27.3 … (An escrow account ensures that a seller is paid only after certain conditions are fulfilled as such the plaintiffs' monies are in safe hands).

27.4 … (The developer ie Eco-house Group is an award winning ISO 9001 accredited developer with extensive track record. The construction is undertaken by Eco-house in Brazil and it is in progress).

27.5 … (The Defendant has been allocated certain units by Eco-house Singapore).

27.6 … (The housing project will be completed in 12 months).

27.7 … (The Plaintiffs will only have to purchase these units and hold these units for a period of 12 months).

27.8 … (After 12 months, these units will be sold to the people of Brazil and the Plaintiffs will be guaranteed a return of 20% of the purchase price).

27.9 … (If there is delay in the selling of these units, the Plaintiffs will be paid 2% of the purchase price on a monthly basis).

27.10 … (The Plaintiffs will sign an agreement with Eco-house Brazil who are the land owners).",

(hereinafter referred to collectively as the 'said Representations').

- The Plaintiffs' submissions

[30] Mr. Ravi Nekoo went into great detail in his submissions on this issue, by posing the question as to who is the Defendant – a party who had portrayed itself to be a property investor having knowledge and experience in international real estate investment, and is an international property investor as pleaded in paragraph 24 of the SoC, **or** an event organiser who was merely having a sharing session by way of the seminars?

[31] The learned counsel contended that if the Defendant's conduct through Aaron Sim and other representatives are viewed as a whole, then it is clear that the Defendant (i) had portrayed itself as a company involved in property investment and is able to provide property investment advice to the Plaintiffs; (ii) had provided investment advice to the Plaintiffs on the said Project; and (iii) was marketing the said Project together with EcoHouse.

[32] The Plaintiffs relied on the following evidence to support the aforesaid propositions:

(a) the Defendant's video recordings of the presentations on the said Project at some of the workshops/seminars in the CDs marked as CD1, CD2, CD3. For the sake of completeness, I would refer to **ANNEXURE F** in the Defendant's Written Reply Submission wherein details of the five CDs tendered in Court have been conveniently reflected in the following table:

	CD1	CD2	CD3	CD4	CD5
Details of CDs	25.7.2013 2.30 p.m. **(B4, p 734)**	24.7.2013 7.30 p.m. **(B4, p 735)**	25.7.2013 7.30 p.m. **(B4, p 736)**	21.4.2013 (a.m.) **(B8, p 765)**	21.4.2013 (p.m.) **(B8, p 765-766)**
Main speaker	Louie Pinto	Jason Purvor	DW1 and Louie Pinto	Deen Bissessar	Deen Bissessar

The video recordings in all five CDs were played in Court during the trial. DW1, in his testimony, explained that Louie Pinto is DW1's/the Defendant's business partner; Jason Purvor is the International Commercial Director of the Developer; and Deen Bissessar is the Chief Operations Officer of EcoHouse Singapore.

The Plaintiffs' counsel had extracted the parts in CD1, CD2 and CD3 which were referred during the cross-examination of DW1 and set it out in **ANNEXURES 2**, **3** and **4** in the Written Submission together with picture frames from these CDs.

Mr. Ravi Nekoo submitted that since DW1, had admitted during cross-examination that the contents of the CDs are similar and that the said CDs were used by the Defendant in all the presentations post-July 2013 to promote the said Project, the Defendant, either through DW1 and/or Louie Pinto, had made the same representations to the Plaintiffs who had attended the seminar/workshop post-July 2013. Furthermore, based on the representations during the presentations as seen in CD1, CD2 and CD3, it was argued that the Defendant, through DW1 and/or its representative in particular Louie Pinto, had made

representations which had portrayed the Defendant as having special skills in property investment, specifically that –

(i) the Defendant knows how the Plaintiffs can generate 20% fixed income in 12 months through a hassle-free, safe secure and simple investment;

(ii) the Defendant is a property investor having properties in Malaysia, Singapore, Cambodia, the United States of America ('USA') and Brazil;

(iii) the Defendant conducts property investment strategy workshops;

(iv) the Defendant knows about international property market and makes a comparison of property prices in Malaysia, Singapore, Hong Kong and Monaco;

(v) the Defendant has information on places which are "*jewel in the world market of property investment*" and in this case it is Brazil;

(vi) by attending the Defendant's programs, around 6,000 people have created more money;

(vii) the Defendant had done due diligence on the said Project in Brazil and DW1 had invested in 11 units after sending the Defendant's business partner, Louie Pinto to visit the EcoHouse office in Brazil and the project site; and

(viii) DW1 and Louie Pinto created the 11 rules in investing in real estate based on their experience and after talking to Robert Kiyosaki and Donald Trump;

(b) the e-mails sent by the Defendant to the Plaintiffs inviting them to attend the seminar. The Plaintiffs relied on DW1's evidence that attendance to the seminar/workshop was by invitation vide e-mail as those received by the 3rd and 6th Plaintiffs. The e-mail dated 23.7.2013 from the Defendant to the 6th Plaintiff at pp 647 – 653 Bundle B4 is a confirmation of reservation for the "*Wealth Mentors Property Workshop*" at Boulevard Hotel on 25.7.2013 where the 3rd. Defendant "*... will uncover: How to participate in US$37,000 properties with 20% fixed return in 1 year, ... High quality in demand units for middle class, underwritten by the government, Client funds are protected in Escrow with a 3rd party independent lawyer ..., Award winning ISO 9001 accredited developer with extensive track record ..., Specific exit strategy of 1 year; 1500 units already bought by Singaporean investors since August 2012 ...*". The Plaintiffs' counsel conceded that apart from the 3rd and 6th Plaintiffs, the other Plaintiffs had not kept the e-mails. Nevertheless counsel urged the Court to conclude, based on DW1's own evidence that attendance at the Defendant's seminar/workshop is by invitation only, that all the Plaintiffs who attended the seminar/workshop organised by the Defendant had received a similar e-mail to that sent to the 3rd and 6th Plaintiffs. It was further submitted that the Defendant had made the representations in these e-mails even before the Plaintiffs had attended the events, and at the seminar/workshop, the same representations were made; and

(c) the representations made at the seminars organised by the Defendant.

[33] In **ANNEXURE 8** to the Written Submission, Mr. Ravi Nekoo had mapped out the details of the Plaintiffs who had attended the Defendant's seminar in the following table:

DATE	TIME	PLACE	PRESEN-TERS	CD	PLAINTIFFS WHO ATTENDED THE
21.04.2013	Morning session	Wealth Mentor's Training Centre in Puchong	Louie Pinto and Dean Bissessar	CD at B8, pg 766	• Chew Siang Peng (P3) • Chong Kwet Hing (P4) • Ship Ka Hung (P18) • Suntharalingam (P19)
21.04.2013	Afternoon session			CD at B8, pg 765	
24.07.2013		Grand Dorsett	Aaron Sim	CD2 at B4 pg 735	-
25.07.2013	1st session	Boule- vard Hotel Midvalley	Aaron Sim and Louie Pinto	CD1 at B4, pg 734	• Anuar Rozhan (P1) • Choy Soo Ngoh (P6) • Choo Pin Yan (P5) • Kong Ngan Yin (P13) • Thum May Yong (P20)
25.07.2013	2nd session			CD3 at B4 pg 736	

[34] As regards the statements made by Louie Pinto, it is the Plaintiffs' contention that these were made in the capacity as the Defendant's business partner and thus, ought to be considered as statements attributable to the Defendant. The Plaintiffs' counsel made no reference to Dean Bissessar in his submissions.

- **The Defendant's submissions**

[35] Learned counsel for the Defendant undertook a detailed analysis of the evidence given by the Plaintiffs who claimed to have attended the seminar at which the said Representations were made by the Defendant which was then summarised in a table as shown below:

Summary of Issue 1 ***DW1 did not and could not have made the Representations to the Plaintiffs***		
Plaintiffs	Date of Event	Remarks
PW20	N/A	• Admitted that DW1 did not make the Representations to her.
PW1 PW2 PW13 PW14 PW19	21.4.2013	• All except PW1 have no proof of attendance. • DW1 was not present at the events on 21.4.2013 and therefore, could not have made the Representations to them. • Representations were made through the videos prepared by the Developer.
PW3 PW4	25.7.2019 2.30 p.m.	• All except PW4 no proof of attendance. • Video recording (CD1) shows that DW1 made disclaimers. • Video recording shows that after introducing Louie Pinto at the beginning of the event,

PW10 PW15 PW17		DW1 did not speak thereafter and therefore, did not make the Representations to them. • Louie Pinto is an independent contractor.
		Adverse inference to be invoked against Plaintiffs for failing to call Louie Pinto to testify at the trial. • Representations were made through the videos prepared by the Developer.
PW5	Jul/Aug 2013	• All no proof of attendance. • Did not attend events specifically on the Project – a departure from pleaded case.
PW7	Cannot recall	• Should be bound my pleadings.
PW6 PW9	Sept 2013	• All no proof of attendance. • Defendant did not organise any event in September 2013 or in July 2013 at Berjaya Times Square therefore, DW1 could not have made the Representations to them.
PW11	July 2013, Berjaya Times Sq	

PW12 PW18	24.7.2013	• All no proof of attendance. • Video recording (CD2) shows that DW1 made disclaimers. • Video recording shows that after introducing the Project, DW1 invited Jason Purvor, International Commercial Director of the Developer to speak about Project. • Representations were made by Jason Purvor and/or through the videos prepared by the Developer.
PW16	Before Aug 2013	• No proof of attendance. • Admitted that cannot recall DW1 being present at event therefore, DW1 could not have made Representations to him.
PW8	Cannot recall	• No proof of attendance. • Admitted that he had gone to fetch his wife, PW7 from the event. Therefore, no knowledge of representations made and by whom, if any, given not present throughout the entire event.

[36] In light of the foregoing, it was submitted that the Plaintiffs have failed to discharge their legal burden under sections 101 to 106 EA 1950 to prove that DW1 made the Representations to them. Accordingly, the Plaintiffs' claim based on negligent misstatement should be dismissed solely on the ground that the

Representations were not made by DW1 to the Plaintiffs and there was no misstatement.

[37] As for the Plaintiffs' allegation that Louie Pinto was an agent of the Defendant, in his Witness Statement, DW1 stated that Louie Pinto was an independent consultant, and not an employee or agent of the Defendant. It was contended that the Plaintiff failed to adduce any evidence to prove the same and the easiest way for the Plaintiffs to rebut DW1's evidence was to call Louie Pinto as a witness at the trial. However, this was not done despite the fact that the Plaintiffs filed a subpoena dated 12.1.2018 (Enclosure 25). Since the Plaintiffs' counsel did not offer any reason or explanation to the Court as to why Louie Pinto was not called as a witness notwithstanding the issuance of the subpoena, it was submitted that an adverse inference pursuant to section 114*(g)* EA 1950 ought to be invoked against the Plaintiffs.

- **Findings of the Court**

[38] The Court was greatly assisted by the Written and Reply Submissions filed by both counsels for the Plaintiffs and the Defendant wherein the evidence of each Plaintiff was dissected and presented in a manner which is immediately comprehensible.

[39] It is trite law that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded: see the Federal Court decision in *Iftikar Ahmed Khan v. Perwira Affin Bank Bhd* [2018] 1 CLJ 415 and the cases cited at p 428. In the earlier case of *Ketua Pengarah Jabatan Kerja Raya v. Strongkota Development Sdn Bhd and another appeal* [2016] 6 MLJ 512, Abang Iskandar JCA (now CJSS) expressed the established legal principles in these words:

> "***[16]*** *... It is trite law that parties to a suit are bound by what have been pleaded in their respective pleadings. To further refine the dispute, parties would normally agree with each other as to what are the issues to be tried.* ***Although the pleadings would expressly bind parties, it has the effect of also limiting the power of the adjudicating court, in that the decision of the court, at the end of the trial of the suit, must be in consonance with what had been pleaded by the parties.*** *... As such, pleadings have the effect of not only binding the parties, inter se, but it also operates to ensure that the court only grants the reliefs that have been prayed for as pleaded as forming the plaintiff's causes or causes of action. There may be exceptions to this rule of the thumb, but only rarely will the courts depart from this crucial rule of civil litigation.*" (emphasis added).

[40] In the instant case, paragraphs 26 and 27 of the SoC do not state where and when the said Representations were made. However, if the said paragraphs are read together with paragraph 25 of the SoC, the said Representations have purportedly been made at a seminar at the Wealth Mentors Training Centre in Puchong and at local hotels in mid-2013. It was further pleaded that based on the representations made by the Defendants, the Plaintiffs had, through the Defendant, entered into SPA with Eco-House Brazil Construcoes Ltda. for the purchase of the houses in the said Project whereby each Plaintiff had paid the amounts as tabulated in paragraph 30 of the SoC, the details of which are also inserted in the table in "***LAMPIRAN A***" of the SoC.

[41] It is observed that the Plaintiffs gave basically the same answers to Q3 in the Witness Statements as to what were the representations made by the Defendant that made each of them

sign the SPA, except for the percentages of guaranteed return and monthly penalties in the event of delay in completion the said Project. An example of such an answer where the percentages of guaranteed return is 20% and monthly penalty is 2% is re-produced below:

> "*a. That there was a national project in Brazil known as "Minha Casa, Minha Vida (MCMV) (My Home My Life);*
>
> *b. That this project was underwritten by the Brazilian Government and it is a national project to assist the lower and middle income citizens of Brazil to own homes;*
>
> *c. The Brazilian Government had chosen EcoHouse Group which had companies incorporated in the United Kingdom, Singapore and Brazil to carry out this housing project in Brazil;*
>
> *d. The units were high in demand and of good quality;*
>
> *e. The investment will be protected in escrow with a 3rd party independent lawyer in Singapore;*
>
> *f. The developer i.e., EcoHouse group is an award winning ISO 9001 accredited developer with extensive track record;*
>
> *g. The construction is undertaken by EcoHouse in Brazil and the construction is in progress;*
>
> *h. The Defendant was marketing this project and I was told that there were only limited units available to invest;*

i. The Housing project will be completed in 12 months;

j. Once I purchase the unit, I will only have to hold it for 12 months;

k. After 12 months, these units will be sold to the people of Brazil and I will be guaranteed a return of 20% of the purchase price and the money which I had invested;

l. If there is a delay in completing the project, I will be paid 2% of the purchase price on a monthly basis; and

m. I must sign an agreement with EcoHouse Brazil.".

[42] The 6th Plaintiff (PW4) had these additions in her Witness Statement:

"...

b. ... In preparation for the 2014 FIFA World Cup, Brazilian Government was working on moving people living in the slums to better housing to give good impression to visitors. Getting financing from banks was difficult and took long time. Hence, it was much efficient to get financing for such projects from investors like us.

...

i. The Defendant's Director, Aaron Sim Chin Chye and family, had invested in many units in the project;

...

n. Other investors in Singapore had received capital and returns and some were re-investing in this project; …".

[43] The 10th Plaintiff (PW7) additionally testified that one of the representations is that if she purchased a minimum of 5 units, she will receive a free flight to view the project in Brazil. In fact the 3rd and 6th Plaintiffs (PW1 and PW4) together with DW1 did visit, among others, the site of the said Project and the EcoHouse office in Brazil for one week from 18.10.2013 on a trip sponsored by the Developer.

[44] Based on the submissions, I find that the Plaintiffs and the Defendant agree that the 3rd, 4th, 18th, and 19th Plaintiff had attended the seminar organised by the Defendant on 21.4.2013 whilst the 1st, 5th, 6th, and 20th Plaintiff had attended the seminar on 25.7.2013. The Plaintiffs' counsel conceded that some of the Plaintiff testified that they did not attend a designated EcoHouse project seminar. To this, I would add that some Plaintiffs had difficulty in recalling the dates and venue of the seminar as well as other details such as who gave the presentations and what was actually said by the presenter(s).

[45] Whilst it is understandable that the recollection of events by some of the 19 Plaintiffs may have been affected due to ill health [the 16th Plaintiff (PW18) and especially, the 9th Plaintiff (PW19) who regrettably is terminally ill]; age; nervousness of being in the witness box [the 15th Plaintiff (PW11)]; the fact that almost 6 years have passed [the 5th Plaintiff (PW3) who was hesitant in her answers on several occasions, and the 7th Plaintiff (PW5) and 10th Plaintiff (PW7) who was unable to recollect details of events]; and other factors, it is notable that some Plaintiffs have selective memories in that they seem to

remember certain aspects which support their claim but when pressed further by Mr. Mark La Brooy, especially on the role of the Developer and its representatives, they are then unable to recall the facts [see for example the answers given during cross-examination of the 20th Plaintiff (PW15)]. Some Plaintiffs were insistent that they invested in the said Project because of DW1's statement and/or because DW1 himself invested in the same; some agreed that DW1 did not make all the said Representations; one witness – the 22nd Plaintiff (PW16) – testified that he invested due to many reasons and not the Defendant's representations. Yet another witness, the 14th Plaintiff (PW10) appears to be honest in her answers as opposed to the 8th Plaintiff (PW6) who was evasive and argumentative when cross-examined.

[46] I believe Mr. Ravi Nekoo recognised the array of evidence given by the Plaintiffs in Court and thus, it was submitted that these 19 Plaintiffs must have attended a seminar organised by the Defendant where the said Project was marketed since the EcoHouse Group Reservation Forms were filled up. The same presentation slides were shown at such seminars and that then, was the mode in which the Defendant made the said Representations. Now, if this reverse methodology is being relied upon by the Plaintiffs, the issue then arises as to the contents of the presentation slides. Based on the evidence, the Court is satisfied that the contents originated from various sources which includes the Defendant, the Developer and EcoHouse Singapore. How is it then possible to attribute the said Representations solely to the Defendant? Moreover, only the EcoHouse Group Reservation Forms with the names of 13 Plaintiffs i.e. the 1st, 5th, 6th, 7th, 8th, 9th, 12th, 14th, 15th, 16th, 18th, 20th and 22nd Plaintiffs were produced at the trial.

[47] In **Annexure F** in the Defendant's Written Reply Submissions at pp 9 – 11, a table setting out the representations made by the Developer through the video presentations and/or its representatives alongside with the corresponding time stamps for each CD was included. Having viewed the CDs, I am satisfied that the said representations originated from the Developer.

[48] It is also pertinent to mention that the Defendant's counsel had highlighted the omission by the Plaintiffs in respect of the incontrovertible fact that similar representations can be found in the brochure "*Bosque Residencial*" which was prepared by the Developer. These brochures were e-mailed to potential investors who registered their interest with the Developer's representatives at the events organised by the Defendant (see **Annexure G** in the same Reply Submissions at pp 12 -13).

[49] As for Louie Pinto, DW1 admitted during cross-examination that he has always described Louie Pinto as a "*partner of Wealth Mentors*", and when re-examined, that Louie Pinto is his business partner. The Defendant has evidently allowed Louie Pinto to partake in the presentations on the said Project at the seminars. As such, the Court would accept any representation by Louie Pinto to be a representation by the Defendant through its representative as pleaded in the SoC.

[50] In sum, it is my conclusion that based on the evidence of the Plaintiffs, viewed in its totality, the facts as pleaded in paragraphs 25 –28 of the SoC have not been proven on a balance of probabilities. The Plaintiffs have clearly failed to discharge the legal burden under EA 1950 to prove that the Defendant made the said Representations as pleaded in paragraphs 26 and

27 of the SoC in a seminar in mid- 2013 as pleaded in paragraph 25 of the SoC.

(B) Does the Defendant owe a duty of care to the Plaintiffs?

[51] Even if I am wrong in my conclusion that the Plaintiffs have failed to prove that the Defendant made the said Representations, I had also considered the next important issue of whether the Defendant owe a duty of care to the Plaintiff.

- The Plaintiffs' submissions

[52] In his submissions on the law on negligent misstatements, Mr. Ravi Nekoo cited a string of cases of high authority (*Hedley Byrne & Co. Heller & Partners* [1964] AC 465; *Caparo Industries PLC v. Dickman* [1990] 1 AII ER 568 & [1990] 2 A.C. 605; *Sim Thong Realty Sdn Bhd v. Teh Kim Dar @ Tee Kim* [2003] 3 MLJ 460; *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389; *The Co-Operative Central Bank Ltd v. KGV & Associates Sdn Bhd* [2008] 2 MLJ 23; and *Lok Kok Beng & 49 Ors v. Loh Chiak Eong & Anor* [2015] 4 MLJ 734) which have established the elements that the Plaintiffs must prove in the present case, namely:

(a) A special relationship exists between the Plaintiffs and the Defendant. In this respect, the Defendant is said to have portrayed itself to be a property investor having knowledge and experience in international real estate investment and is an international property investor. Applying the reasonable man's test as laid down in *OSK & Partners Sdn Bhd & Anor v. Assets Investment Pte Ltd & Anor* [2008] 4

MLJ 914, there is thus a special relationship between the Plaintiffs and the Defendant.

(b) The Defendant owe the Plaintiffs a duty of care by applying the three-fold test in *Caparo Industries* (*supra*) of –

(i) Foreseeability

The Plaintiffs argued that it was foreseeable that the Plaintiffs would rely on the information/advice given by the Defendants through DW1 and/or Louie Pinto, and to invest in the said Project, following the said Representations. Each Plaintiff gave evidence that he/she knew the Defendant and/or DW1 where DW1 had somewhat of "a following" and the Plaintiffs looked up to him. The name "*Wealth Mentors*" is a brand that was recognised by the Plaintiffs to be synonymous with DW1. So, when DW1 invited the Plaintiffs to the seminar/workshop, they duly attended and invested in the said Project because it was being promoted by the Defendant and/or DW1, or they trusted or knew the Defendant. The statements made by Louie Pinto as the business partner of DW1, would necessarily be a statement attributable to the Defendant.

(ii) Proximity

It is the Plaintiffs contention that the Defendant ought to know that the Plaintiffs would rely on the representations made by DW1 and/or Louie Pinto and would act on it due the Plaintiffs' relationship with the Defendant and/ or DW1. The Plaintiffs were

investors and they attended the workshop organised by the Defendant on the invitation of the Defendant, only because they knew the Defendant and/or DW1. They then decided to invest in the said Project because they trusted the Defendant and/or DW1. Some of the Plaintiffs even testified that if they had received the e-mail or invitation from EcoHouse itself, they would not have gone to the workshop/seminar, let alone invest their money in the said Project.

(iii) Whether it is just and reasonable to impose a duty of care

Learned counsel for the Plaintiffs submitted that it is just and reasonable to impose a duty of care as DW1 himself admitted that the Plaintiffs did not get 20% fixed return as promised by the Defendant within the 12 months period. The Escrow Agent did not safeguard the Plaintiffs' money and DW1 has filed a civil suit against the Escrow Agent in Singapore.

[53] It was further submitted that in deciding on duty of care, the law allows the Court to take into consideration additional factors such as public policy and local circumstances (*Majlis Perbandaran Ampang Jaya* (*supra*); *The Co-Operative Central Bank Ltd* (*supra*); and *RSP Architects Planners & Engineers v. Management Corporation Strata Title No. 1075* [1999] 2 SLR 449 cited). Moreover, the Defendant in the present case should not have marketed the said Project when it was not licensed to do so.

- **The Defendant's submission**

[54] Mr. Mark La Brooy began his submissions in reply by contending that the Plaintiffs' submission is totally inconsistent and, in fact, diverge in material ways from the pleadings in the SoC in view of that fact that the Plaintiffs never pleaded, *inter alia* –

(a) any special or necessary relationship of trust;

(b) that some form of duty arises by virtue of the fact that the Defendant organised events; and

(c) the Defendant had misled the Plaintiffs into believing that it was a property investment consultant or advisor.

[55] Learned counsel relied on Clerk & Lindsell on Torts, 20th ed., 2010 at para 8-04, p 415 and the High Court judgment in *Loo Soo Yong v. Vista Eye Centre Sdn Bhd & Anor* [2019] MLJU 594 in emphasising that there are four essential elements of the tort of negligence that have to be proven by the Plaintiffs before they would be successful in their claim for negligent misstatement against the Defendant. These elements are that –

(a) the Defendant owes the Plaintiffs a duty of care;

(b) the Defendant had breached that duty;

(c) the alleged breach had caused the damage i.e. that there is a causal connection between the alleged cause and the effect; and

(d) the particular kind of damage/losses to the Plaintiffs is not so unforeseeable as to be too remote.

[56] In this regard, the Defendant contended that the Plaintiffs have failed to address the elements on breach of a duty of care owed by the Defendant to the Plaintiffs; the causal link between the Defendant's conduct and the alleged losses suffered; the remoteness of damage and whether the Plaintiffs have in fact suffered the alleged losses. These omissions, being fatal, would by themselves lead to a conclusion that the Plaintiffs have failed to discharge their burden of proof and therefore, the Plaintiffs' claim against the Defendant is bound to fail.

[57] As for the Plaintiffs' assertion that the Defendant allegedly has special skills in property investment, Mr. Mark La Brooy retorted that this is baseless and unsupported by any evidence by the Plaintiffs' witnesses. Prior to the events in respect of the said Project, the Defendant had not organised any other event related to property investments and the Plaintiffs were unable to adduce any evidence to the contrary. Viewing CD5, it is clear that Deen Bissessar, had expressly informed the attendees of the event which was held on 21.4.2013 that Eco House is "*the developer, the land owner, the sales force, everything*".

[58] In addition, at all the events which the Defendant organised in respect of the said Project, the Defendant drew the attendees' attention to several disclaimers including:

(a) the Defendant is not the developer of the said Project; the developer is EcoHouse Brazil Construcoes Ltda.;

(b) the Defendant is merely sharing its experience as a property investor. The "*experts*" are the Developer, not the Defendant;

(c) interested investors are to deal directly with the Developer;

(d) the Developer would provide a due diligence package to interested investors;

(e) all investments have risks and therefore, interested investors should speak to the representatives of the Developer in order to make an informed decision; and

(f) representatives of the Developer were present at all events which were organised in respect of the said Project.

[59] It was thus submitted that under the test established by *Hedley Byrne* and reiterated in *Caparo Industries*, the legal proximity between the Plaintiffs and the Defendant has not been proven. There was no contractual, business or commercial relationship between the parties. The Plaintiffs had attended a free seminar and the Defendant was not paid to do due diligence or to give a property investment analysis.

[60] On the allegation that the Plaintiffs "trusted" the Defendant and/or DW1, and that DW1 "had a following", the Defendant submitted that the evidence clearly demonstrates that the Plaintiffs in fact relied on the explanation of the representatives of the Developer, the representations made by the Developer through its video presentations which were shown at the events and/or the due diligence kit (including the brochure, pictures and newspaper reports) which were e-mailed to the potential investors by the representatives of the Developer.

[61] The Defendant further argued that the Plaintiffs' submission on the issue of public policy and local circumstances is mischievous as it fails to take into account that the Defendant had not breached any legislative provision, and on the authority of *Karuppannan a/l Chellappan v. Chong Lee Chin @ Chong Lai*

Chun [2000] MLJU 438, the guiding principle in a common law jurisdiction such as Malaysia is *caveat emptor*, or buyer beware.

- **Findings of the Court**

[62] First and foremost, I would agree with the Defendant's counsel that in order for the Plaintiffs to successfully prove their claim for negligent misstatement, and on the assumption that the Plaintiffs have established that the Defendant had made the said Representations to the Plaintiffs, the Plaintiffs would have to go on to show, on a balance of probabilities, that –

(a) the Defendant owed a duty of care to the Plaintiffs in respect of the said Representations;

(b) the Plaintiffs' claim for the alleged losses and damages was caused by the said Representations; and

(c) the alleged losses and damages are not too remote.

[63] A recent decision in respect of negligent misstatement is the judgment of the High Court in *De Tebrau Makmur Sdn Bhd & Anor v. Bank Kerjasama Rakyat Malaysia Berhad* [2017] 1 LNS 252 where reference was made to the Federal Court decision in *Lok Kok Beng & 49 Ors v. Loh Chiak Eong & Anor* [2015] 4 MLJ 734. Zainun Ali FCJ in delivering the judgment of the Court in *Lok Kok Beng* at pp 751 - 752, 764 - 765 held that:

> "***[33]*** *Proximity of relationship between the parties and public policy.*
>
> *As rightly pointed out by the Court of Appeal, reasonable foreseeability does not of itself lead to a duty of care. The Privy Council in Yuen Kun-yeu v. A-G of Hong Kong*

[1988] AC 175 held that ***whether or not a duty of care in negligence existed depended primarily upon foreseeability of damage, together with the existence of a close and direct relationship or proximity between the parties, and that occasionally, it would be necessary to go on to consider whether public policy requires that liability should not attach.*** *In the same case, the Privy Council criticised the applicable law in determining duty of care in England at that time, namely the two-stage test of proximity and policy considerations laid down by Lord Wilberforce in Anns v. Merton London Borough Council [1978] AC 728. The reason was that Anns equated 'proximity' with the reasonable foresight of damage thus giving rise to an indeterminate liability in negligence claims.*

[34] *To put it in a nutshell* ***the preferred test is the three fold test, where the requirements of foreseeability, proximity and policy considerations must exist in any claim for negligence.*** *The three fold test has been recognised by the House of Lords in Caparo Industries plc v. Dickman [1990] 2 AC 605, as the elements giving rise to a duty of care. In the judgment of Lord Bridge in Caparo at pp 617–618, His Lordship said that:*

> *What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it*

fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other.

[35] The most difficult ingredient to prove in establishing a duty of care is the requirement of sufficient proximity between the claimant and the defendant. The court would have to look at the closeness of the relationship between the parties and other factors to determine sufficient proximity based on the facts and circumstances of each case. *These factors are likely to vary in different categories of cases. The fact that damages sought by the claimant is pure economic loss not flowing from personal injury or damage to the property is also a factor to be considered.* ***As has often been acknowledged, a more restricted approach is preferable for cases of pure economic loss.*** *As such, the concepts of voluntary assumption of responsibility and reliance are seen as important factors to be established for purposes of fulfilling the proximity requirement. The reason for a more stringent approach taken in the claims involving pure economic loss is because* ***such loss might lead to an indeterminate liability being imposed on a particular class of defendants, thus leading to policy issues.***

...

[68] *Claims for pure economic loss in negligence cases must always be brought within the scope of duty of care. The court should exercise caution when determining the existence of a duty of care and allowing claims for pure economic loss. In determining the existence of a duty of*

care in such cases, much would depend on the facts and circumstances of each case." (emphasis added).

[64] Wong Kian Kheong JC (as His Lordship then was) in *De Tebrau Makmur* offered His Lordship's understanding of *Lok Kok Beng* at p 68 in these words:

"***[50]*** ...

(1) liability for negligent misstatement is based on the tort of negligence. In other words, there is no distinction between liability for negligent misstatement and liability for negligent acts/omission; and

(2) in deciding whether a party (X) owes a duty of care to another party (Y), the Court shall consider the following –

(a) whether there is "sufficient legal proximity" between X and Y. It is to be noted that Courts have also applied the test of whether it is reasonably foreseeable that Y will suffer loss or damage arising from X's misstatement. In this respect, the following considerations are relevant -

(i) the nature of relationship between X and Y;

(ii) whether X has voluntarily assumed responsibility to Y regarding X's misstatement;

(iii) whether Y has relied on X's misstatement;

(iv) whether there is physical proximity;

(v) whether there is circumstantial proximity; and

(vi) whether there is causal proximity;

(b) if there is "sufficient legal proximity" between X and Y, X owes a prima facie duty of care to Y. The next question is whether X's prima facie duty of care is negated by policy consideration. The following matters are pertinent –

(i) the factual matrix of the case;

(ii) whether there is a contract between X and Y; and

(iii) the relative bargaining positions of X and Y;

(c) the Court should adopt an incremental approach by considering the facts of previously decided cases (which have recognized or rejected the existence of duty of care). However, the absence of a similar factual precedent, does not preclude the Court from recognizing the existence of a duty of care when it is just to do so;

and

(d) whether there exists a duty of care in a particular case depends on the facts of that case.".

[65] In his submissions, the Plaintiffs counsel quoted the passage from the judgment of Lord Oliver of Aylmerton in *Caparo Industries PLC* at p 638 that:

> "*What can be deduced from the Hedley Byrne case, therefore, is that the necessary relationship between the maker of a statement or giver of advice ("the adviser") and the recipient who acts in reliance up on it ("the advisee") may typically be held to exist where (1) the advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the adviser at the time when the advice is given; (2) the adviser knows, either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose; (3) it is known, either actually or inferentially, that the advice so communicated is likely to be acted on by the advisee for that purpose without independent inquiry, and (4) it is so acted on by the advisee to his detriment. …*".

[66] In paragraph 35 SoC, the Plaintiffs pleaded that the Defendant owes a duty of care to the Plaintiffs when making the said Representations because based on the said Representations, each Plaintiff made the payments to purchase the units in the said Project as listed in the table in paragraph 30 SoC. However, the special relationship between the Plaintiffs and the Defendant was not pleaded. In the course of evidence by the Plaintiffs,

some of them spoke of how they had attended past events organised by the Defendant and how they were drawn into purchasing the units in the said Project because they trusted DW1.

[67] It has not escaped the attention of this Court about how frequent the word "*trust*" was used by a majority of the Plaintiffs in their testimony. However, this does not by itself, amount to a fulfillment of the legal principles as laid down in *Hedley Byrne* and followed in numerous subsequent cases as mentioned by the Federal Court in *Lok Kok Beng*. Apart from the 10th Plaintiff who was employed by the Defendant for 10 years, the built-up of the relationship between the other 18 Plaintiffs and DW1 so as to repose such trust is rather vague.

[68] I would however agree with Mr. Ravi Nekoo's submission that the evidence supports a finding that DW1 was marketing the said Project as an investment falling within the "*11 Rules of Property Investmen*t" which was put together by DW1 and Louie Pinto from their own personal experience. Although the Defendant provided advice on property investment, the Defendant would not know who among the attendees at the seminars would actually act upon the advice and that they would do so without independent inquiry.

[69] Furthermore, for reasons as put forth by learned counsel for the Defendant, this Court finds that the other aspects for a special relationship to arise have not been established. All 19 Plaintiffs are educated and English-speaking, some are even holding or have held high-ranking positions such as Senior Manager with Petronas (4th Plaintiff), General Manager (16th Plaintiff) and Manager/Assistant Manager (9th, 11th and 15th Plaintiffs.). From the Defendant's disclosure, they are well-aware that the

Defendant is not the developer of the said Project. They were given every opportunity to engage or to check with the Developer's representatives and the Escrow Agent, which some Plaintiffs did, before signing the SPA and Escrow Agreement (refer to the evidence of DW2 and DW3). The Plaintiffs were informed by the representatives of the Developers to seek independent legal advice and yet none of them did so. The Plaintiffs were never prevented or dissuaded from obtaining such independent advice. I agree with Mr. Mark La Brooy that this is an apt case for the *caveat emptor* rule to apply.

[70] In this respect, the elements of proximity and foreseeability have not been established to the standard of proof required of the Plaintiffs.

- The public policy consideration

[71] Apart from the above quoted passages from *Lok Kok Beng*, Zainun Ali FCJ also held at p 764 that:

> "***[64]*** *In other words,* ***the imposition of policy considerations require some measure of public policy to be infused in the establishment of a duty of care****. In the present appeal, we agree with the Court of Appeal that the court must give consideration to the presence of a contractual matrix between the developer and purchasers which clearly define the rights and liabilities of parties and their relative bargaining positions. There can be no action against the architect if the remedy asked for is specifically provided for in the contract. Otherwise, it has the effect of rewriting the contractual terms. Such claims must be dismissed on grounds of policy. Nevertheless, we must reiterate that* ***a claim for negligence must be brought within the scope of duty of care. The***

recoverability of claims for pure economic loss in negligence cases is dependent on the facts of individual cases. Some measure of public policy must be considered though it should not be the sole determinant of liability." (emphasis added).

[72] On the assumption that there is sufficient legal proximity between the Plaintiffs and the Defendant such that a duty of care arises, the Plaintiffs have not, to my mind, offered cogent reasons from the public policy perspectives to convince this Court to find that it is just and reasonable to impose a duty of care on the facts of this case. The preponderance of arguments would actually support a conclusion to the contrary.

[73] Firstly, Clause 10 of the SPA states as follows:

"***10. Vendor's Default***

If the Vendor shall not have entered into a valid and binding re-sale agreement, under Brazilian Laws for the re-sale of the Unit on or before end of the 12 months period form the date of this Agreement, then the Purchaser shall be entitled as follows:

(a) The Vendor shall effect a transfer of the Unit and deliver vacant possession and title to the Unit to the Purchaser at the Vendor's costs and expense, and pursuant to the further provisions herein; or

(b) The Vendor's undertaking to sell and honor all payments due to the Purchaser, shall remain valid and subsisting until fulfillment thereof,

notwithstanding its failure to procure a Buyer within the 12 months period.".

[74] The Plaintiffs therefore have an express and specific contractual remedy as provided in the SPAs. DW1 has commenced legal proceedings in Singapore against the Escrow Agent on 26.4.2018 as well as against the Developer in Brazil. However, the Plaintiffs have chosen to file this civil suit against the Defendant rather than to pursue an action in contract against the Developer and Escrow Agent. The 1st Plaintiff (PW17) testified that since the Developer is located in Brazil with different laws, it will be a long process if legal action was to be taken against them. The 6th Plaintiff (PW4) in the cross-examination said that if DW1 is not liable, then who else should be liable, whilst the 10th Plaintiff (PW7) testified, also in cross- examination, that she does not know whether she will take legal action against the Escrow Agent and she believes the Developer no longer exists. PW7 additionally said that she would take action against the Developer if she had the money. It appears to me that therein lies the crux of the matter; the Plaintiffs are unable or unwilling to pursue contractual claims against the Developer and Escrow Agent due to, *inter alia*, financial constraints and thus, they are bent to make the Defendant responsible for the losses they suffered as a result of the failed property investment.

[75] The 3rd Plaintiff (PW1) testified that DW1 earned commissions from the sales of the properties in the said Project but proof of receipt of such commissions came to naught. What is clear though is that the Defendant did not receive any monies from the Plaintiffs in respect of their investments in the said Project. Ultimately, the Defendant is an event organiser who organises events on a no-fee and no- commitment basis. It would therefore be contrary to public policy to impose a duty of care on the

Defendant based on the factual matrix of this case. The Defendant's counsel raised the "*floodgates of litigation*" argument if the Court imposes a duty of care against event organisers notwithstanding the fact that the attendees of the event have no legal proximity or nexus with the event organiser itself. I am inclined to agree with learned counsel on this point.

[76] Mr. Mark La Brooy cited the case of *Kerajaan Malaysia v. Cheah Foong Chiew* [1993] 2 MLJ 439 to supplement *Lok Kok Beng* as authority where the Court refused to allow the plaintiff's claim for pure economic loss against the defendants who were not parties to the contract between the plaintiff and a third party. To this I would add the case of *L3 Architects Sdn Bhd v. PCP Construction Sdn Bhd* [2019] 6 AMR 250 in which I held that the defendant/ consultant architect appointed by an employer in a construction project does not owe a duty of care to the plaintiff/ main contractor to ensure that the payment certification issued is accurate and valid. In arriving at my decision in *L3 Architects*, *Lok Kok Beng* and *De Tebrau Makmur* were among the authorities reviewed. To my mind, it is not reasonable to impose a duty of care on the defendant in that case since it would cut across, and be inconsistent with, the structure of relationships as governed by the contracts entered into between the employer and the plaintiff, and between the employer and the defendant. Similarly here, the Plaintiffs have a contractual relationship with the Developer and the Escrow Agent by virtue of the SPA and Escrow Agreements, respectively. The Plaintiffs' legal recourse must therefore be premised on the terms and conditions of the SPA and Escrow Agreement.

(C) Has the Plaintiffs proven their alleged losses?

- The Plaintiffs' submissions

[77] Learned counsel for the Plaintiffs merely submitted that the Plaintiffs will be entitled to damages as per the computation in the table in paragraph 14 of this judgment, if this Court holds that the Defendant owed a duty of care to the Plaintiff. Basically, the Plaintiffs are claiming the principal sum which they had invested as shown in the column under the heading "*Jumlah dibayar*", and the return on investment as indicated in the column under the heading "*Pulangan yang Dijanjikan*", as damages, both of which are said to be reasonably foreseeable.

[78] In addition, the Plaintiffs claimed for exemplary damages. In this respect, reliance was placed on the *obiter dictum* by the Court of Appeal in *Sambaga Valli a/p KR Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784 at p 800 that "*The amount of the exemplary damages award is left to the judge's discretion and is determined by considering the character of the defendant's misconduct, the nature and extension of the plaintiff's injury and the means of the defendant. The quantum of exemplary damages to be awarded must be appropriate to the wrongdoing inflicted to the parties involved. Exemplary damages must not be uncontrolled or arbitrary; they must be of an amount that is the minimum necessary to achieve their purpose in the context of the particular case.*". The matter was then left to the discretion of this Court.

[79] Mr. Ravi Nekoo indicated that the Plaintiffs are not pursuing the claim for (i) aggravated damages as this is not a case where there is injury to the dignity or pride of the Plaintiff as a result

of the Defendant's reprehensible conduct in the sense as expounded in *Cassel v. Broome* [1972] AC 1027; and (ii) penalty interest since it was conceded that there was no representation made by the Defendant to the effect that the Plaintiffs would be allowed to recover such interest.

- The Defendant's submissions

[80] The Defendant's arguments on this aspect are essentially two-fold i.e. firstly, that the Plaintiffs have not produced an iota of evidence to prove that they have indeed suffered the losses as alleged in view of the fact that not even one Plaintiff was able to confirm whether the monies paid to the Escrow Agent are still held by the Escrow Agent or otherwise. Secondly, the Plaintiffs have no knowledge where their monies currently are.

[81] On the claim for exemplary damages, Mr. Mark La Brooy submitted that the Plaintiffs have failed to plead any feature and/or fact which justifies an award for exemplary damages. Learned counsel referred to the Federal Court decision in *Hassan Bin Marsom & Ors v. Mohd Hady Bin Ya'akop* [2018] 5 MLJ 141 at p 185 where the case of *Rookes v. Barnard* [1946] AC 1129 was cited with approval. The House of Lords in that English case held that exemplary damages must be restricted to situations which are *"oppressive, arbitrary, or unconstitutional action by the servants of the Government or where the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff."*.

[82] It was also contended that the alleged losses suffered by the Plaintiffs are too remote given that the Defendant would not have been able to foresee whether or not the Developer and/or the Escrow Agent would abide by their respective obligations

pursuant to the SPA and/or the Escrow Agreement. Learned counsel implored that to expect the Defendant to be able to foretell the future would be too stringent a test and too heavy a duty to impose on anyone. Based on the information which was available to the Defendant, the alleged losses suffered by the Plaintiffs are too remote and not reasonably foreseeable.

- Findings of the Court

[83] It is indisputable that the Plaintiffs have paid the purchase price for the properties in the said Project to the Escrow Agent in accordance with Clause 5 of the SPA as quoted below:

> **"5. Payment to ESCROW AGENT**
>
> *5.1 The Purchaser Price shall be paid directly to the Appointed ESCROW AGENT:*
>
> *...*
>
> *In accordance with the terms and provisions as stated under the Escrow Agreement, which is annexed to and forms part of this Sale and Purchase Agreement.*
>
> *The Escrow Agent has been duly authorized to hold on behalf of the Vendor and the Purchaser* ***(ANNEXE 1 – The Escrow Agreement).***
>
> *5.2 The release of the Purchase Price by the ESCROW AGENT from the Purchaser shall be as follows:*
>
> *(a) Upon receipt by the ESCROW AGENT of the purchase price from the Purchaser, the ESCROW AGENT shall release to the Vendor, 25% of the purchase price towards payment of marketing, commissions and any other legitimate expenditure required to be paid out by the*

Vendor, to enable it to commence the building and construction of the Project.

(b) The balance 75% retained by the ESCROW AGENT, shall be released to the Vendor by the ESCROW AGENT on the basis of a certificate produced by an independent Accountant ("the Accountant") being a member of a recognized Body of "Contadores" (Accountants) that he has received from the Vendor legitimate receipts and invoices for those amounts expended for the benefit of the whole Project and such reimbursement to be equal to the amount invoiced and paid out by the Vendor.

(c) All monies transferred and paid out by the ESCROW AGENT shall indicate the Purchaser's names and the Unit number as reference for the bank transfer.

The Vendor is entitled and shall use the purchase price as paid herein towards payment of all fees, commissions, on-going construction, building and development and as it deems necessary to advance the Project completion.

5.3 The Parties to this Agreement, agree that the responsibility of the ESCROW AGENT is limited to the extent of its duties as ESCROW AGENT and no further and in any case only in accordance with the terms of the Escrow Agreement, entered into by the Vendor, the Purchaser and the ESCROW AGENT simultaneously with this Agreement.".

[84] Clause 5.2(a) – (c) above appear as Clause 10 in the Escrow Agreement between the Plaintiffs, Eco House Group Pte Ltd as the seller and the Escrow Agent. It is thus evident that the parties to the Escow Agreement have agreed that the Escrow

Agent would hold the purchase price until certain conditions under the Escrow Agreement are met.

[85] The Defendant's counsel has rightly pointed out that in order to satisfy the Court that the Plaintiffs have suffered their alleged losses, the Plaintiffs must prove that the Escrow Agent had wrongly released the Plaintiffs' monies. Throughout the trial, there was simply no evidence to this effect. None of the Plaintiffs have any knowledge of where their monies currently are.

[86] In the premises, the Court is in agreement with the Defendant's submission that it would be an absurd situation if the Court is to allow the Plaintiffs claim and award damages to the Plaintiffs as it would presuppose that fact that the Escrow Agent had released the Plaintiffs' monies when not a shred of evidence was tendered by the Plaintiffs in support of that contention.

[87] The Plaintiffs have undoubtedly failed to prove that they had indeed suffered the losses alleged whereas the claim for the purchase price of the house units in the said Project and the return on investment, being in the nature of special damages, must be specifically proven by the Plaintiffs (see *Lee Sau Kong v. Leow Cheng Chiang* [1961] 27 M.L.J. 17 and *Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v. Awang Soh bin Mamat & Ors* [2009] 4 MLJ 610).

[88] As regards the claim for exemplary damages, it is absolutely a non- starter as there are no features or circumstances to warrant the grant of such an award against the Defendant. The Court surely has to take cognizance of the fact that DW1 and his family members are no less victims of the same failure of the Developer and the Escrow Agent to carry out their respective contractual obligations.

(D) Were the alleged losses caused by the Defendant?

- The Defendant's submissions

[89] Mr. Ravi Nekoo did not address the issue as to whether there is a causal link between the Defendant and the alleged losses suffered in his submissions. This naturally gave room to the Defendant's counsel to submit that on this ground alone, the Plaintiffs have failed to discharge the burden on them to prove that the damages which they have allegedly suffered was caused by the Defendant and therefore, the Plaintiffs' claim against the Defendant is bound to fail.

[90] Nevertheless, learned counsel for the Defendant went on to submit that even if the Court finds that DW1 did make the said Representations to the Plaintiffs and there was a duty of care between the Plaintiffs and the Defendant, and further that a breach of that duty has been proven, the Plaintiffs must go on to prove that the Defendant's fault caused or materially contributed to the alleged losses suffered by the Plaintiffs: see *Bonnington Castings v. Wardlaw* [1956] AC 613.

[91] Mr. Mark La Brooy strived to convince this Court that the Defendant did not, and could not, have caused the Plaintiffs' alleged losses, which are actually the direct result of –

(a) the failure of the Developer, as vendor under the SPA, to carry out its obligations as provided in the SPA, namely to build, sell and transfer or deliver the properties which were purchased by the Plaintiffs, DW1 and his family. The Defendant had no control over the construction, sale and/or transfer of the properties as these were entirely the responsibilities of the Developer; and/or

(b) the failure of the Escrow Agent to safeguard the Plaintiffs' monies which were paid into the Escrow Agent's bank account as provided in the Escrow Agreement. The Defendant had no control over the custody, management and/or release of the monies which the Plaintiffs paid to the Escrow Agent since only the Escrow Agent, as the account holder, would have control over those monies.

[92] Learned counsel additionally relied on the "*but for*" test as explained in the case of *Ngan Siong Hing v. RHB Bank Bhd* [2014] 2 MLJ 449 in determining whether the Defendant's act was the main factor in causing the alleged losses suffered by the Plaintiffs.

- Findings of the Court

[93] The majority in the judgment of the Court of Appeal in *Ngan Siong Hing* (*supra*, at pp 486 – 487) found that the learned trial judge had failed to deal with the issue of causation in the right perspective and failed to appreciate the test as to whether or not it is just on the facts to hold the appellant liable. It was further explained that:

> "***[37]*** *... The test requires a balance between proximity and remoteness. That is to say whether it was reasonably foreseeable at the relevant time that the behavior complained of would cause loss and damage of that type when the learned judge found liability against the appellant when there was no specific instruction on related issues, more so when the letter of instruction as well as the pleadings were vague. In Lamb v. Camden London Borough Council [1981] QB 625, Lord Denning was*

candid on the issue of duty remoteness and causation. His Lordship observed:

> *The truth is that all these three—duty, remoteness and causation—are all devices by which the courts limit the range of liability for negligence All these devices are useful in their way. But ultimately it is a question of policy for the judges to decide.*

[38] *... And the 'but for' test plays an important part. In the recent case of Chua Seng Sam Realty Sdn Bhd v. Say Chong Sdn Bhd & Ors and other appeals [2013] 2 MLJ 29, the Court of Appeal on 'but for' test made the following observation:*

> *[44] In this regard, the 'but for' test is important in determining whether or not the defendants' act was the main factor causing the damage suffered by the plaintiffs'. The text in para 2-09 in Clerk & Lindsell states that:*
>
> *The first step in establishing a causation is to eliminate irrelevant causes, and this is the purpose of the 'but for' test. The courts are concerned, not to identify all of the possible causes of the particular incident, but with the effective cause of the resulting damage in order to assign responsibility to that damage.* ***The 'but for' test asks: would the damage of which the claimant complains have occurred 'but for' the negligence (or other wrongdoing) of the defendant?*** *...*

[39] *When issues relating to duty of care is inextricably entwined with issues like remoteness and causation, the*

courts to do justice to the parties conduct an evaluative weighing process rather than set out a clear cut rule of law (see Holling v. Yorkshire Traction Co Ltd [1948] 2 All ER 662]. The learned authors of Ramaswamy Iyers 'The Law of Torts' (10th Ed), Lexis Nexis Butterworth on this issue has this to say:

> *We shall now proceed to refer to certain tests of causation considered in the case-law.*
>
> *(1) A person becomes liable for the harm complained of, if his conduct is the proximate cause of it.*
>
> *(2) He becomes liable if his conduct is the direct cause of the harm or the harm is the direct consequence of his conduct.*
>
> *(3) He becomes liable if he could have, as a reasonable man foreseen such harm or considered it as probable. In other words, the tests are proximity, directness, and foreseeability or probability.*
>
> *The third test has now the support of high judicial authority in England and the other two may be regarded as unacceptable.*".

[94] Applying the aforesaid "*but for*" test as the basic test for establishing causation, I would agree with the Defendant that but for the Developer's failure to carry out its obligations under the SPA, the Plaintiffs would not have suffered the alleged losses, and but for the Escrow Agent's failure to safeguard the

Plaintiffs' monies which were paid into its account, the Plaintiffs would not have suffered the alleged losses.

[95] Among the "***Vendor's Obligations***" as set out in Clause 8 of the SPA (using the SPA signed by the 1st Plaintiff as an example) are that:

> "*8.1. The Vendor must as soon as possible build the Unit, together with all common property of the Building and the Housing Project in a good and workmanlike manner according to the Specifications and the plans as duly approved by the relevant Commissioner of Building Control and other relevant authorities in Brazil, São Gronçalo do Amarante for the Housing Project.*
>
> *...*
>
> *8.7 The Vendor and its agents undertakes to procure a buyer or buyers under social housing incentive to buy the Unit or Units as sold, on or before 12 months from the date of this Agreement and to ensure that the Purchaser shall enjoy a gain of **20%** out of the purchase price and the Vendor undertakes to ensure that this **20%** gain – together with the initial Unit or Units Purchase Price – shall be paid within 14 days of the twelve (12) months anniversary of the payment of the purchase price or date of the contract herein. The Purchaser agrees that any balance sums from the sale price shall be paid over to the Developer/Vendor to defray all costs and expenses of development and initial outlay and the Purchaser waives all rights to claim for any other gains, profits or monies, other than the **20%** gains due as aforesaid.*

> *Accordingly, on or before 12 months from the date of this Agreement, the vendor undertakes to resell or procure buyers to purchase the Purchasers Unit Units and also undertakes to make all payments to the Purchaser as follows:*
>
> *S$46,000 per Unit plus* ***S$9,200*** *for a total of* ***S$55,200*** *payable per unit.*
>
> ***One*** *unit(s) multiplied by* ***S$55,200*** *equals a total of S$55,200 total sum payable in accordance with the number of Unit or Units purchased.*".

[96] Clause 10 of the SPA which provides the remedy to the purchasers in the event of the Vendor's default, has been alluded to earlier.

[97] It is therefore indisputable that pursuant to the SPA, the construction, development, completion, sale and delivery of the housing units purchased by the Plaintiffs were the sole responsibilities of the Developer. The Defendant had no control whatsoever over any of these matters.

[98] In the same vein, Clause 7 of the Escrow Agreement reads:

> "*Upon receipt of the Purchase Price via bank telegraphic – transfer from the Buyer (with the related telegraphic transfer fees and all bank commissions fully borne by the Buyer), the Escrow Agent shall pay into a separate designated ledger in its client account ("Account") to hold the same in Escrow as a stakeholder on the terms set out in this Agreement.*",

and as also stated earlier, Clause 10 in the Escrow Agreement is a mirror image of Clause 5.2(a) – (c) in the SPA. Thus, likewise,

the proper release of the Plaintiffs' monies was the sole responsibility of the Escrow Agent under the Escrow Agreement. The Defendant had absolutely no control over the release of the Plaintiffs' monies.

[99] The totality of the evidence presented before the Court, when viewed in its proper perspective, tend to support a finding that the Defendant is not the proximate or direct cause of the Plaintiffs' losses and neither were the losses foreseeable or probable. The losses claimed by the Plaintiffs are as a direct result of the Developer's failure to carry out its obligations pursuant to the SPA and/or the Escrow Agent's failure to carry out its obligations pursuant to the Escrow Agreement. In view of the Plaintiffs'' failure in establishing the causal link between the Defendant and the Plaintiffs' alleged losses, the Plaintiffs' claim against the Defendant must fail.

(E) Are the alleged losses too remote and recoverable in law?

[100] The Plaintiffs again made no submissions on this element. For the Defendant, Mr. Mark La Brooy submitted that the alleged losses suffered by the Plaintiff are too remote since the Defendant would not have been able to tell whether the Developer and/or Escrow Agent would abide by their respective obligations as expressly provided in the SPA and Escrow Agreement. DW1 and his family were themselves convinced by the material provided by the Developer that the said Project was worth investing in and as a result of which, they purchased 16 units and invested a total of S$736,000.00.

[101] In these circumstances, it was submitted, and which I am persuaded to agree, that to expect the Defendant to be able to foretell the future would be too stringent a standard to impose

on the Defendant. It is only reasonable that the Defendant be judged by the knowledge which then was, or ought reasonably to have been possessed by it and/or DW1 at the material time (see *Roe v. Ministry of Health* [1954] 2 All ER 131 at p142), and not the information as they surfaced after the event. The alleged losses suffered by the Plaintiffs are undoubtedly too remote and not reasonably foreseeable.

[102] For the sake of completeness, I should mention that the Defendant had additionally submitted that given the fact that the Defendant had disclosed to the attendees of the seminars as to who the Developer of the said Project and/or the Escrow Agent were, by virtue of section 183 of the Contracts Act 1950 [*Act 136*] and the *ratio decidendi* in the Supreme Court decision in *Medicon Plastic Industries Sdn Bhd v. Syarikat Cosa Sdn Bhd* [1993] 2 MLJ 416, the Defendant is not bound by the respective contracts entered into between the Plaintiffs and the Developer and/or Escrow Agent. However, I do not find it necessary to make a conclusive finding on this issue as there are ample reasons for me to conclude that the Plaintiffs have failed to prove, on a balance of probabilities, a case of negligent misstatement against the Defendant.

CONCLUSION

[103] Although the Court is sympathetic to the Plaintiffs' predicament of losing their hard earned monies, which for some, was part of their retirement funds, the Court is duty bound to consider the evidence and to apply the law to the facts as proven in this case. In this instance, the end result is not in favor of the Plaintiffs.

[104] As for the issue of costs, the Defendant's counsel proposed a sum of RM50,000.00 in view of the fact that a total of 24

witnesses testified at the trial which took 10 days to complete. The Plaintiffs' counsel suggested RM25,000.00 since his clients lost monies in the said Project. In my opinion, RM50,000.00 to be paid as costs after a full trial of this scale is fair and reasonable, and was thus so ordered, subject to allocatur.

Dated: 27 FEBRUARY 2020

(ALIZA SULAIMAN)
Judicial Commissioner
High Court
Kuala Lumpur

COUNSEL:

For the plaintiffs - Ravi Nekoo, Moganambal Murugappan & Parvinder Kaur Harbindar Kaur; M/s Hakem Arabi & Associates

For the defendant - Mark La Brooy, Charlaine Adrienne Chin; M/s Raja, Darryl & Loh

Cases referred to:

Bonnington Castings v. Wardlaw [1956] AC 613

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331

Caparo Industries PLC v. Dickman [1990] 1 AII ER 568; [1990] 2 A.C. 605

Chua Seng Sam Realty Sdn Bhd v. Say Chong Sdn Bhd & Ors and other appeals [2013] 2 MLJ 29

De Tebrau Makmur Sdn Bhd & Anor v. Bank Kerjasama Rakyat Malaysia Berhad [2017] 1 LNS 252

Guan Teik Sdn Bhd v. Hj Mohd Noor Hj Yakob & Ors [2000] 4 CLJ 324 Hassan Bin Marsom & Ors v. Mohd Hady Bin Ya'akop [2018] 5 MLJ 141 Hedley Byrne & Co. Heller & Partners [1963] 2 AII ER 575

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Lee Sau Kong v. Leow Cheng Chiang [1961] 1 MLJ 17

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Medicon Plastic Industries Sdn Bhd v. Syarikat Cosa Sdn Bhd [1993] 2 MLJ 416

Ngan Siong Hing v. RHB Bank Bhd [2014] 2 MLJ 449

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

The Co-Operative Central Bank Ltd v. KGV & Associates Sdn Bhd [2008] 2 MLJ 23

Legislation referred to:

Contracts Act 1950, s. 183

Evidence Act 1950, ss. 101, 102, 103, 104, 105, 106 and 114*(g)*

Rules of Court 2012, O. 15 r. 7

Other source(s) referred to:

Clerk & Lindsell on Torts, 20th ed., 2010, Sweet & Maxwell/ Thomson Reuters