

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim No CV2015-01608**

**BETWEEN**

**SUZETTE SMITH**

**Claimant**

**AND**

**7 HILLS ESTATE DEVELOPMENT LIMITED**

**1<sup>st</sup> Defendant**

**BERNARD SAROOP**

**2<sup>nd</sup> Defendant**

**HADYN-JOHN GADSBY**

**3<sup>rd</sup> Defendant**

**Before the Honourable Mr. Justice Robin N. Mohammed**

**Appearances:**

Mr. Anthony V. Manwah instructed by Ms Renee Marlene Johncilla for the Claimant

Mr. Kerwyn Garcia instructed by Ms Aisha Donawa for the 3<sup>rd</sup> Defendant

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**JUDGMENT**

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**I. Background:**

[1] These proceedings arise from representations made by the 3<sup>rd</sup> Defendant to the Claimant, Ms Smith, in a written agreement entered into by the parties on the 24<sup>th</sup> June, 2011 (the “Agreement”). The Agreement stipulated that 7 Hills Estate Development Company Limited, a company set up as a property management company, would sell a parcel of land situated in Arima together with the dwelling house to be constructed thereon for the price of \$650,000.00 to the Claimant.

[2] Both parties proceeded on the basis that the name of the company stated in the Agreement was the 1<sup>st</sup> Defendant. This assumption, however, was misconceived as Ms Smith gave evidence that there exists no company named 7 Hills Estate Development Company Limited at the Companies Registry. Rather, there are registered Articles of Incorporation for a Company 7 Hills Estate Development Limited, which is the 1<sup>st</sup> Defendant herein. In any event, neither party sought to make this misnomer a material issue in their submissions or at trial.

[3] Pursuant to the registered articles of incorporation, Mr Gadsby and Mr Saroop are listed as the directors and were responsible for the preparation and signing of the Agreement respectively.

[4] The terms of the Agreement included, inter alia, that:

- i. The Claimant would pay a deposit of \$65,000.00 upon signing of the Agreement;
- ii. Completion of the dwelling house was to occur within 12 months from the date of payment of the deposit;
- iii. Completion of the sale would occur within 90 days from the notification of completion of the dwelling house; and
- iv. Should 7 Hills Estate Development Company Limited be unable to show good marketable title to the land or fail to complete the construction of the dwelling house within 18 months from the date of the Agreement, the

Claimant would be entitled to rescind the Agreement and receive a full refund of the monies paid to the 1<sup>st</sup> Defendant.

[5] In pursuance of the Agreement, Ms Smith paid the deposit of \$65,000.00. However, to date, the dwelling house has not been constructed and therefore, the Agreement has not been completed. Accordingly, on the 10<sup>th</sup> January, 2014, Ms Smith activated her contractual right to rescind the Agreement and was thereby entitled to a refund of her deposit. The Defendants, however, have failed to fulfil their contractual duty to reimburse the \$65,000.00.

[6] In addition to claiming for the payment of her deposit, Ms Smith has brought this claim on the basis that fraudulent misrepresentations were made in the Agreement that influenced her to enter into the Agreement. In particular, she referred to the following clause in the recitals of the Agreement, wherein the 1<sup>st</sup> Defendant represented itself as the owner of the parcel of land:

***“The Company is registered as proprietor of an estate in Fee Simple in the lands described in the First Schedule...subject nevertheless to such mortgages...but otherwise free from encumbrances.”***

[7] Needless to say that it later came to Ms Smith’s attention that at the time of execution of the Agreement, the Company was not the registered proprietor of the parcel of land. It is her case that Mr Gadsby knew or ought to have known of this fact at the time that the Agreement was executed. Further, in spite of this knowledge, Mr Gadsby encouraged and/or induced her to sign the Agreement on the 24<sup>th</sup> June, 2011. Such a fact pattern, in her estimation, was indicative of fraud.

[8] Mr Gadsby candidly admitted the error in his drafting but denied that any fraudulent intent was behind it. He contended that it was through his inadvertence—occasioned by his use of a precedent to draft the Agreement that he omitted to replace the words “registered as proprietor”, as contained in the precedent agreement, with the words “beneficial owner”.

His case was that he prepared the Agreement on instructions from the 1<sup>st</sup> Defendant and in pursuance of the proper discharge of his professional duties as the 1<sup>st</sup> Defendant Company's secretary.

[9] In explanation for the failure to complete the Agreement, Mr Gadsby averred that the parcel of land, which was the subject of the Agreement, was part of a larger parcel of land, which the 1<sup>st</sup> Defendant had contracted to purchase from third parties. The said purchase, however, never materialized due to the 1<sup>st</sup> Defendant's inability to obtain final approval from the Town and Country Planning Division, which he claims has been unreasonably denied.

[10] Mr Gadsby admitted to receiving Ms Smith's request for a refund of her deposit but gave no reason for the Defendants' refusal to reimburse. It does appear from the pleadings, however, that the Defendants do not desire for the Agreement to be terminated, but rather, wish to eventually complete the Agreement upon receipt of the requisite approvals from the Town and Country Planning Division.

## **II. Submissions:**

[11] In his submissions, counsel for the 3<sup>rd</sup> Defendant, Mr Kerwyn Garcia, relied on the principle of separate legal personality espoused in the landmark case of **Salomon v Salomon**<sup>1</sup>, which, if applied to this matter, would absolve Mr Gadsby of all liability on the basis that directors of a company are not personally liable for the debts of the corporation.

[12] It is, however, trite law that the exception to this principle, or to put another way, the circumstances in which a Court can "lift this corporate veil" is when the director is guilty of fraudulent misrepresentation. Accordingly, Mr Garcia, in a formidable effort, went at lengths to convince this Court that the misrepresentations made by Mr Gadsby in the Agreement were not fraudulent in nature.

[13] He relied on the landmark House of Lords decision in **Derry v Peek**<sup>2</sup>, where Lord Herschell gave a thorough analysis on the distinction between a fraudulent

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<sup>1</sup> (1897) A.C. 22

<sup>2</sup> (1889) 14 App. Cas. 337

misrepresentation as opposed to a negligent one. In this sense, it was argued that the facts of this case, in particular, the circumstances behind Mr Gadsby's inaccurate representation that the 1<sup>st</sup> Defendant was the registered proprietor of the parcel of land, amounted, at most, to a negligent misrepresentation.

[14] With respect to Mr Gadsby's pleaded intent to use the words 'beneficial owner' Mr Garcia submitted the following in support<sup>3</sup>:

- a. That R & D Holdings gave instructions through Mr Saroop to Mr Gadsby to incorporate the 1<sup>st</sup> Defendant;
- b. That the purchasers under the purchase agreement for the larger parcel of land were also the shareholders of the 1<sup>st</sup> Defendant;
- c. As a result of (b), the 1<sup>st</sup> Defendant had control over the purchaser's equitable interest in the purchase agreement to be vested in the 1<sup>st</sup> Defendant's name; and
- d. That notwithstanding that the 1<sup>st</sup> Defendant was not named as the purchaser in the purchase agreement for the larger parcel, the 1<sup>st</sup> Defendant still retained the power to deal fully with the purchaser's equitable title interest in the larger parcel.

[15] Mr Manwah, on behalf of Ms Smith, focused his submission, not on the misrepresentation of the words 'registered proprietor' but rather on the words which Mr Gadsby claimed he intended to use—'beneficial owner'.

He submitted that even if one were to believe Mr Gadsby's defence, that he intended to state, and held the honest belief that the 1<sup>st</sup> Defendant was the beneficial owner of the parcel of land at the time of execution, there was simply no evidence nor pleadings to support this averment.

He submitted that the 1<sup>st</sup> Defendant would have had to have been party to a contract to purchase the lands with the consideration having been paid in full to honestly hold the belief he intends to convince the Court that he held at the time of execution. In such a scenario, the vendor would hold the lands on trust for the 1<sup>st</sup> Defendant as purchaser, who then becomes the beneficial owner.

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<sup>3</sup> Paras 7, 8 & 9 of the 3<sup>rd</sup> Defendant's closing submissions

[16] Given this context, it is clear that this matter boils down to two primary issues:

- a. **Whether the misrepresentations made by the 3<sup>rd</sup> Defendant in the Agreement were fraudulent?**
  - i. **If not, then the matter ends here as Mr Gadsby cannot be held to be personally liable for the refund of the deposit;**
- b. **If so, whether the Claimant was induced to enter into the Agreement based on these misrepresentations?**

### **III. Law & Analysis:**

[17] The ‘exception’ to the *Salomon* principle was deliberated upon more recently by the House of Lords in **Standard Chartered Bank v Pakistan National Shipping Corp and others**<sup>4</sup>, where it was held that *“A director of a company could not escape liability for deceit on the ground that his or her act had been committed on behalf of the company”*.

In explaining the reasoning behind this ‘exception’, their Lordships found that-

*“His contention that he had made the relevant fraudulent misrepresentation on behalf of the beneficiary was true **but irrelevant**: he had made a fraudulent misrepresentation intending the confirming bank to rely upon it and the confirming bank had relied upon it...Although an agent might assume responsibility on behalf of another without incurring personal liability in respect of negligent misrepresentation, **that reasoning could not apply to fraud.**”*

[18] Therefore, Mr Gadsby would be personally liable to account for the deposit monies in the sum of \$65,000.00 to Ms Smith if the incorrect representation in the Agreement—that the 1<sup>st</sup> Defendant was the registered proprietor of the parcel of land, was made fraudulently.

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<sup>4</sup> (No 2) (2002) UKHL 43

**The case of Derry v Peek**<sup>5</sup>:

[19] Despite its vintage, this still appears to be the leading case on the issue of what constitutes a fraudulent misrepresentation. In *Derry* supra, the respondents alleged that the appellants made untrue statements in a prospectus and that those statements were made fraudulently and with intent to induce the respondents to take shares in the company.

Lord Herschell set the context for this speech in the following preliminary statement:

*“In an action for deceit, on the contrary, it is not enough to establish misrepresentation alone, it is conceded on all hands that something more must be proved to cast liability upon the defendant, **though it is a matter of controversy what additional elements are requisite.**”*

After taking the panel through various judicial opinions on the elements that constitute fraudulent misrepresentation, His Lordship finally settled on a conclusion to this ‘controversy’:

*“In my opinion making a false statement through want of care falls short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds...But the whole current of authorities, with which I have so long detained your lordships, shows to my mind conclusively that fraud is essential to found an action in deceit, and that it cannot be maintained where the acts proved cannot properly be so termed.”*

Lord Herschell was of the view that nothing less than fraud will render directors liable to an action in deceit. However, in determining whether a statement was made fraudulently, he viewed that the question of whether there was reasonable grounds for believing in the truth of the statement is an important consideration:

*“At the same time I desire to say distinctly that when a false statement has been made **the question whether there was reasonable grounds for believing it, and***

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<sup>5</sup> (1889) 14 App. Cas. 337

*what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground on which an alleged belief was founded is a most important test of its reality.”*

[20] At trial, Mr Manwah zeroed in on Mr Gadsby’s stated intent to use the word “beneficial owner” in the Agreement. Mr Gadsby was first asked to illustrate the difference between a registered owner and a beneficial owner<sup>6</sup> and his response was as follows:

*“Well the registered proprietor would be the entity that would have a Deed in its name, registered at the – am - land registry, stating that it is the owner of the land. In this case a beneficial owner would be a party that had an interest in the land, such as we’ll have a sale agreement, which was executed. Meaning that the entity would be, would have an interest in the property, a right to sue against the ultimate owner, to be able to effect that sale agreement.”*

Mr Manwah then asked Mr Gadsby to identify the alleged agreement by which the 1<sup>st</sup> Defendant has established its beneficial interest. In response, Mr. Gadsby referred to the purchase agreement exhibited at HJG4<sup>7</sup>, which is the 4<sup>th</sup> exhibit to Mr Gadsby’s witness statement.

[21] However, the Court notes that the said purchase agreement exhibited as HJG4 is stated as being made between S.R.I Holdings Limited, as the vendor and R & D Holdings Limited as the purchaser.

This purchase agreement therefore does not support the alleged beneficial ownership of the parcel of land by the 1<sup>st</sup> Defendant. Further, no documents have been adduced to show that R & D Holdings, the purchaser of the larger parcel in the Agreement, and the 1<sup>st</sup> Defendant are the same company or comprise the same shareholders/directors.

[22] This lacuna in the Defendant’s evidence is further compounded by the fact that Mr Gadsby pleaded that *“the First Defendant has thus far been unable to complete its purchase of the larger parcel because the potential financiers of the said purchase have been unwilling to proceed with the purchase...”*

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<sup>6</sup> NOE page 14, lines 27- 35.

<sup>7</sup> NOE page 15, line 27.



There is no gainsaying the statement that the purchaser's beneficial ownership in a property can only be established when the purchase agreement for that property has been completed.

The evidence of Mr Gadsby, however, is not clear on when he would have first been aware that the purchase agreement was not completed. Had this knowledge dawned on him at the time he prepared the Agreement, there would be no reasonable grounds available to him to form an honest belief that the 1<sup>st</sup> Defendant had any interest in the parcel of land.

In his witness statement, he gives evidence that he first received a letter dated the 1<sup>st</sup> February, 2012 from Ms Ramoutar on behalf of S.R.I Holdings Limited, stating that the purchase agreement for the larger parcel had been terminated. This, however, is many months after the Agreement with the Claimant was executed on the 24<sup>th</sup> June, 2011.

Prior to this letter, Mr Gadsby gives evidence that he was advised by Mr Saroop of the difficulties that the 1<sup>st</sup> Defendant was having in obtaining the necessary approvals from Town and Country Planning. No dates were given for this communication but it does suggest the purchase agreement was still pending at that time. Mr. Manwah, however, did not seek to probe this issue at trial.

[23] Rather, in his cross-examination, Mr. Manwah asked Mr Gadsby if the said purchase agreement for the larger parcel of land was the agreement by which the 1<sup>st</sup> Defendant got their beneficial interest and, despite the above facts highlighted from Mr Gadsby's pleaded case and evidence, Mr Gadsby replied "*Yes, ultimately.*"<sup>8</sup>

Mr Gadsby then suggested that although the 1<sup>st</sup> Defendant's name was not included in the said purchase agreement, the 1<sup>st</sup> Defendant could still attain beneficial ownership by way of an assignment.

Counsel then enquired of Mr Gadsby if this purchase agreement had ever been assigned to the 1<sup>st</sup> Defendant, and, in a less than convincing manner, Mr Gadsby volunteered that

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<sup>8</sup> NOE page 16, line 3

he didn't prepare the purchase agreement before finally answering that he *believed* it was assigned<sup>9</sup>.

Mr Manwah probed further and asked if this alleged assignment was before the Court and Mr Gadsby replied "*I don't think it forms part of this bundle.*"

The third Defendant then stated that "*there is no pleadings of any assignment or any evidence of any assignment...*"

Despite these admissions, Mr Gadsby maintained that he would not accept that the 1<sup>st</sup> Defendant is not the beneficial owner of the parcel of land that is the subject of the Agreement.

[24] This evidence from trial confirmed one important fact—that at the time of the execution of the Agreement, the purchase agreement for the larger parcel of land had not yet been completed. It is therefore highly improbable, that there would have been any assignment of the larger parcel to the 1<sup>st</sup> Defendant under these circumstances.

[25] Indeed, while the threshold for proving fraud is quite high, the test for determining whether a witness's belief in the truth of his statement is reasonable belief must be examined objectively.

Lord Herschell stated as much toward the end of his speech:

***"I quite admit that the statements of witnesses as to their belief are by no means to be accepted blindfold. The probabilities must be considered. Whenever it is necessary to arrive at a conclusion as to the state of mind of another person, and to determine whether his belief under given circumstances was such as he alleges, we can only do so by applying the standard of conduct which our own experience of the ways of men has enabled us to form; by asking ourselves whether a reasonable man would be likely under the circumstances so to believe."***

In coming to his finding, Lord Herschell concluded that "*a reasonable man situated as the defendants were, with their knowledge and means of knowledge, might well believe*

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<sup>9</sup> NOE page 16, line 36.

*what they state they did believe, and consider that the representation made was substantially true.”*

[26] It would be useful at this point, in the pursuit of clarity, to set out the material facts of **Derry v Peek** which, when applied, led to His Lordship’s considered conclusion.

In **Derry v Peek** supra, a statutory provision allowed carriages used on tramways to be moved by steam or mechanical power for fixed periods with consent from and subject to regulations of the Board of Trade. The appellants (“Derry”) issued a prospectus referring to this Act and stating that the company now had the right to use steam motive power instead of horses, which would result in considerable saving of working expenses compared to other tramways worked by horses.

The respondents, induced by this statement, obtained shares in the company. It eventually turned out that the Board refused consent to the use of steam except in certain portions of the tramways. The appellants’ company was thereafter wound up and the respondent brought an action of deceit against the appellants claiming damages for fraudulent misrepresentation.

[27] The key distinction in the facts of **Derry** and the instant case is that the appellants in **Derry**, formed the basis of their belief in the accuracy of the statements contained in their prospectus from the provisions in the Act, which allowed them to use steam power, albeit conditional on obtaining the consent of the Board of Trade. It was therefore, in this Court’s opinion, logical for Lord Herschell to view that the appellants held an honest belief that they would be allowed to have their tramways operated by steam.

Indeed, Lord Herschell’s reasoning for his conclusion states as much:

*“I think they were mistaken in supposing that the consent of the board of trade would follow as a matter of course because they had obtained their Act. It was absolutely in the discretion of the Board whether such consent should be given. The prospectus was therefore inaccurate. But that is not the question. **If they believed that the consent of the board of trade was practically concluded by the passing of the Act, has the***

*plaintiff made out, which it was for him to do, that they have been guilty of a fraudulent misrepresentation? I think not. I cannot hold it proved as to any one of them that he knowingly made a false statement, or one which he did not believe to be true, or was careless whether what he stated was true or false. In short I think they honestly believed that what they asserted was true, and I am of the opinion that the charge of fraud made against them has not been established.”*

[28] In the instant matter, as gleaned from the cross examination, the evidence that formed Mr Gadsby’s belief that the 1<sup>st</sup> Defendant was the beneficial owner of the parcel of land is not before the Court nor was it pleaded. The Court therefore, simply has no document showing that the purchase agreement for the larger parcel of land was ever assigned to the 1<sup>st</sup> Defendant. Further, as stated above, the fact that the purchase agreement was never completed makes it even more likely that no assignment of the agreement could have been made.

[29] Mr Gadsby therefore, is essentially placing himself at the feet of the Court in the hopes that his word and credibility are persuasive enough to convince the Court that he held and honest belief that the purchase agreement was assigned to the 1<sup>st</sup> Defendant at the time that the Agreement was executed.

[30] Unfortunately, the torrent of evidence is simply against him. He has shown nothing that could form the basis of such a belief. Further, it is Mr Gadsby himself who alleged that the 1<sup>st</sup> Defendant is the beneficial owner and therefore, it was incumbent on him, knowing the claim against him, to provide proof that that statement would have been accurate.

[31] What makes Mr Gadsby’s misrepresentations even more alarming is the fact that he is a partner in the corporate department of a prestigious law firm with over a decade of experience. Given this context, the Court finds that these misrepresentations cross the Rubicon of recklessness and/or negligence. It is simply unfathomable that a man of such background can honestly believe that the 1<sup>st</sup> Defendant is the beneficial owner of a parcel of lands in the absence of an assignment.

[32] What puts the proverbial nail in the coffin, in this Court's opinion, is Mr Gadsby's hesitant answers at trial. Having failed to provide evidence of the assignment of the purchase agreement with respect to the larger parcel of land, anything less than a firm and convincing answer stating "*yes the agreement was assigned to the 1<sup>st</sup> Defendant, I have seen a copy of the assignment although I have not adduced it as evidence*" is simply not sufficient. His response that he 'believes it was assigned' evidences his uncertainty and implies that he has never actually seen the assignment.

[33] Such a finding leads to the inevitable conclusion that this case is distinguishable on its facts from **Derry v Peek**. Mr Gadsby simply had no reason to believe that the purchase agreement was assigned to the 1<sup>st</sup> defendant and therefore, could not have justifiably intended to say that the 1<sup>st</sup> Defendant was the beneficial owner of the parcel of land.

[34] The Court therefore finds that the 3<sup>rd</sup> Defendant is liable for fraudulent misrepresentation.

**Inducement:**

[35] The law is clear that it must be proven that the 3<sup>rd</sup> Defendant made the fraudulent misrepresentation (i) with the intention that the Claimant would rely on it and (ii) that the Claimant did, indeed, so rely when executing the Agreement.<sup>10</sup>

[36] Mr Gadsby's case is that he had prepared and witnessed the Agreement in order to discharge his professional duties and to comply with the instructions given to him by the 1<sup>st</sup> Defendant. Therefore, he never prepared the Agreement to induce any party to execute it. In particular, he pleaded that he did not, by his words or conduct, induce the Claimant to enter into the said Agreement and that the Claimant had already made up her mind to execute the Agreement.<sup>11</sup>

[37] Mr Garcia's cross-examination of Ms Smith on this issue began by focusing on when Ms Smith developed her intention to enter into the Agreement. Her responses revealed the following:

- a. That she had already paid the deposit prior to executing the Agreement;

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<sup>10</sup> See **Standard Chartered Bank** supra at page 174 b

<sup>11</sup> Para 7 of the Defence

- b. That she did not rely on anything that was said in the Agreement to pay the deposit;
- c. That in December, 2010, she had already signed the reservation agreement and therefore, she had already decided that she wanted to purchase the lot by the time she signed the Agreement;
- d. That her intention to buy the lot was formed 6 months before the Agreement.

[38] Moreover, Mr Garcia was able to elicit from Ms Smith that she relied primarily on the oral representations made by Mr Gadsby, along with her familiarity with the firm and Mr Gadsby himself, to induce her to enter into the agreement. Her testimony revealed<sup>12</sup>:

- a. That clause 14 of the Agreement says that there are no other written or oral agreements or representations between the company and the purchaser affecting the subject-matter of this Agreement;
- b. That at paragraph 13 of her witness statement, Ms Smith refers to a conversation between herself and Mr Gadsby on the day of execution and that this conversation was oral;
- c. That at paragraph 14 of her witness statement, Ms Smith stated that she felt reassured and encouraged by Mr Gadsby's responses and thereafter signed the Agreement.
- d. That Ms Smith also stated in her witness statement that she relied on Mr Gadsby's connection with J. D. Sellier & Co. and the assurances that Mr Gadsby gave her on the 24<sup>th</sup> June, 2011 before signing the Agreement;

[39] Clause 14 of the Agreement specifically states as follows:

***“It is understood that there are no oral or other written agreements or representations between the company and the purchaser affecting the subject matter of this agreement and this agreement supersedes and cancels all and any previous negotiations, arrangements,***

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<sup>12</sup> NOE page 7, line 20 to page 10, line 17.

*representations and understandings (if any) between the parties hereto in respect thereof.”*

[40] This cross-examination, therefore, was particularly incisive. It showed that (i) Ms Smith had already formed the intention to purchase the lot and provide the deposit prior to signing the Agreement; (ii) that the actual written Agreement superseded and cancelled all other representations made to the Claimant by Mr Gadsby or otherwise concerning the terms of the Agreement; and (iii) that Ms Smith signed the Agreement based on Mr Gadsby’s oral representations and therefore, according to her evidence in chief, she was induced not by the written representations on the Agreement itself, but primarily by the oral representations of Mr Gadsby, which, pursuant to the Agreement, are null and void.

[41] The law on inducement is stated clearly in the text of **Clerk & Lindsell on Torts**<sup>13</sup>:

*“It seems that intent, for these purposes, includes not only the case where the defendant actually desires the claimant to rely on what he says, but also where he appreciates that in the absence of some unforeseen intervention he will actually do so.”*

[42] Thus in **Shinhan Bank Limited v Sea Containers**<sup>14</sup>, a buyer issued clean receipts to the seller for goods that it was purchasing without having received the goods. The seller used these receipts to obtain financing from the bank. However, the seller soon went into bankruptcy before the goods specified in the clean receipts were actually delivered to the buyer. The bank brought a claim against the buyer for fraud arising out of the incorrectly made clean receipts. The buyer denied any fraud, on the basis that they allegedly did not know that the clean receipts were going to be presented to the bank. Further, the buyer claimed that they did not know that the full terms of the contractual relationship between themselves and the seller were not to be made known to the bank. The Court ruled as follows:

*“On the evidence, the bank had proved to the relevant high degree of probability that SCL [the seller] did intend the bank to act on the false*

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<sup>13</sup> 21<sup>st</sup> Edition at para 18-30

<sup>14</sup> (2000) 2 Lloyd’s Rep. 406

*clean receipts. The evidence also established that the bank relied upon the false clean receipts, and thus all the elements of deceit were established. SCL was aware that the receipts would be shown to the bank, that they were false, and that the bank would, unless something unlikely intervened, pay against them.”*

[43] In this Court’s opinion, the cross-examination by Mr Garcia did nothing to dispel the view that Mr Gadsby intended for Ms Smith to rely on his oral and/or written representations in the Agreement concerning the 1<sup>st</sup> Defendant’s ownership of the land. The undisputed facts as presented by both parties show that, being a director of the 1<sup>st</sup> Defendant, Mr Gadsby intended that Ms Smith would act to execute the Agreement based on a belief that the 1<sup>st</sup> Defendant was the owner and/or had a beneficial interest in the parcel of land.

[44] With respect to the second limb— that the Claimant must have been influenced by the misrepresentation, Mr Garcia’s cross-examination becomes more relevant.

However, as stated in Clerk & Lindsell *ibid*, “*what is relevant here is what the claimant would have done if no representation had been made.*”<sup>15</sup>

Further, the law does not seem to require that reliance on Mr Gadsby’s written representation be the sole cause of inducement:

*“Although the claimant must show that he was induced to act as he did by the misrepresentation, it need not have been the sole cause. Provided it substantially contributed to deceiving him that will be enough. **If the claimant’s mind was partially influenced by the defendant’s misstatements, the defendant will not be any less liable because the claimant was also partly influenced by his own mistake.**”*

[45] Based on Ms Smith’s evidence in chief— that she would not have entered into the Agreement had she known that the 1<sup>st</sup> Defendant was not the owner of the lands<sup>16</sup>, it

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<sup>15</sup> At para 18-34.

<sup>16</sup> At para 14 of her witness statement.



clearly answers the first question of what she would have done if the recital in the Agreement had not been made.

[46] What Mr Garcia attempted to do was to focus on the fact that Ms Smith was influenced by other material separate and apart from the words in the recital of the written Agreement.

Therefore, to be successful in her claim, Ms Smith would have to show that the representations in the recital influenced her in some way, even if to a lesser degree, to sign the Agreement on the 14<sup>th</sup> June, 2011.

In this sense, the Court must also examine Mr Manwah's cross-examination of Mr Gadsby on this issue.

[47] Under cross-examination, Mr Gadsby admitted that a draft copy of the Agreement had been sent to Ms Smith prior to her execution and that on that copy, the words 'registered as proprietor' were present.<sup>17</sup> Thereafter, the cross-examination continued as follows:

*Mr Manwah: so you are aware that she had a copy of this agreement before she came to sign it?*

*Mr Gadsby: I would believe so.*

*Mr Manwah: Yes. And that copy will also have the words "registered as proprietor" on it?*

*Mr Gadsby: it would...*

*Mr Manwah: Right, now when Ms Smith came to you, I'm concentrating on the time, she told you that she had some concerns, is that correct?*

*Mr Gadsby: Am she had some questions...*

*Mr Manwah: and you read and explained the agreement to her?*

*Mr Gadsby: I responded to her questions.*

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<sup>17</sup> NOE Page 17, line 44.

*Mr Manwah: did you read and explain the agreement to her?*

*Mr Gadsby: I did not read the entire agreement and explain it to her; I answered her questions...*

*Mr Manwah: would you look at paragraph 9. "At the said meeting the provisions of the agreement were explained to the Claimant, including her legal rights to redress on the First Defendant etcetera..." so you did read and explain the agreement to her?*

*Mr Gadsby: I explained the agreement to her by responding to her questions on the agreement...*

*Mr Manwah: That's your interpretation of what you are saying here?*

*Mr Gadsby: yes, but that's what happened.*

[48] It is useful to note that at the said paragraph 9 of Mr Gadsby's witness statement he states as follows:

*"...At the said meeting the provisions of the Agreement were explained to the Claimant including her legal rights of redress from the First Defendant and she was reminded that she was free to obtain legal advice with respect to same. I verily believe that the Claimant made up her mind to execute the Agreement on this occasion since she was provided with an electronic draft of the Agreement and paid the deposit of sixty-five thousand dollars..."*

[49] This paragraph coupled with the above evidence given by Mr Gadsby at trial suggests that (i) Ms Smith was given a copy of the Agreement prior to the meeting; (ii) the terms of the Agreement were explained to her by Mr Gadsby before execution; and (iii) that pursuant to his evidence in chief, Mr Gadsby was of the opinion that Ms Smith made up her mind to execute the Agreement on the day they met at J. D. Sellier & Co to sign the Agreement.

[50] In **Dardourian Group International Inc v Simma**<sup>18</sup> it was noted that there exists a rebuttable presumption that a claimant was induced by a fraudulent misrepresentation. In this case, the English Court of Appeal reviewed the lower Court's finding that the defendant failed to rebut the presumption and in the end, found no error in the lower Court's reasoning process:

*“We are unable to detect any error of law on the part of the judge in the way in which he approached this issue and did not understand the appellants to suggest otherwise. The question therefore was simply one of fact: was the judge entitled on the balance of probabilities, viewing the evidence as a whole, to conclude that the intermediary representation did induce the option agreement (i.e., that the presumption that it did had not been rebutted)? For there can be no doubt that the intermediary representation was of such a character as to engage the application of the presumption: once it is established - as the judge held that it was - that the intermediary representation was made, and was made dishonestly, and was intended to be relied upon by DGI in deciding whether to enter into the option agreement, there is no realistic scope for contending that the intermediary representation was not sufficiently material as to give rise to the presumption.”*

[51] In similar fashion, this Court has found (i) there was a misrepresentation made in the recital of the Agreement; (ii) that the said misrepresentation was made dishonestly; and (iii) the misrepresentation was intended to be relied upon by Ms Smith in deciding whether to enter into the Agreement.

[52] It therefore follows that there is a strong presumption that Ms Smith would have relied on this misrepresentation, even if her reliance on it was not decisive in her decision to execute the Agreement and that this presumption has not been rebutted.

[53] Moreover, by the mere fact that Mr Gadsby has introduced evidence that Ms Smith had been provided with an electronic draft of the Agreement beforehand<sup>19</sup>, coupled with his

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<sup>18</sup> (2009) EWCA Civ. 169; (2009) All ER (D) 175 at [95] – [108]

<sup>19</sup> Para 9 of the 3<sup>rd</sup> Defendant's witness statement.

testimony that, on the day of execution, he answered questions that Ms Smith asked concerning the terms in the Agreement, leads to the probability that Ms Smith read the Agreement before attending the offices of J.D.Sellier & Co. which would have afforded her the insight to ask questions on specific clauses on the day of execution. While this may not have been the decisive factor influencing her to sign the Agreement, it would have no doubt played a party in her decision.

**IV. Disposition:**

**[54] Having considered the evidence and the submissions of both parties, the Court finds that the 3<sup>rd</sup> Defendant is liable for the payment of the deposit sum of \$65,000.00 to the Claimant in damages for fraudulent misrepresentation and breach of contract together with interest at the commercial rate and costs.**

**[55] Accordingly, the order of the Court is as follows:**

**ORDER:**

- I. Judgment be and is hereby entered for the Claimant against the 3<sup>rd</sup> named Defendant for the sum of \$65,000.00.**
- II. The 3<sup>rd</sup> named Defendant shall pay to the Claimant interest on the said sum of \$65,000.00 at the rate of 2 % per annum from the 10<sup>th</sup> January, 2014 to the date of this judgment and 5% from the date of this judgment to the date of payment.**
- III. The 3<sup>rd</sup> named Defendant shall also pay to the Claimant prescribed costs quantified in the sum of \$17,000.00.**

**Dated this 4<sup>th</sup> day of July, 2017**

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**Robin N. Mohammed  
Judge**