Jofa Hilmi bin Jaafar & Anor v Abdul Hakam bin Abdul Hadi & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO D-22–302 OF 2009
LEE SWEE SENG JC
17 AUGUST 2011

Contract — Breach — Obligation to procure — Failure of second defendant to procure bank guarantee — Second plaintiff's agreement to buy diesel from supplier terminated as a result — Whether second plaintiff had cause of action against second defendant — Whether losses incurred by second plaintiff recoverable

The first plaintiff ('P1') was the founder-shareholder and director of the second plaintiff ('P2'), a Labuan offshore company. The first defendant ('D1') was the managing director of the second defendant ('D2'), which had a licence to provide financial services and to do moneylending. P1 and D1 entered into a shareholders and joint ventures agreement ('SJVA') under which P2 was incorporated to engage in international trading in high speed diesel sourced from Malaysia. Under the SJVA, D1 was obliged to secure banking facilities for P2 so as to allow P2 to arrange for either a bank guarantee or a standby letter of credit to be made in favour of P2's supplier ('Ceria') with whom P2 had signed a sale and purchase agreement ('SPA') to buy RM15.2m worth of diesel. P2 was to pay for the purchase, inter alia, by providing, within seven days of the SPA, a RM10m bank guarantee issued by P2's bank to Ceria's bank as well as a deposit of RM2m. P2, which had earlier accepted D2's letter of offer to finance the purchase, instructed D2 to issue the RM10m bank guarantee but D2 failed to provide the same. D2 attempted to justify its failure by informing P2 much later that in compliance with Shariah guidelines, the 'Kafalah' bank guarantee could only be issued in favour of Ceria itself and not to its bank. D2's default made it unable for P2 to meet its financial commitments to Ceria resulting in Ceria terminating the SPA and forfeiting the RM2m deposit. Although Ceria did not sue P2, it claimed RM3,320,720 for losses and damages from P2 in a letter of demand. Towards settlement of that claim, P2 paid Ceria RM406,960. With regard to the RM2m deposit which P2 had paid, this amount was borrowed, with D2's knowledge, from a Hong Kong company, for which P2 had paid RM296,400 as financing costs. Meanwhile, P1 terminated the SJVA after notifying D1 of his breach and giving him time to remedy the same. P1 then took over control of P2 and also took over the shares held by D1. In the suit, P1's claim against D1 was for misrepresenting that D2 had financing facilities with Kuwait Finance House Bhd (KFH) that enabled it to procure

KFH to issue the bank guarantee for the SPA between P2 and Ceria. P2's claim against D2 was for breach by D2 of its letter of offer.

Held, allowing P2's claim and dismissing all other claims:

(1) Well before D2's letter of offer to P2, P1 had emailed to D1 the format of the bank guarantee and the standby letter of credit that was required by the supplier. The format of the guarantee was to guarantee payment to Ceria's bank (see para 17).

(2) D1 was putting a strained and strange interpretation to D2's obligation to provide a 'Kafalah' bank guarantee to mean it was intended to provide the guarantee direct to Ceria. Whatever the meaning of 'Kafalah' as an adjective, it could not derogate from the fact that it was a bank guarantee that D2 was to procure for P2. It did not quite matter whether it was issued to Ceria or to its banker. The important thing was it had to be a bank guarantee (see paras 19–20).

(3) D2 did not consent to information being released or call relevant witnesses from KFH to dispel doubts about whether it had, at the relevant period, the capacity to procure KFH to issue the necessary bank guarantee (see para 29).

(4) As P1 had rescinded the SJVA and taken control of P2 and the shares held by D1, there was nothing else that P1 could claim against D1 (see para 35).

(5) As the substratum of the contractual relationship between the parties was founded on the letter of offer and revised letter of offer between P2 and D2, P2 could maintain a cause of action for breach of contract against D2 (see para 36).

[Bahasa Malaysia summary

Plaintif pertama ('P1') adalah pengasas-pemegang saham dan pengarah kepada plaintif kedua ('P2'), syarikat luar pesisir Labuan. Defendan pertama ('D1') adalah pengarah pengurusan defendan kedua ('D2'), yang mempunyai lesen untuk memberikan khidmat kewangan dan untuk membuat pinjaman wang. P1 dan D1 memasuki perjanjian pemegangan saham dan usaha sama ('SJVA') di mana P2 digabungkan untuk menjalankan perdagangan antarabangsa diesel berkuasa tinggi yang diambil dari Malaysia. Di bawah SJVA, D1 bertanggungjawab untuk mendapatkan kemudahan perbankan untuk P2 untuk membenarkan P2 untuk sama ada mengatur jaminan bank atau surat kredit sedia untuk dibuat bagi pihak pembekal P2 ('Ceria') yang mana P2 telah menandatangani perjanjian jual beli ('SPA') untuk membeli diesel bernilai RM15.2 juta. P2 dikehendaki untuk membayar pembelian tersebut, antara lain, dengan memberikan, dalam masa tujuh hari dari SPA tersebut, jaminan bank sebanyak RM10 juta dikeluarkan oleh P2 kepada bank Ceria dan juga

deposit sebanyak RM2 juta. P2, yang mana sebelumnya menerima surat tawaran D2 untuk membiayai pembelian tersebut, mengarah D2 untuk mengeluarkan RM10 juta jaminan bank tetapi D2 gagal untuk meberikannya. D2 mencuba untuk menjustifikasikan kegagalannya dengan memberitahu P2 kemudiannya bahawa dalam mematuhi garis panduan Syariah, jaminan bank 'Kafalah' hanya boleh dikeluarkan bagi memihak Ceria dan bukan banknya. Keingkaran D2 membuatkan P2 tidak dapat memenuhi komitmen kewangannya kepada Ceria menyebabkan Ceria menamatkan SPA tersebut dan merampas deposit RM2 juta tersebut. Walaupun Ceria tidak menyaman P2, ia menuntut RM3,320,720 untuk kerugian dan ganti rugi daripada P2 dalam surat tuntutan. P2 membayar Ceria RM406,960 sebagai penyelesaian tuntutan tersebut. Berkaitan deposit RM2 juta yang dibayar oleh P2, jumlah ini dipinjam, dengan pengetahuan D2, daripada syarikat Hong Kong, yang mana P2 telah membayar RM296,400 sebagai kos pembiayaan. Sementara itu, P1 menamatkan SJVA selepas memberitahu D1 mengenai kemungkirannya dan memberikan dia masa untuk membayarnya. P1 kemudiannya mengambil alih kawalan P2 dan juga mengambil alih saham-saham yang dipegang oleh D1. Dalam tindakan, tuntutan P1 terhadap D1 adalah atas sebab menyalahgambarkan bahawa D2 mempunyai kemudahan kewangan dengan Kuwait Finance House Bhd ('KFH') yang membolehkannya untuk mendapatkan KFH mengeluarkan jaminan bank untuk SPA tersebut di antara P2 dan Ceria. Tuntutan P2 terhadap D2 adalah untuk kemungkiran oleh D2 mengenai surat tawarannya.

Diputuskan, membenarkan tuntutan P2 dan menolak kesemua tuntutan yang lain:

(1) Sebelum surat tawaran D2 kepada P2, P1 telah menghantar format jaminan bank dan surat kredit sedia yang dikehendaki oleh pembekal kepada D1 melalui emel. Format jaminan bank tersebut adalah untuk menjamin bayaran kepada bank Ceria (lihat perenggan 17).

(2) D1 meletakkan penekanan dan tafsiran yang ganjil ke atas tanggungjawab D2 untuk memperuntukkan jaminan bank 'Kafalah' ialah bermaksud ia berniat untuk memberikan jaminan terus kepada Ceria. Apa sahaja maksud 'Kafalah' sebagai adjektif, ia tidak dapat menjejaskan daripada fakta bahawa ia adalah jaminan bank yang D2 patut dapatkan untuk P2. Tidak penting sama ada ia dikeluarkan kepada Ceria atau pengurus banknya. Yang penting adalah ia mestilah jaminan bank (lihat perenggan 19–20).

(3) D2 tidak bersetuju kepada maklumat yang disiarkan atau memanggil saksi-saksi relevan daripada KFH untuk melenyapkan kesangsian mengenai sama ada ia telah, pada tempoh masa relevan, berupaya untuk mendapatkan KFH mengeluarkan jaminan bank yang diperlukan (lihat perenggan 29).

(4) Memandangkan P1 telah membatalkan SJVA tersebut dan mengambil alih P2 dan saham-saham yang dipegang oleh D1, tiada apa lagi yang boleh ditutntut oleh P1 terhadap D1 (lihat perenggan 35).

(5) Memandangkan substratum hubungan kontrak antara pihak-pihak berdasarkan surat tawaran tersebut dan surat tawaran yang disemak semula di antara P2 dan D2, P2 boleh mengekalkan kausa tindakan untuk kemungkiran kontrak terhadap D2 (lihat perenggan 36).]

Notes

For cases on obligation to procure, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3124–3125.

Cases referred to

Antaois Compania Naviera SA v Salen Rederierna AB [1985] AC 191, HL (refd)

British Westinghouse Electric and Manufacturing Co, Limited v Underground Electric Railways Co of London, Limited [1912] AC 673, HC (refd)

Pacific & Orient Insurance Co Sdn Bhd v Kathirvelu [1992] 1 MLJ 249; [1992] 1 CLJ (Rep) 251, SC (refd)

Popular Industries Limited v Eastern Garment Manufacturing Co Sdn Bhd [1989] 3 MLJ 360; [1990] 2 CLJ (Rep) 635, HC (refd)

Sim Thong Realty Sdn Bhd v Teh Kim Dar@Tee Kim [2003] 3 MLJ 460; [2003] 3 CLJ 227, CA (refd)

Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777; [1995] 1 CLJ 15, FC (refd)

Legislation referred to

Banking and Financial Institutions Act 1989 Schedule 21
Companies Act 1965 Form 40B
Islamic Banking Act 1983 s 34
Evidence Act 1950 s 34

Mohamed Harmy Yusoff (Harmy Yusoff & Co) for the plaintiffs.
HariharanTara Singh (Wan Shahrizal, Hari & Co) for the defendants.

Lee Swee Seng JC:

PROLOGUE

[1] The plaintiffs understood a Kafalah bank guarantee facility provided by the second defendant to the second plaintiff as a bank guarantee issued in favour of its supplier's banker. The second defendant when pressed to provide such a bank guarantee contended that it could only provide a bank guarantee direct to the supplier and not in favour of the supplier's banker. An impasse

resulted with the second plaintiff declaring the second defendant to be default. A

PARTIES

[2] The first plaintiff is the founder shareholder and director of the second plaintiff, a Labuan offshore company incorporated to trade in high speed diesel. The first defendant is the managing director of the second defendant. The second defendant has a license approved by Bank Negara Malaysia to provide financial services under Schedule 21 of the Banking and Financial Institutions Act 1989 and has a moneylending license to conduct moneylending business. Together the plaintiffs sued the first and second defendants under a host of various heads of claims for failure to furnish the bank guarantee at the proper time for the purchase of the high speed diesel. B C

PROBLEM D

[3] The second defendant ('D2') by a letter of offer dated 20 May 2008 offered the second plaintiff ('P2') a project financing for the purchase of high speed diesel. The facilities consisted of the a Kafalah bank guarantee for up to a maximum aggregate amount of RM10m and a *Musyarakah Bai Al-Dayn* for up to a maximum aggregate of RM2m. The profit sharing ratio based on the net profit was 85% to P2 and 15% to D2. There was also the direct financing costs of 0.2% per month for the issuance amount for the Kafalah bank guarantee and 1.35% per month and RM50,000 (for the first drawdown) of the *Musyarakah Bai Al-Dayn* facility. E F

[4] The above letter of offer duly accepted by P2 was subsequently revised by a fresh letter of offer from D2 to P2 dated 28 May 2008 with the deletion of the *Musyarakah Bai Al-Dayn* facility of RM2m and with that the deletion of the security for the deposit of RM2m in favour of D2. This revised letter of offer was duly accepted by P2 on the same date. G

[5] The purpose of the Kafalah bank guarantee was to guarantee payment for the purchase of high speed diesel from identified Petroleum Development Act 1974 ('PDA') holder. H

[6] There had earlier been a shareholders' and joint ventures agreement ('SJVA') dated 2 May 2008 executed between the first defendant (D1) and the first plaintiff ('P1') where P2 had been incorporated as an offshore company in Labuan as the vehicle for the joint venture of conducting an international trading business of high speed diesel which shall be sourced from Malaysia and to be exported regionally beyond Malaysia upon the terms and conditions I

appearing in the SJVA. Under the SJVA, D1 represented Group A and P1 represented Group B. The equity in P2 was to be 50%:50% between Group A and Group B.

[7] Under cl 7.2 of the SJVA it was provided that:

> 7.2 Group A's funding obligation during the Initial Funding Period
>
> Group A on its own effort and costs shall obtain for the Company a banking facility from a financial institution within 7 days of the Effective Date. Group A shall also to ensure that:
>
> -the Company (P2) shall be able to execute a financing agreement with the financial institution within 7 days of the Effective Date. The facility shall be valid for 3 + 3 months and shall allow the Company to immediately issue an acceptable financial value of payment guarantee instrument in a form of Bank
>
> Guarantee (BG) or Standby Letter of Credit (SBLC), directly to supplier. The payment guarantee instrument is to affect the Sale and Purchase Agreement between the Company and Ceria Bersama International Sdn Bhd (CBI).
>
> -the Company shall have enough funding to be able to purchase the initial 5,000 metric tonne of diesel from the supplier Ceria Bersama International Sdn Bhd (CBI) within 14 days of the Effective Date.
>
> All costs of documentation and execution of the Company's financing agreement as well as the procurement of the initial payment guarantee instrument are to be provided by Group A and shall be considered as Shareholder's advance and shall be reconciled within three (3) months.
>
> Group B's Funding Obligation during the Initial Funding Period
>
> Group B shall provide funding for all of the Company's other operation costs.

[8] P2 entered into a sale and purchase agreement ('SPA') dated 21 May 2008 with Ceria Bersama International Sdn Bhd ('Ceria') for the purchase of 10,000 metric tons via two shipments of 5,000 metric tons for an agreed price of RM15.2m, FOB Sungai Udang Melaka. The terms of payment were, inter alia, that P2 shall within seven days make a payment guarantee via a RM10m bank guarantee issued by any banks in Malaysia and also payment of RM2m cash. The payment guarantee shall be issued by the buyer's bank to the seller's bank within seven days after the signing of the SPA.

[9] P2 gave draw-down instruction to D2 to issue the Kafalah bank guarantee of RM10m as per the letter of offer. The bank guarantee was not forthcoming inspite of extensions by Ceria and various reminders sent by P2 to D2. D2 contended that its agreement was to furnish a Kafalah bank guarantee direct to the supplier.

[10] As the bank guarantee was not furnished by D2, P2 could not meet its financial commitment to pay Ceria with the consequence that Ceria terminated the SPA and forfeited the RM2m paid. Ceria also claimed for damages against P2 though it did not sue P2 but did send a letter of demand. All in a further sum of RM406,960 had been paid to Ceria by P2 towards settlement of the claim.

[11] Meanwhile P1 terminated the SJVA after sending notice of non-performance and remedy of D1's obligations under cl 7.2 of the SJVA. P1 and P2 sued D1 and D2 for losses arising out of breach of the SJVA by D1 and breach of the letter of offer by D2.

PRAYER

[12] The plaintiffs claimed against the defendants in their amended statement of claim under various heads for the various sums paid to third parties and for the sums claimed by Ceria against P2 as well as for loss of profits and damages to be assessed together with interest and costs.

PRINCIPLE

What is the true nature of the Kafalah bank guarantee facility of RM12m provided by D2 to P2

[13] Counsel for both the plaintiffs and defendants agreed that the main issue to be decided by the court is the true nature of the Kafalah bank guarantee of RM12m in the letter of offer and revised letter of offer.

[14] The letter of offer from D2 to P2 dated 20 May 2008 at pp 41–43 of bundle D is reproduced below:

> Al-Musyarakah Capital Sendirian Berhad
>
> Our Ref: JI/LO/042/05-08
>
> Private and Confidential
>
> Date: 20th May 2008
>
> JEJAK INCORPORATED (Co. No.: LL06316)
>
> U0195, Jalan Merdeka
>
> 87000 FT. of Labuan
>
> Attention: Encik Jofa Hilmi Jaafar
>
> LETTER OF OFFER - PROJECT FINANCING FOR THE PURCHASE OF HIGH SPEED DIESEL.

PROJECT FINANCING FACILITIES:-	I) KAFALAH BANK GUARANTEE II) MUSYARAKAH BAI AL-DAYN

We are pleased to offer to you the terms and conditions of the abovementioned Facilities as set out below:

Financier:	Al-Musyarakah Capital Sdn Bhd ("AMCSB")
Customer:	Jejak Incorporated ("Jejak Incorporated")
Facility:	i) Kafalah Bank Guarantee
	ii) ii) Musyarakah Bai Al-Dayn
Facility Amount:	Up to a maximum aggregate amount of RM12.0 million consisting of:-
	i) Kafalah Bank Guarantee
	Up to a maximum aggregate amount of RM10.0 million.
	ii) Musvarakah Bai Al-Dayn
	Up to a maximum aggregate amount of RM2.0 million
Purpose:	i) Kafalah Bank Guarantee
	To guarantee payment for the purchase of high speed diesel from the identified PDA holder.
	ii) Musyarakah Bai Al-Dayn
	To finance the purchase of high speed diesel from the identified PDA holder.
Tenure:	i) Kafalah Bank Guarantee
	Revolving subject to annual review.
	Each Kafalah Bank Guarantee to be issued shall have the validity period of not exceeding 12 months from the date of issuance.
	ii) Musyarakah Bai Al-Dayn
	Revolving subject to annual review.
	Maximum of 30 days or any other such period to be agreed upon by AMCSB.
Assignment of payment:	All payment proceeds arising from the Project shall be assigned to Al-Musyarakah Capital Sdn Bhd.
Profit sharing:	Based on the net profit* at the following ratio:
	i) Jejak Incorporated - 85%
	ii) AMCSB-15%
	*after deduction of all relevant financial costs incurred by AMCSB in relation to the financing of the Project (purchase of high speed diesel).

Direct financing costs:	i) Kafalah Bank Guarantee Fees: 0.2% per month for the issuance amount. ii) Musyarakah Bai Al-Dayn 1.35% per month and RM50.000 (for the first drawdown) of the facility.
Security(ies):	1) Al-Musyarakah Facility Agreement 2) Deposit amounting to RM2.0 million in favour of AMCSB 3) Assignment of Proceeds 4) Guarantee & Indemnity 5) Guarantee of Jofa Hilmi Jaafar (NRIC:700213-02-5103)

This letter of offer shall be valid for a period of seven (7) days from the date hereof and shall be made absolute by AMCSB subject to AMCSB having fully satisfied with all the relevant documents to be submitted by Jejak Incorporated an/or upon advice from AMCSB's solicitors.

If you are agreeable to the above terms and condition, please sign this letter and return the same to us by 27th May 2008 or such other extended date agreed to by us, together with a non-refundable processing fee of RM10,000.00 payable to 'AL-MUSYARAKAH CAPITAL SDN BHD'. failing which this offer will lapse.

Notwithstanding your acceptance of our offer, AMCSB reserves the right to withdraw this offer without assigning any reason thereof. Thank you

Yours faithfully,

Al-Musyarakah Capital Sdn

sgd

ABDUL HAKAM BIN ABDUL HADI

Managing Director

We, JEJAK INCORPORATED (Co No.: LL06316) hereby accept the above offer upon the stated terms and conditions.

sgd

(Authorised Signatories and Company Stamp)

Date: 27 May 2008

[15] In the revised letter of offer dated 28 May 2008 at pp 44–45 of bundle D the facility amount is 'Up to a maximum aggregate amount of RM10.0 million'. The *Musyarakah Bai Al-Dayn* facility had been deleted in the revised letter of offer.

[16] It must be noted that P1 who was PW2 at the trial, as far back as 21

February 2008 had emailed the format of the bank guarantee and the standby letter of credit to D1 who was DW1 at the trial. See pp 94–99 of bundle D (common bundle of documents). The email also stated that the bank guarantee and the standby letter of credit were from the supplier, per-approved and non-negotiable. The format of the bank guarantee was a guarantee to be issued by an issuing bank to Malayan Banking Bhd as beneficiary, guaranteeing the payment to Malayan Banking Bhd in favour of Ceria of sum referred to as the 'Guaranteed Sum' for the purpose of guaranteeing the payment for the purchase of high speed diesel. The other usual terms of validity period and how the demand is to be made before the expiry date were also provided for.

[17] There was also another email of the same date enclosing the format of the SPA between the supplier and P2 as well as between P2 and the proposed buyer. See pp 100–119 of bundle D. At p 111 and in cl 7.1 on payment guarantee in the format between the supplier and P2 it is provided as follows:

> 7.1 Payment guarantee amount for this Agreement is USD3, 650,000.00 and shall be in the form of the form of Irrevocable Standby Letter of Credit (SBLC) or Bank Guarantee (BG), a format as shown in Appendix C, and confirmed by the Seller's Bank.

[18] Again the format in Appendix C at p 119 of bundle D is the same as the earlier format referred to at pp 95–96 of bundle D.

[19] DW1 who is also D1 is now putting a strained and strange interpretation to the obligation of D2 to provide a Kafalah bank guarantee to mean that it was intended to provide the bank guarantee direct to the supplier. At the end of the day, as businessman, the intention is clear and practical and the meaning placed on the word 'bank guarantee' cannot derogate from its ordinary and natural meaning. Whatever is the meaning of 'Kafalah' as an adjective, it cannot derogate from the fact that it is a bank guarantee that D2 is to procure for P2. DW1 testified that D2 is a company that has a license approved by Bank Negara Malaysia to provide financial services under Schedule 21 of the Banking and Financial Institutions Act 1989 and that it has a moneylending license and is authorised to do moneylending business.

[20] The interpretation of DW1 is skewed on the semantics of the meaning of a 'Kafalah bank guarantee'. No evidence has been led on the meaning of 'Kafalah'. Whatever it is it cannot mean something less than a bank guarantee. The evidence of PW2 was that the representation made to him by DW1 was that D2 had existing facilities with Kuwait Finance House Bhd ('KFH') and would procure the 'Kafalah bank guarantee' to be issued. It does not quite matter whether it is issued to the supplier or to the supplier's banker, Maybank. The important thing is it must be a bank guarantee. As was brilliantly expressed

by Lord Diplock in the House of Lords' decision of *Antaois Compania Naviera SA v Salen Rederierna AB* [1985] AC 191 at p 201:

> … that if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.

[21] As stated in cl 7.1 of the format of the supplier's SPA it is either an 'irrevocable Standby Letter of Credit' or a 'Bank Guarantee'. The two documents are to be read *ejusdem generis* as referring to the same strength, stature and specie of document in that both are to be issued by a bank and it is as good as payment upon the presentation of the relevant documents or demand. Any other interpretation does not make commercial sense. Why would P2 or its suppliers accept something less as in a Kafalah bank guarantee issued by a licensed moneylender? In the first place D2 is not a bank and how could it issue a Kafalah bank guarantee? If the intention of D2 has been all along that it would be issuing a 'Kafalah bank guarantee' straight to the supplier then it should say so expressly. It had many opportunities to correct what it must have perceived to be the misguided understanding of P2 but it clearly did not. It was only very late in the day on 23 July 2008 that D2 issued a letter to P2 stating as follows in exh D13 at p 330 of bundle D:

> As explained to your good self and in accordance to our Letter of Offer dated 28 May 2008, the Kafalah Bank Guarantee facility is intended to guarantee the payment for the purchase of high speed diesel from your supplier, Ceria Bersama International Sdn Bhd ('CBISB'). Hence, to comply with the Shariah guidelines, the said Kafalah Bank Guarantee can only be issued in favour of your supplier and it is not assignable to CBISB's financier, Malayan Banking Berhad. Kindly be informed that upon issuance of the said Kafalah Bank Guarantee, all commission payable shall be fully borne by Jejak Incorporated.

[22] P2 replied immediately the next day 24 July 2008 to D2 which letter was marked as exh D6 at p 345–346 of bundle D, the relevant parts of which read:

> We are certain that you are well aware of the condition of the BG to be issued as we have submitted the draft SPA with BG format in our Information Memorandum on 2nd May 2008.
>
> Furthermore, in the executed SPA as above, which is part of the Facility Agreement perfectly executed between Al-Musyarakah Capital Sdn Bhd (AMC) and Jejak Incorporated (Jejak), Clause 7.2 clearly states that, the BG is to be issued to the Seller's Bank and has to be acceptable by the Seller's Bank.
>
> In addition, Appendix B of the SPA described that the Seller's Bank is the Malayan Banking Berhad (Maybank).

[23] However no one from KFH was called by D2 to corroborate what is so crucial and critical in the dispute that had arisen between P2 and D2.

[24] The application of the principle of interpretation of 'ejusdem generis' has been clearly explained in the Supreme Court case of *Pacific & Orient Insurance Co Sdn Bhd v Kathirvelu* [1992] 1 MLJ 249; [1992] 1 CLJ (Rep) 251 at pp 262 and 263 where His Lordship Gunn Chit Tuan SCJ (as he then was) said:

> Counsel then referred us to the following footnote on the 'ejusdem generis' rule appearing on p 310 of ER Hardy Ivamy on the 'General Principles of Insurance Law (2nd Ed)':
>
> In the question 'Have you had chronic dyspepsia or any other disease?' the word 'disease' refers to maladies as serious as chronic dyspepsia or which might, in the way it might, increase the risk, and does not include attacks of acute dyspepsia or ordinary indigestion: *IOF v Turmelle* [1910] QR 9 i KB 261 (life insurance) where the further question Tor what disease or diseases have you consulted a physician?' was construed in accordance with the same principle. *Sun Fire Office v Hart* (1889) 14 App Cas 98 (PC) (fire insurance) per Lord Watson at p 103:
>
> It is a well known canon of construction that where a particular enumeration is followed by such words as 'or other' the latter expression ought, if not enlarged by the context, to be limited to matters ejusdem generis with those specially enumerated. The cannon is attended with no difficulty except in its application. Whether it applies at all, and if so, what effect should be given to it, must in every case depend upon the precise terms, subject matter and context of the clause under construction.
>
> It was counsel's contention that a fair and reasonable construction must be adopted on the questions in the proposal form and the answers by the insured to the questions. In this case, the relevant question dealt with a multitude of serious illnesses and then finishes with the words 'or any other disease'. It was therefore submitted that a reasonable construction of that question must be that it referred only to serious illnesses of which the plaintiff was aware. Counsel stated that it was agreed that the plaintiff had piles and cervical spondylosis but stated that they were not diseases or serious ones, and then referred to *Joel v Law Union And Crown Insurance Co* [1908] 2 KB 863 as authority for the connection that the defendant by the question for information of a specific sort has relieved the plaintiff from the obligation to disclose facts which are not within the scope of that question.
>
> On this score, we disagree with the contention of Mr Kumar that the learned judge had wrongly applied the 'ejusdem generis' rule. We note that no evidence was adduced by the defence nor any questios asked, especially by the defence, as to whether cervical spondylosis or the other three conditions were diseases and, if so, whether they were of a serious nature. We also note that the word 'disease' has not been specifically defined in the said policy.
>
> Looking at the diseases referred to in question 11(a) of the said proposal form, we are of the view that the defence has not shown nor do we think that any of the four conditions referred to by the defence are of the same genus as those mentioned in the

> said question and are as serious as cancer, tuberculosis or any disorder or disease of the mental, nervous, urinary, digestive and cardio-vascular systems. Applying a fair and reasonable construction on that question in the proposal form, we therefore do not consider as a matter of fact that it was material for the plaintiff to have disclosed in the proposal form that he had early cervical spondylosis, haemorrhoids, labile hypertension or peptic ulcer as they are not serious diseases or illnesses of the same genus as those mentioned earlier on in the said question. Here again we agree with the learned judge that the defendant was not entitled to repudiate the policy on the ground of non-disclosure of material facts; …

[25] Applying the principle of *ejusdem generis* both the irrevocable standby letter of credit and the bank guarantee are documents issued by a bank and whether issued direct to the supplier or the supplier's banker, the effect is the same in that the ultimate beneficiary is the supplier.

Whether D2 had the relevant financing available from KFH with respect to procuring the relevant bank guarantee to be issued

[26] DW1 gave evidence that as at 20 May 2008 D2 had the capability to offer the said RM12m based on the letter of offer of KFH issued on 12 May 2008 (exh P9) wherein KFH had agreed to grant an additional facility of RM10m to the then existing RM3m of Kafalah bank guarantee which is interchangeable with the letter of credit.

[27] PW5 Encik Raja Sulong Ahmad bin Raja Abd Razak who is the assistant director in commercial banking in KFH was called by the plaintiffs. He has been in the financial institution line for about 25 years. He agreed with learned counsel for the plaintiffs that the Form 40B of the Companies Act (exh P12) for the additional facility was only filed somewhere on 4 December 2008 which was outside the relevant period is during which D2 had to procure KFH to furnish the relevant bank guarantee of RM10m. PW5 also testified that generally a borrower would not be allowed to use an additional facility under the completion of the loan documentation.

[28] When asked specifically whether during the relevant period of 20 May 2008 to 23 June 2008, did D2 have a facility with KFH enabling D2 to issue a bank guarantee of RM10m, his answer was cautiously couched thus:

> According to section 34 of the Islamic Banking Act I am not allowed to disclose information between a bank and its customer.

[29] Whilst that may be so, there was nothing preventing D2 from consenting to this information being released as it would dispel all doubts as to whether D2 at the relevant period had the capacity to procure KFH to issue the

necessary bank guarantee. This was uncomfortably not forthcoming from D2. D2 could also have called the relevant officer to come to court to testify on what it said it could enjoy during the relevant period ie the increased bank guarantee facility of RM10m but chose not to.

[30] Section 34 of the Islamic Banking Act 1983 is reproduced below to show that banking secrecy could be waived by the customer itself and more so when the information when disclosed would vindicate its position:

> 34 Banking secrecy
>
> (1) Except as provided in sections 31 and 32, nothing in this Act shall authorize the Minister to direct the Central Bank, or shall authorize the Central Bank, to enquire specifically into the affairs of any individual customer of any Islamic bank and any incidental information relating to the affairs of the individual customer obtained by the Central Bank in the course of an inspection or investigation made by the Central Bank under the provisions of this Act shall be secret between the Central Bank and that bank.
>
> (2) Nothing in this section shall be deemed to limit any powers conferred upon the High Court or a Judge thereof by the Banker's Books (Evidence) Act 1949 (Act 33) or to prohibit obedience to an order made under that Act.
>
> (3) Except with the consent of the Central Bank in writing and to the extent specified therein, no officer of any Islamic bank and no person who by reason of his capacity or office has by any means access to the records of that bank, registers or any correspondence or material with regard to the account of any individual customer of that bank shall give, divulge or reveal any information whatsoever regarding the moneys or other relevant particulars of the account of the customer unless —
>
> (a) *the customer or his personal representative gives his permission so to do;*
>
> (b) the customer is declared bankrupt; or
>
> (c) the information is required to assess the creditworthiness of the customer relating to a bona fide commercial transaction or a prospective commercial transaction. (Emphasis added.)

[31] The reluctance and failure of the D2 to call the relevant officer of KFH to disclose its utilisation of the credit facility it had with KFH or its failure to consent to PW5 an officer of KFH to disclose this information attracts the application of s 34 of the Evidence Act 1950 which reads:

> 114 Court may presume existence of certain fact
>
> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

ILLUSTRATIONS

(g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it; …

[32] D2 has nothing to lose but everything to gain by calling the relevant officer of KFH to testify on its capability to procure KFH to issue a bank guarantee of RM10m or to consent to PW5 to give evidence to that effect.

Whether P1 can claim damages against D1 for misrepresentation in the SJVA

[33] The brunt of the claim by P1 against D1 is that of D1 misrepresenting to P1 that D2 had the necessary financing facilities available to procure KFH to issue the bank guarantee of RM10 for the SPA between P2 and Ceria. Though there were some reference to negligence on the part of D1 this was not particularised at all. Neither was there any allegation of fraud nor particularisation of fraudulent misrepresentation. In the light of the above this court would confidently follow the analysis and assessment of the law on remedies for misrepresentation as given by His Lordship Gopal Sri Ram in the Court of Appeal case of *Sim Thong Realty Sdn Bhd v Teh Kim Dar@Tee KIm* [2003] 3 MLJ 460; [2003] 3 CLJ 227 at pp 242 and 243:

We now return to the present appeal to determine the remedies that the defendant is entitled to have.

It is clear that the defendant's pleaded case alleges neither fraud nor negligence. All that the defendant has pleaded is the misrepresentation about the access to the land. Absent a specific and particularised plea of fraud or negligence, the defendant must be taken as asserting a case of innocent misrepresentation in the sense already discussed.

In its pleaded case, the defendant has sought, inter alia, the following relief, namely, (i) rescission (ii) return of the deposit of RM254,204 (iii) interest on the sum of RM254,204 and (iv) damages.

Applying the principles discussed earlier to the facts of the present instance, it is our judgment that the defendant is entitled only to rescission and to the return of the deposit of RM254,204. These are the two items that would replace the defendant in its position — to borrow the words of Bowen LJ — 'so far as regards the rights and obligations which have been created by the contract into which (it) has been induced to enter'. The defendant is not entitled to interest on the sum of RM254,204. To award interest would amount to compensating the defendant for the loss of the use of his money while it was in the plaintiff's hands. This, in our view, would amount to an award of damages. We would add *ex abundanti cautela* that none of the discretionary bars to rescission were raised by the plaintiff. In any event, they do not apply to the facts of the present instance. Neither is there any need for any equitable adjustment under s 37 of the Specific Relief Act 1950 as the defendant did not, on the facts, obtain any advantage or benefit under the voidable transaction.

For the reasons already given, the appeal is allowed. The orders of the High Court are set aside. The plaintiff's claim is dismissed. The following relief is granted to the defendant on its counterclaim: (i) rescission is decreed and the sale and purchase transaction entered into between the plaintiff and the defendant in respect of the subject land is hereby set aside; (ii) judgment is entered for the defendant in the sum of RM254,204. The costs of this appeal and of the proceedings in the High Court must be borne by the plaintiff. The deposit lodged in court shall be refunded to the defendant.

[34] P1 by letter dated 22 July 2008 to D1 at pp 239–240 of bundle D, gave notice to declare that D1 had failed to perform his obligation under cl 7.2 of the SJVA. P1 also gave a 30-day notice from the date of the said letter for D1 to remedy the breach as per the provision in cl 13.2(i) and cl 14.1 of the SJVA. As there was a failure on the part of D1 to remedy the breach, P1 proceeded to rescind the SJVA. The said letter is set out in full below:

Jofa Hilmi Jaafar

(CO-SHAREHOLDER OF JEJAK INCORPORATED)

22nd July 2008

Abdul Hakam Abdul Hadi

Co-Shareholder of Jejak Incorporated

Dear Hakam,

SHAREHOLDER AND JOINT VENTURE AGREEMENT OF JEJAK INC INTIAL FUNDING BY SHAREHOLDERS

I refer to Shareholder and Joint Venture Agreement (SJVA) executed between both of us on 2nd May 2008.

With your consent, Jejak Inc has executed a Sale and Purchase Agreement (SPA) on 21 May 2008 with Ceria Bersama International Sdn Bhd (CBI) for the initial purchase of 5,000 metric tonne of diesel. Which terms among others, requires Jejak Inc (Company) to provide a payment guarantee of RM15.2 million.

You are well aware that, in accordance to Clause 7.2 of the SJVA, not only all funding for the initial purchase of 5,000 metric tonne of diesel shall be provided or arranged by you, the facility shall be executed within 7 days of the SJVA and to affect draw down immediately, and all related cost for the execution of the loan and documentations inclusive of cost of initial procurement of BG shall be advanced by you.

You have brokered and arranged a loan deal for the Company in which the Company had perfected a Loan Agreement with Al-Musyarakah Capital Sdn Bhd (AMC) for a BG facility of RM10 million only. In order to make up for the shortfall of RM5.2 million of the initial funding required, with your as well as AMC's consent and in good faith, I have brokered and arranged an additional RM2 million loan from Global Plus Investment company Limited (and the company perfectly

executed the Funding Agreement). I have also managed to make arrangement with CBI to defer payment of another RM3.2million.

Please be informed that as of today, not only the facility by AMC is providing only RM10 million as suppose to the actual requirement of RM15.2 million, and, the draw down of RM10 million in a form of BG is yet to be affected, and, so much so the Company still unable to have enough fund to purchase the initial 5,000 tonne of diesel; more than the permissible 14 days.

For your information, due to the delay of issuing the payment Guarantee to CBI, they have the right to cancel the SPA or issue the extension of time or varies the purchase price in accordance to the market price. In coming weeks, it is estimated than the initial funding required shall be at least RM7 million if not more in order to purchase the initial 5,000 tonne of diesel.

The delay also had caused the Company a huge interest dued to Global Plus Investment Company Limited and CBI of RM85 thousand. Furthermore, in less than 30 days, should the SPA is cancelled, the Company's liability will increase to at least RM375 thousand for the interests and other penalty charges. May I remind you that as the shareholders of the Company, both of us will have to resume these liabilities.

Furthermore, the Company has also unable to perform the delivery to its buyers. It is estimated that from 26 May 2008 until today, the Company could have delivered 3 shipment of 5,000 metric tonne of diesel. The revenue that could have been collected would be more than USD 18 million with estimated direct gross profit in excess of USD 3.5 million.

I have to declare that you have failed to perform your obligation under Clause 7.2 of the SJVA.

As per the provision in Clause 13.2 (i) and Clause 14.1 of the SJVA, you are hereby given 30 days from the date of this letter to remedy this. Your fast action is of utmost importance.

Regards,

sgd

JOFA HILMI JAAFAR

CO-SHAREHOLDER

JEJAK INCORPORATED

[35] As P1 had rescinded the SJVA with D1 and had taken control of P2 and had also taken over the shares held by D1 through his nominee, I held that there was nothing else that P1 could claim against D1.

[36] I also held that the SJVA was a kind of arrangement entered into by P1 and D2 as agents of P2 and D2 respectively and that the substratum of the contractual relationship between the parties in this dispute was founded on the

letter of offer dated 20 May 2008 and revised letter of offer dated 28 May 2008 entered into between P2 and D2. They are parties to the contract and in the case of a breach here by D2, it is P2 who could maintain a cause of action for breach of contract against D2.

Damages that P2 could claim against D2 for breach caused by D2

[37] In assessing damages for breach of contract and in deciding what heads of damages and what cannot be claimed we do well to remind ourselves of the wisdom distilled by His Lordship Edgar Joseph Jr FCJ in the Federal Court case of *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777; [1995] 1 CLJ 15 at p 20:

> … that part of the judgment of the judge which provides that the vendor shall pay to the purchaser damages to be assessed for wrongful termination of the agreement with costs and that Tan Sri Khoo and the vendor shall pay to the purchaser damages to be assessed for breaches of the undertakings, even though affirmed on appeal, can in no way relieve the purchaser of satisfying the fundamental requirement of having *to prove its loss* (if any) arising from those breaches. To hold otherwise would amount to dispensing with proof of quantum altogether, and that cannot be the law. In so saying, we are reminded of the words of Lord Goddard in *Bonham-Carter v Hyde Park Hotel Ltd* (1948) 64, TLR 177, 178:
>
> … plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, so to speak, throw them at the head of the court, saying: 'This is what I have lost, I ask you to give me these damages'. They have to prove it.

[38] We also remind ourselves of the principles enunciated by His Lordship Edgar Joseph Jr FCJ in *Popular Industries Limited v Eastern Garment Manufacturing Co Sdn Bhd* [1989] 3 MLJ 360; [1990] 2 CLJ (Rep) 635 at p 644:

> In such circumstances, when as here, the buyer is a trader and the seller knew. (*Frank Mott & Co Ltd v Muller & Co (London) Ltd* (1922) 13 LILR 492; *Grebert-Borgenis v J & WNugent* (1885) 15 QBD 85 or ought to have known (*Patrick v British Grain Export Co Ltd* [1927] 2 KB 535, 541) that the buyer bought the goods with a view to resale, the buyer is entitled to his loss of profits on the resale, upon non-delivery of the goods by the seller. (*Household Machines Ltd v Cosmos Experts Ltd* [1947] KB 217, 219; *J Leavy & Co Ltd v George H Hirst & Co Ltd* [1944] KB 24.
>
> I now turn to consider the crucial question: have the plaintiffs proved their claim for damages as alleged or at all?
>
> With regard to this part of the case, I would preface what I have to say by referring to certain well established principles.

It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right.

Thus nominal damages may be awarded in all cases of breach of contract (see *Marzetti v Williams* (1830) 1 B & Ad 415. And, where damage is shown but its amount is not proved sufficiently or at all, the court will usually decree nominal damages. See, for example, *Dixon v Deveridge* (1825) 2 C & P 109 and *Twyman v Knowles* (1853) 13 CB 222.

On the question of the quality of evidence expected of a plaintiff it is well to remember what Devlin J said in *Biggin v Permanite* [1951] 1 KB 422 438 namely, 'where precise evidence is obtainable, the court naturally expects to have it, where it is not, the court must do the best it can'. Nevertheless, it remains true to say that generally 'difficulty of proof does not dispense with the necessity of proof' (see *Aerial Advertising Co v Batchelors Peas* [1938] 2 All ER 788, 796 per Atkinson J). A case which affords an illustration of the requirement of reasonable certainty in this area is *Ashcroft v Curtin* [1971] WLR 1731 (CA) in which the plaintiff claiming for diminution of profits of his one man business failed in his claim even though the evidence pointed to a decrease in the company's profitability due to the injury, the records produced being too rudimentary and the accounts too unreliable to quantify the loss. So also when, as here, the claim is for the difference between the contract price and a clear and undoubted market price, absolute certainty in proving damages is possible and therefore the court will expect precise evidence to be given (see para 345 *McGregor on Damages*, (15th Ed)).

[39] The above principle is subject to the over-arching principle that the non-defaulting party is duty bound to take all reasonable steps to mitigate the loss. This principle is traceable to the dicta of Viscount Haldane LC in *British Westinghouse Electric and Manufacturing Co, Limited v Underground Electric Railways Co of London, Limited* [1912] AC 673 (HL), at p 689:

The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.

[40] By a letter of demand issued by Ceria to P2 dated 30 December 2008 (exh P2, pp 334–335 of bundle D) signed by its Executive Chairman, Encik Alid bin Awang, PW4, Ceria declared that P2 had breached the SPA dated 21 May 2008. Ceria also exercised its right in accordance with cl 15, item 5 of the Addendum 01 dated 18 June 2008 its losses and damages as follows:

1)	2% of the Contract Amount as Penalty Charge for the failure to comply with Clause 7 of the SPA	RM 600,000

2)	Loss of income and potential earning.	RM6,400,000
3)	Bank interest and other charges	RM 320,720
4)	Administrative Cost and other losses.	RM1,000,000
	TOTAL RM8,320,720	

[41] PW4 testified that P2 had paid only RM283,600 and RM 123,360 on 14 October 2008 and 21 October 2008 respectively. PW4 also issued a further reminder by Ceria's letter dated 30 November 2009 to P2 (exh P4 at p 342A-342B of bundle D) as follows:

> Kindly be informed that, we have taken the necessary action in recovering monies owed by you for the breach of the above Sale and Purchase Agreement by liquidating the above mentioned fixed deposit account on 26 October 2009.
>
> We are pleased to inform that, the proceeds amounting to RM2,000,000.00 from the liquidation was utilised to be as a part payment received from you. Hence to date, we had only received the amount of RM2,406,960.00 from you. Enclosed herewith the statement of amount owing by you.
>
> Please make the necessary arrangement to effect the payment of the balance of amount owing of RM5,913,760.00 within 30 days from the date of this letter in order to really avoid any unnecessary outcome.

[42] However to date Ceria has not commenced any legal action to recover the balance. Even assuming that Ceria sues P2, it still has to prove the damage suffered. As and when Ceria does commence such an action for the balance outstanding, P2 is not without its remedy for it can always join D2 as a third party and contest the claim by Ceria as well.

PRONOUNCEMENT

[43] I therefore allowed P2 the claim against D2 of the sum of RM2m only liquidated by Ceria and the sum of RM283,600 and RM 123,360 actually paid by P2 to Ceria as damages.

[44] There is evidence from PW2 that P2 had borrowed a sum of RM2m from Global Plus Investment Co Ltd in Hong Kong for the initial deposit for the purchase of the high speed diesel from Ceria and this is evident in the funding agreement between Global and P2 dated 26 May 2008 at pp 296–300 of bundle D. The financing costs as provided therein was USD78,750 equivalent to RM296,400. D2 was aware of this source of financing from Global and indeed by its letter to Global dated 27 May 2008 at p 62 of bundle D, it undertook the commitment to make payment to Global on behalf of P2. It also confirmed with Global that its position as beneficiary under the SPA

between P2 and Ceria is directly resulting from the primary funding extended to P2 for the SPA. I therefore allowed the claim of P2 against D2 for the financing cost of RM296,400.

[45] I also allowed interest at 4%pa from date of writ to date of realisation.

[46] All other claims therein including the reimbursement of RM150,000 (ranging from mileage claims to salaries, travelling expenses and costs of incorporation of P2) were not allowed as P1 now being in control of P2 stands to gain from having P2 as the vehicle to conduct any future business that he may have. Also the said sum cannot be said to have arisen naturally out of the breach by D2 and in any event it being an advance of expenses incurred by P1 on behalf of P2 it can always be claimed from P2 as repayment of loans from director. I also dismissed the claim of RM8,320,720 and USD3,905,000 claimed under economic loss and loss of potential profit as being too remote and speculative and P2 has not shown that it had tried to mitigate its loss by sourcing for alternative financing from elsewhere.

[47] I also ordered costs of RM30,000 to be paid by D2 to P2.

Second plaintiff's claim allowed and all other claims dismissed.

Reported by Ashok Kumar