Tahan Steel Corp Sdn Bhd v Bank Islam Malaysia Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)-1734 OF 2010
ABU SAMAH, MOHD HISHAMUDIN AND AZIAH ALI JJCA
20 DECEMBER 2011

Banking — Banks and banking business — Islamic banking — Islamic banking Al-Istisnaa' financing facility — Appellant terminated facility when respondent bank refused third drawdown — Whether termination of financing facility was valid and lawful — Whether security documents formed part of financing transaction — Whether respondent ought to be restrained from acting upon security documents — Whether there was insufficient evidence from appellant to prove damages — Counterclaim — Whether failure of respondent to allow third drawdown absolved appellant from liability to pay — Whether respondent entitled to counterclaim balance of sale price

The respondent bank agreed to provide the appellant a banking facility in the sum of RM97 million for the purpose of part-financing the appellant's project to develop and construct a mill plant ('the project'). The financing provided by the respondent took the form of an Islamic financing facility known as Al-Istisnaa'. Under the Al-Istisnaa' financing facility, the respondent purchased the project from the appellant for a sum of RM97m, by way of the Al-Istisnaa' purchase agreement ('APA') and concurrently sold the project back to the appellant at an agreed price of RM185.36 million payable by the appellant by way of 40 quarterly installments, as evidenced by the Al-Istisnaa sale agreement ('the ASA'). In addition to executing the APA and the ASA, the appellant executed nine other documents as security for the Al-Istisnaa' facility (the security documents). The RM97m was to be disbursed to the appellant in three tranches upon the appellant meeting all the conditions contained in the APA. The respondent bank allowed the appellant the first and second drawdowns but refused the drawdown of the third and final tranche. The appellant claimed that the respondent's refusal in releasing the third tranche was a fundamental breach of the APA, which amounted to a repudiation of the respondent's obligations under the financing facility. The appellant wrote to the respondent accepting this repudiation and terminated the facility. The appellant then commenced an action against the respondent wherein it sought, inter alia, a declaration that that the termination of the Al-Istisnaa' financing facility was valid and lawful, discharge of the ASA and security documents, various injunctive reliefs to restrain the respondent from enforcing the ASA and security documents, damages of RM78,247,014.53, general damages, interest and costs. It was the appellant's case that the failure of the project was due to the respondent bank's failure to allow the third drawdown. The respondent

claimed that it was the appellant who had breached the APA by failing to satisfy a condition precedent prescribed by the APA. The respondent thus contended that it was justified in refusing the third drawdown and counterclaimed against the appellant the sum of RM143,590,488.09, which was the whole of the sale price under the ASA less the amount drawndown and payments made by the appellant. The trial judge found that the respondent's refusal of the third drawdown amounted to a breach of the APA and that the appellant had rightly terminated the APA. However, as the appellant had failed to prove its claim, it was awarded a token sum of RM50,000 as damages with costs. The trial judge also dismissed the appellant's prayers for various injunctive reliefs and discharge of the ASA and security documents. The trail judge also allowed the respondent's counterclaim in the sum of RM143,590,488.09 less the undisbursed amount and profits. This was the appellant's appeal against the High Court's quantum of general damages, the dismissal of the rest of its claims and against the award of counterclaim granted in favour of the respondent. The respondent cross appealed against the High Court order, which allowed the undisbursed amount and profits to be deducted.

Held, allowing the appellant's appeal only in respect of the amount of the counterclaim and dismissing the respondent's cross-appeal, with each party to bear its own costs:

(1) (per **Mohd Hishamudin JCA, dissenting in part**) Although the trial judge made the correct finding when she ruled that the respondent had breached the APA and correctly granted the declaration sought by the appellant that the termination of the facility was lawful and valid, she erred by refusing to grant the consequential reliefs prayed for by the appellant. The security documents were executed contemporaneously with the APA and ASA and could not be segregated from them. Thus, the repudiation of APA by the respondent would automatically result in a repudiation of the ASA and the security documents must be treated as one with the APA and ASA. As such, the trial judge ought not to have refused the reliefs on the security documents as prayed for by the appellant. This refusal was inconsistent with her order declaring the appellant's termination of the APA and ASA to be lawful and valid (see paras 35–43).

(2) (per **Mohd Hishamudin JCA, dissenting in part**) After having made a declaratory order on the lawfulness and validity of the termination by the appellant of both the APA and ASA, it would be contradictory or inconsistent for the trial judge to allow the respondent's counterclaim. It is settled principle that once a contract was lawfully terminated the contract came to an end and the parties were absolved from all future obligations (see para 59).

(3) In the present case the trial judge was correct in finding that there was

insufficient evidence from the appellant to prove damages. The trial judge's findings were arrived at based on her appreciation of the evidence and her assessment of the credibility and demeanour of the witnesses. The appellant had not shown that the trial judge's findings on the issue of proof of damages were clearly wrong or that the trial judge had erred in law and principle (see para 96).

(4) Insofar as Islamic financing transactions are concerned, an Al-Istisnaa' financing facility is similar to a BBA financing arrangement, in which a property purchase agreement and a property sale agreement complete the transaction. In a BBA transaction the security documents did not form part of the financing transaction. Similarly, in the present case the security documents were a security arrangement and not part of the APA and the ASA. Hence the trial judge had not erred in refusing to grant the prayers sought for in respect of the security documents (see para 98).

(5) Further, the respondent's rights against the appellant were preserved by the terms of the ASA and there was no reason for the respondent to be restrained from acting upon the security documents (see para 100).

(6) In Islamic financing, profit was different from interest. As it was the respondent who repudiated the APA resulting in its termination, the respondent was only entitled to counterclaim the sums paid to the appellant by way of the first and second drawdown totaling RM58,715,984.84 and the corresponding profits thereon after deducting the amount of repayment, if any. Thus, the appellant's appeal against the amount of counterclaim was allowed and the respondent's appeal on the counterclaim was dismissed (see paras 103–104).

[Bahasa Malaysia summary

Bank responden bersetuju untuk menyediakan kemudahan perbankan berjumlah RM97 juta kepada perayu bagi tujuan membiayai separuh daripada projek perayu untuk membangunkan dan membina sebuah loji ('projek'). Pembiayaan yang disediakan oleh responden berbentuk kemudahan pembiayaan Islam dikenali sebagai Al-Istisnaa'. Di bawah kemudahan pembiayaan Al-Istisnaa', responden membeli projek daripada perayu bagi jumlah RM97 juta, melalui perjanjian belian Al-Istisnaa' ('PBA') dan pada masa yang sama projek tersebut dijual semula kepada perayu pada harga yang telah dipersetujui sebanyak RM185.36 juta dibayar oleh perayu melalui 40 ansuran suku tahun, seperti yang dibuktikan oleh perjanjian jualan Al-Istisnaa' ('PJA'). Sebagai tambahan kepada pemeteraian PBA dan PJA, perayu memeterai sembilan dokumen lainnya sebagai cagaran untuk kemudahan Al-Istisnaa' (dokumen-dokumen cagaran). RM97 juta akan dibayar kepada perayu dalam tiga bahagian setelah perayu memenuhi kesemua syarat yang terkandung di dalam PBA. Bank responden membenarkan perayu membuat pengeluaran buat kali pertama dan kedua tetapi enggan membenarkan

A pengeluaran bahagian ketiga dan terakhir. Perayu mendakwa bahawa keengganan responden dalam melepaskan bahagian ketiga merupakan pelanggaran serius PBA dan bermaksud penolakan kewajipan-kewajipan responden di bawah kemudahan pembiayaan. Perayu menulis kepada responden menerima penolakan dan membatalkan kemudahan. Perayu B kemudiannya memulakan tindakan terhadap responden di mana perayu menuntut, antara lain, satu deklarasi bahawa pembatalan kemudahan pembiayaan terpakai dan sah di sisi undang-undang, pelepasan PJA dan dokumen-dokumen cagaran, pelbagai relief injunksi untuk menahan responden daripada menguatkuasakan PJA dan dokumen-dokumen cagaran, C ganti rugi RM78,247,014.53, ganti rugi umum, faedah dan kos. Kes perayu adalah kegagalan projek tersebut disebabkan kegagalan bank responden untuk membenarkan pengeluaran ketiga. Responden mendakwa bahawa perayu yang melanggar PJA dengan gagal memenuhi syarat terdahulu yang ditetapkan oleh PJA. Oleh itu responden menghujah bahawa keengganannya untuk D pengeluaran ketiga adalah wajar dan menuntut balas terhadap perayu sebanyak RM143,590,488.09, yang merupakan keseluruhan harga belian di bawah PJA selepas menolak jumlah pengeluaran dan bayaran-bayaran yang dibuat oleh perayu. Hakim perbicaraan mendapati bahawa keengganan responden untuk E pengeluaran ketiga merupakan pelanggaran PBA dan bahawa perayu bertindak tepat dengan membatalkannya. Walau bagaimanapun, memandangkan perayu gagal membuktikan tuntutannya, perayu diawardkan sejumlah RM50,000 sebagai tanda ganti rugi dengan kos. Hakim perbicaraan juga menolak rayuan perayu untuk pelbagai relief injunktif dan melepaskan F PJA dan dokumen-dokumen cagaran. Hakim perbicaraan juga membenarkan tuntutan balas responden berjumlah RM143,590,488.09 ditolak jumlah tidak dibayar dan keuntungan. Ini merupakan rayuan perayu terhadap kuantum ganti rugi umum, penolakan kesemua tuntutannya dan terhadap award tuntutan balas yang diberikan kepada responden. Responden membuat rayuan G balas terhadap perintah Mahkamah Tinggi yang membenarkan jumlah tidak dibayar dan keuntungan ditolak.

Diputuskan, membenarkan rayuan perayu hanya berhubung jumlah tuntutan balas dan menolak rayuan balas responden, di mana setiap pihak perlu H menanggung kos sendiri:

(1) (oleh **Mohd Hishamudin HMR, menentang sebahagian**) Meskipun hakim perbicaraan membuat dapatan yang betul apabila beliau memutuskan bahawa responden telah melanggar PBA dan secara tepatnya memberikan deklarasi yang dituntut oleh perayu bahawa I pembatalan kemudahan tersebut adalah sah, beliau terkhilaf apabila beliau enggan memberikan relief-relief berbangkit yang dirayu oleh perayu. Dokumen-dokumen cagaran dimeterai serentak dengan PBA dan PJA dan tidak boleh diasingkan daripada PBA dan PJA. Oleh itu, penolakan PBA oleh responden secara automatik menyebabkan

penolakan PJA dan dokumen-dokumen cagaran perlu diambilkira sebagai bersama dengan PBA dan PJA. Oleh itu, hakim perbicaraan tidak sepatutnya enggan memberikan relief-relief ke atas dokumen-dokumen cagaran seperti yang dirayu oleh perayu. Keengganan ini adalah tidak konsisten dengan perintah beliau yang mengisytiharkan pembatalan PBA dan PJA sebagai sah dan terpakai (lihat perenggan 35–43).

(2) (oleh **Mohd Hishamudin HMR, menentang sebahagian**) Selepas membuat perintah deklarasi mengenai kesahan dan kesahihan pembatalan PBA dan PJA oleh perayu, adalah bercanggah atau tidak selaras bagi hakim perbicaraan untuk membenarkan tuntutan balas responden. Prinsip terpakai ialah sebaik sahaja kontrak yang sah dibatalkan, kontrak tersebut telah berakhir dan pihak-pihak dibebaskan daripada segala kewajipan masa depan (lihat perenggan 59).

(3) Di dalam kes ini, hakim perbicaraan adalah benar apabila mendapati bahawa terdapat keterangan daripada perayu untuk membuktikan ganti rugi adalah tidak mencukupi. Dapatan hakim perbicaraan dibuat berdasarkan penghargaan bukti dan penilaian mengenai kredibiliti dan tingkah laku saksi-saksi. Perayu tidak menunjukkan bahawa dapatan hakim perbicaraan mengenai isu bukti ganti rugi adalah sememangnya salah atau bahawa hakim perbicaraan terkhilaf dari segi undang-undang dan peraturan (lihat perenggan 96).

(4) Sejauh mana transaksi pembiayaan Islam berkenaan, kemudahan pembiayaan Al-Istisnaa' adalah sama dengan pengaturan pembiayaan BBA, di mana perjanjian pembelian harta dan perjanjian penjualan harta melengkapkan transaksi tersebut. Dalam transaksi BBA, dokumen-dokumen cagaran tidak membentuk sebahagian daripada urus niaga pembiayaan. Begitu juga di dalam kes ini, dokumen-dokumen cagaran merupakan pengaturan keselamatan dan bukannya sebahagian daripada PBA dan PJA. Oleh itu hakim perbicaraan tidak terkhilaf apabila enggan memberikan rayuan yang dituntut berhubung dokumen-dokumen cagaran (lihat perenggan 98).

(5) Seterusnya, hak responden terhadap perayu dipelihara oleh terma-terma PJA dan tiada sebab untuk responden dihalang daripada bertindak ke atas dokumen-dokumen (lihat perenggan 100).

(6) Dalam pembiayaan Islam, keuntungan adalah berbeza daripada faedah. Memandangkan responden yang menolak PBA dan mengakibatkan pembatalannya, responden hanya berhak kepada tuntutan balas ke atas jumlah yang dibayar oleh perayu melalui pengeluaran pertama dan kedua berjumlah RM58,715,984.84 dan keuntungan-keuntungan yang diperolehi selepas menolak jumlah pembayaran, sekiranya ada. Oleh itu, rayuan perayu terhadap jumlah tuntutan balas dibenarkan dan rayuan responden ke atas tuntutan balas ditolak (lihat perenggan 103–104).]

Notes

For cases on Islamic banking, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2273–2290.

Cases referred to

Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd [2006] 3 CLJ 1, FC (refd)

Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd and another appeal [1999] 2 MLJ 500, CA (refd)

Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Anor [1993] 2 MLJ 76; [1993] 2 CLJ 495, SC (folld)

Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals [2009] 6 MLJ 839; [2009] 6 CLJ 22, CA (refd)

Dato' Haji Nik Mahmud bin Daud v Bank Islam Malaysia Bhd [1998] 3 MLJ 393; [1998] 3 CLJ 605, CA (not folld)

Glamour Green Sdn Bhd v Ambank Bhd & Ors & another appeal [2007] 3 CLJ 413, CA (refd)

Guan Soon Tin Mining Co v Wong Fook Kum [1969] 1 MLJ 99; [1968] 1 LNS 43, FC (refd)

Heyman v Darwins Ltd [1942] AC 356, HL (refd)

Inglis v Commonwealth Trading Bank of Australia (1971–1972) 126 CLR 161 (refd)

Johnson and another v Agnew [1980] AC 367, HL (refd)

Kesang Leasing Sdn Bhd v Dato' Haji Mat @ Mat Shah bin Ahmad & Ors (No 2) [2009] 2 MLJ 574; [2009] 1 LNS 74, HC (refd)

KPM Khidmat Sdn Bhd v Tey Kim Suie [1994] 2 MLJ 627; [1994] 3 CLJ 1, SC (refd)

Lee Sau Kong v Leow Cheng Chiang [1961] MLJ 17, CA (refd)

Manks v Whiteley [1912] 1 Ch 735, CA (refd)

Nirwana Construction Sdn Bhd v Pengarah Jabatan Kerja Raya Negeri Sembilan Darul Khusus & Anor [2008] 4 MLJ 157, CA (refd)

Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd [1999] 3 MLJ 489, CA (refd)

Tanjung Tiara Sdn Bhd v Paragro Sdn Bhd [2010] 9 CLJ 400, CA (folld)

Legislation referred to

Contracts Act 1950 ss 74, 76
Evidence Act 1950 s 65(1)(c)

Appeal from: Civil Suit No D4–22A–48 of 2003 (High Court, Kuala Lumpur)

Harpal Singh Grewal (Jasvinjit Singh with him) (AJ Ariffin, Yeo & Harpal) for the appellant.

Sulaiman Abdullah (Kapt(B) Tajuddin Md Isa, R Thayakugan and Farah Naz Kumar with him) (Md Tajuddin & Co) for the respondent.

Mohd Hishamudin JCA (partially dissenting judgment):

[1] This is an appeal against the decision of the High Court of Kuala Lumpur of 1 June 2010. Before the High Court, the appellant was the plaintiff, and the respondent, the defendant.

[2] There is also a cross-appeal by the respondent on its counterclaim, but only in respect of quantum.

[3] The claim of the appellant/plaintiff against the respondent/defendant before the High Court is for breach of Islamic financing agreements called Al-Istisnaa' agreements, namely, the Al-Istisnaa' purchase agreement ('the APA') and the Al-Istisnaa' sale agreement ('the ASA). The appellant/plaintiff sought before the High Court several declarations, an injunction and general damages.

[4] The respondent/defendant, on its part, denies that it was in breach of the Al-Istisnaa' agreements and made a counterclaim against the appellant/plaintiff for the full payment of the sale price under the ASA, minus the following sums: (1) the sum under the APA that was not released to the appellant/plaintiff; and (2) the sum that had been paid by the appellant/plaintiff (see para 46 of the statement of defence and counterclaim). The net sum claimed under the counterclaim is RM143,590,488.09 (this is the figure as stated in para 48(a) of the statement of defence and counterclaim).

[5] At the conclusion of the trial, the learned trial judge allowed the appellant's/plaintiff's claim — but only partially. First, the learned High Court judge granted the appellant's/plaintiff's prayer for a declaration that the termination by the appellant/plaintiff of the Al-Istisnaa' facility agreements, that is, the APA and the ASA dated 14 May 2001 is lawful and valid. That part of the order of the High Court granting the declaration reads:

> (1) tuntutan oleh Plaintif untuk satu deklarasi bahawa penamatan Perjanjian-Perjanjian Kemudahan Al-lstisnaa' bertarikh 14.5.2001 oleh Plaintif adalah sah dan mengikut undang-undang, diberikan.

[6] Secondly, the High Court awarded the appellant/plaintiff nominal general damages in the sum of RM50,000.

[7] The High Court, however, dismissed the appellant's/plaintiff's prayer for

a declaration that by reason of the lawful and valid termination of the APA and the ASA the respondent/defendant is, as a consequence, not entitled to rely or enforce the securities given by the appellant/plaintiff for the facility agreements (the various security documents eg deeds of assignment, guarantee agreements, debenture, undertaking, are listed in para 33(2) of the statement of claim).

[8] The learned High Court judge also dismissed the appellant's/plaintiff's other consequential claims or reliefs (including a prayer for an injunction to restrain the respondent/defendant from enforcing the securities).

[9] The learned High Court judge, however, allowed the respondent's/defendant's counterclaim that it be paid in full the sale price under the ASA (minus the undisbursed sum under the APA and the sum paid by the appellant/plaintiff), but subject to certain deductions.

THE APPELLANT'S/PLAINTIFF'S APPEAL

[10] The appellant's/plaintiff's appeal is against:

(a) the award of nominal general damages of RM50,000;

(b) the refusal of the High Court to grant consequential reliefs in the form of declarations in respect of the securities;

(c) the refusal of the High Court to grant a consequential relief in the form of an injunction in respect of the securities; and

(d) the allowing of the respondent's/defendant's counterclaim against the appellant/plaintiff for full payment of the sale price under the ASA (but with certain deductions).

THE RESPONDENT'S/DEFENDANT'S CROSS-APPEAL

[11] There is, as said earlier, a cross-appeal by the respondent/defendant against the decision of the learned High Court judge in respect of the respondent's/defendant's counterclaim — but only on quantum. In its counterclaim before the High Court, the respondent/defendant claims that it be paid in full the selling price of RM185,360,000 as provided for under the ASA but minus the sums as stated in para 46 of its statement of defence and counterclaim ie the sum under the APA that was not disbursed to the appellant/plaintiff as well as the sum that has been paid to the respondent/defendant; thus arriving at the figure of RM143,590,488.09. The learned High Court judge allowed the respondent's/defendant's counterclaim for this sum of RM143,590,488.09. However, at the same time the learned

judge deducted from this amount the following sums:

(a) profits on the undisbursed sum of RM38,284,064.46 (this is the sum as stated in the sealed order, but in the learned High Court judge's grounds of judgment, the sum is stated as RM30,414,061.05); and

(b) 'the profits (if any) that are unearned at the date of full payment)' (to quote the wordings in the sealed order).

[12] It is important to note, firstly, that the 'profits' in (a) and (b) above are not quantified by the sealed order; secondly, there is no order that the 'profits' in (a) and (b) be assessed by the court; and, thirdly, the learned judge in her grounds of judgment does not explain as to how the 'profits' in (a) and (b) above are to be calculated.

[13] The only complaint of the respondent/defendant in its cross-appeal is that the deductions should not have been made by the learned High Court judge for 'profits' (a) and (b) above (but do note that in the notice of cross-appeal filed by the respondent/defendant the undisbursed sum is stated to be 'RM38,284,075.16'). It is only against these deductions ('profits' (a) and (b)) that the respondent/defendant is cross-appealing.

NO CROSS-APPEAL ON DECLARATION ON THE LAWFULNESS AND VALIDITY OF THE APPELLANT'S/PLAINTIFF'S TERMINATION OF THE APA AND THE ASA

[14] It is important to note that the respondent/defendant is not cross-appealing against the declaration sought by the appellant/plaintiff, and granted by the High Court, to the effect that the appellant's/plaintiff's termination of the two Al-Istisnaa' agreements (ie the APA and the ASA) was lawful and valid. By not cross-appealing against the declaration pertaining to the lawfulness and validity of the termination of the two Al-Istisnaa' agreements (ie the APA and the ASA) by the appellant/plaintiff, the respondent/defendant must be deemed to have accepted the lawfulness and the validity of the termination by the appellant/plaintiff of the APA and the ASA, and the correctness of the Order of the High Court in granting the declaration.

THE FACTS OF THE CASE

[15] The appellant/plaintiff company intended to construct and develop a mill plant ('the project') in Kapar, Klang, to produce hot roll coils. The mill plant then was second of its kind in this country. The appellant/plaintiff expected to complete the construction of the mill plant within two years, and thereafter to commence operation.

[16] For the purpose of the project, the appellant/plaintiff obtained the following financing:

(a) a sum of approximately RM309.62m from its shareholders;

(b) a sum of RM97m from the respondent/defendant bank; and

(c) a sum of USD80m from foreign EXIM banks.

[17] The financing provided by the respondent/defendant bank took the form of an Islamic financing facility known as Al-Istisnaa'.

[18] Under the Al-Istisnaa' financing facility, the respondent/defendant purchased the project from the appellant/plaintiff for a sum of RM97m (hence the APA).

[19] Concurrently, the respondent/defendant sold the project back to the appellant/plaintiff at an agreed price of RM185.36m, payable by the appellant/plaintiff by way of 40 quarterly installments (hence the ASA).

[20] For the purpose of the financing facility, the parties executed the following two agreements:

(a) the Al-Istisnaa' purchase agreement ('the APA'); and

(b) the Al-Istisnaa' sale agreement ('the ASA').

[21] In addition, in order to secure the financing facility, the following documents were executed in favour of the respondent/defendant bank:

(a) a deed of assignment executed by the appellant/plaintiff in favour of the respondent/defendant in respect of the land on which the project is located;

(b) a debenture executed by the appellant/plaintiff in favour of the respondent/defendant;

(c) a deed of assignment of an insurance policy in respect of the project;

(d) a deed of assignment of performance bonds in respect of the project;

(e) a memorandum of deposit of an investment account certificate over a sum of RM1m in favour of the respondent/defendant;

(f) a corporate guarantee executed by a company, Tai E King Sdn Bhd, in favour of the respondent/defendant;

(g) a directors' guarantee by two directors of the appellant/plaintiff, namely, Dato' Tai E King and Tai Hean Leng in favour of the respondent/defendant;

(h) a shareholders' support agreement executed by Tai E King Sdn Bhd; and

(i) a shareholders' undertaking also executed by Tai E King Sdn Bhd.

[22] All the above documents are dated 14 May 2001.

[23] The purchase price under the APA was to be drawdowned in three tranches. To trigger a drawdown, the appellant/plaintiff was required to give the respondent/defendant a notice of drawdown in accordance with the Schedule to the APA.

[24] The first two tranches of RM46,116,596.07 (released on 27 April 2001) and RM12,099,338.77 (released on 29 May 2001) were duly drawndown (see para 8 of the statement of agreed facts), leaving a third tranche of RM38,284,064.46 (this is the figure as stated in the sealed order of the High Court) yet to be disbursed.

[25] The respondent/defendant failed to comply with the terms of the facility by failing to release the third tranche, although it had been duly served with the requisite drawdown notice by the appellant/plaintiff (it is not disputed that the appellant/plaintiff had submitted a drawdown notice in accordance with the Schedule to the APA to the respondent/defendant), and despite several reminders by the latter.

[26] The appellant/plaintiff contends that this failure by the respondent/defendant amounted to a repudiation of the respondent's/defendant's obligations under the financing facility; and by a letter of 26 April 2002 the appellant/plaintiff accepted this repudiation and terminated the facility.

[27] By a letter dated 14 April 2003 the respondent/defendant responded to the appellant's/plaintiff's letter, alleging that it was the latter who had breached the APA by failing to satisfy a condition precedent prescribed by cl 5.1(v) of the APA in that it failed to secure financing from a foreign EXIM bank in the sum of USD80m.

THE APPELLANT'S/PLAINTIFF'S CLAIM

[28] The appellant/plaintiff claims that, by reason of the failure on the part of the respondent/defendant to allow the drawdown of the third tranche, the respondent/defendant had breached both the APA and the ASA, and the appellant/plaintiff was entitled to rescind the APA and the ASA; and hence it seeks, among others, the following relief in prayer (1) of the statement of claim:

(1) A declaration that the termination of the Al-lstisnaa' Facility Agreements dated 14-5-2001 was valid and lawful.

[29] It is also the appellant's/plaintiff's case that by reason of the breach of the APA and the ASA by the respondent/defendant it had suffered heavy losses and is therefore claiming damages.

[30] The respondent/defendant in its defence contends that it was the appellant/plaintiff who had breached the Al-Istisnaa' agreements by failing to meet the condition precedent referred to earlier.

CONTRADICTION IN THE TRIAL JUDGE'S GROUNDS OF JUDGMENT

[31] At the outset, it must be pointed out that the learned trial judge, having made an order granting a declaration to the effect that the appellant's/plaintiff's termination of both the Al-Istisnaa' agreements (ie the APA and the ASA) is lawful and valid, yet in her grounds of judgment appears to have treated only the APA as having been lawfully terminated; in spite of the fact that it is the appellant's/plaintiff's contention that the conduct of the respondent/defendant amounts to an unlawful repudiation and breach of both the APA and the ASA as they are inseparable and are to be treated as one facility agreement. To my mind, and with respect, this approach amounts to self-contradiction on the part of the learned trial judge in her grounds of judgment. She said in her grounds (at para 27):

> Therefore I hold that the Plaintiff had rightly terminated the APA by its letter of 26.4.2002.

[32] Even in that part of her grounds of judgment pertaining to the respondent's/defendant's counterclaim (see para 46 of the grounds of judgment) the learned trial judge does not discuss on the clear and unambiguous ruling and declaratory order that she had made pertaining to the lawfulness and validity of the appellant's/plaintiff's termination of both the APA and ASA. But the fact remains that the sealed order of the High Court does clearly state that the High Court declares that the appellant's/plaintiff's termination of both the APA and the ASA was lawful and valid. With respect, the learned trial judge, in her grounds of judgment, appears to be oblivious to this fact, that is, the declaration that she had made in clear terms.

[33] In my judgment, I accept Dato' Harpal's (learned counsel for the appellant/plaintiff) submission that I should disregard this contradiction in the grounds of judgment of the learned High Court judge as any order this court (ie Court of Appeal) makes must strictly relate to the ruling in the sealed order of the High Court and not on the inconsistent or contradictory position taken by the learned trial judge in her grounds of judgment.

[34] It is of importance to note — as what I have stressed earlier in this judgment — that the respondent/defendant has accepted the High Court Order declaring the appellant's/plaintiff's termination of the APA and the ASA to be lawful and valid and has not filed a cross-appeal against this part of the order.

THE APPELLANT'S/PLAINTIFF'S APPEAL AGAINST THE TRIAL JUDGE'S REFUSAL TO GRANT THE DECLARATION AND INJUNCTION IN RESPECT OF THE SECURITY DOCUMENTS

[35] In my judgment, the learned trial judge made a correct finding when she ruled that the respondent/defendant had breached the APA; and had correctly granted the declaration sought by the appellant/plaintiff that the termination of the APA and the ASA was lawful and valid.

[36] However, having made such a finding and declaration, the learned trial judge refused to declare that the respondent/defendant was not entitled to rely on or enforce the securities and that all the securities be discharged forthwith. She also refused to grant an injunction to restrain the respondent/defendant from enforcing the securities.

[37] It is the submission of the appellant/plaintiff that the learned trial judge had erred; she should have granted the above consequential reliefs as prayed for by the appellant/plaintiff.

[38] With respect, I agree with the submission that the learned trial judge had erred by refusing to grant the consequential reliefs prayed for by the appellant/plaintiff.

[39] It is not disputed that the security documents were executed contemporaneously with the APA and the ASA. Indeed, all these documents were dated the same date.

[40] Furthermore, the recitals to and terms of the security documents all point to the fact that they are all closely related to one another and form part of the very same documents governing the rights and obligations between the parties pertaining to a single financial facility.

[41] Hence the APA cannot be segregated from the ASA; and the security documents cannot be segregated from the APA and the ASA. As such the APA and the ASA must be treated as one facility agreement, such that a repudiation (and breach) of the APA by the respondent/defendant (which is the case here) would automatically result in a repudiation (and breach) of the ASA as well;

and the security documents must be treated as one with the APA and the ASA. In *Glamour Green Sdn Bhd v AmBank Bhd & Ors & another appeal* [2007] 3 CLJ 413, Gopal Sri Ram JCA (as he then was) said:

> [7] It is a settled guiding principle that where in a transaction more than one document or instrument is involved, courts usually construe those documents together. The point was made by Raja Azlan J in *Mohamed Isa & Ors v Abdul Karim & Ors* [1970] 2 MLJ 165 in a language that cannot be rivaled. This is what Raja Azlan J (as His Royal Highness then was) said:
>
> It is a settled rule of construction that where several documents forming part of one transaction are executed contemporaneously, all the documents must be read together as if they were one. This principle was followed in *Idris bin Haji Mohamed Amin v Ng Ah Siew* [1935] MLJ Vol IV 257 …

[42] In *Manks v Whiteley* [1912] 1 Ch 735, Fletcher Mouton LJ said (at pp 754–755):

> But I say it to emphasise the principle that where several deeds form part of one transaction and are contemporaneously executed they have the same effect for all purposes such as are relevant to this case as if they were one deed. Each is executed on the faith of all the others being executed also and is intended to speak only as part of the one transaction and if one is seeking to make equities apply to the parties they must be equities arising out of the transaction as a whole. It is not open to third parties to treat each one of them as a deed representing a separate and independent transaction for the purposes of claiming rights which would only accrue to them if the transaction represented by the selected deed was operative separately. In other words, the principles of equity deal with the substance of things, which in such a case is the whole transaction, and not with unrealities such as the hypothetical operation of one of the deeds by itself without the others.

[43] Applying the above principles, the learned trial judge ought not to have refused the reliefs on the security documents as prayed for by the appellant/plaintiff. This refusal on her part is inconsistent with her order declaring the appellant's/plaintiff's termination of the APA and the ASA to be lawful and valid.

[44] In her grounds of judgment the learned High Court judge takes the position that that the security documents were necessary to secure payments due on the counterclaim (which she had granted) and hence they ought not to be disturbed.

[45] In my judgment, such reasoning is untenable in the light of the fact that the learned High Court judge had already made an order declaring the termination of the APA and the ASA by the appellant/plaintiff to be lawful and

valid. Once the termination of the APA and the ASA is declared lawful and valid, the respondent/defendant ceased to have any rights under the APA and the ASA, and the security documents lose their purpose and should cease to have any legal effect. In other words they should no longer be enforceable by the respondent/defendant.

[46] In my judgment, for the purpose of the issue at hand, the case of *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals* [2009] 6 MLJ 839; [2009] 6 CLJ 22 is irrelevant as the issue in that case is different from the issue in the present case. There, in that case, the sole issue before the Court of Appeal was whether the Bai Bithaman Ajil contract (the BBA contract) was contrary to the religion of Islam. The present case, however, concerns Al-Istisnaa' agreements, and there is no assertion by any party that the Al-Istisnaa' agreements are contrary to the religion of Islam. The remark made by the Court of Appeal at para 20 of its judgment, on the status of the security document (such as a charge or a deed of assignment) vis-a-vis the BBA contract, at best, is merely an obiter dicta, and is not meant to be a statement of a legal principle.

[47] Therefore, the reliefs on the security documents, as prayed for by the appellant/plaintiff, should have been granted.

[48] Accordingly, I am allowing the appellant's/plaintiff's appeal against that part of the decision of the learned High Court judge that disallowed the appellant's/plaintiff's prayer seeking reliefs in respect of the security documents.

THE APPELLANT'S/PLAINTIFF'S APPEAL AGAINST THE AWARD OF NOMINAL GENERAL DAMAGES OF RM50,000

[49] The appellant/plaintiff is appealing against the award of nominal general damages in its favour amounting to RM50,000. Although this award is in favour of the appellant/plaintiff, nevertheless, the appellant/plaintiff is aggrieved by this award on the ground that this sum is manifestly inadequate. It is the contention of the appellant/plaintiff that the award of damages should not have been nominal; it ought to have been substantial.

[50] In the statement of claim, although there is a prayer for general damages (see para 33(10)), there is, however, no prayer that the damages be assessed at a later stage by a separate inquiry (be it by the trial judge or by a registrar); nor did the appellant/plaintiff ask either at the trial or in submission before the High Court that the general damages be assessed at a later stage.

[51] Needless to say that the burden of proof on the issue of quantum lies on the appellant/plaintiff.

[52] In my judgment, the learned trial judge was correct in awarding only nominal general damages of RM50,000 (which, I think, is a generous sum, considering that it is meant to be only nominal). This is because having examined the evidence it is clear to me that the appellant/plaintiff had failed to furnish clear evidence as to the amount of damages that it suffered. It is true that the learned trial judge, in her grounds of judgment, after having quoted what Thomson CJ (as he then was) in *Lee Sau Kong v Leow Cheng Chiang* [1961] MLJ 17 at p 20, said:

> Guided by the same case, though I know that the plaintiff would suffer damages resulting from the defendant's breach, the assessment of damages is virtually impossible.

[53] But to my mind this is an indirect way of saying that she found that the appellant/plaintiff had failed to prove the damages it claimed to have suffered.

[54] However, at this appellate stage the appellant/plaintiff is now urging this court to allow the appeal on general damages, and that the issue of quantum be remitted to the High Court for the general damages to be assessed.

[55] With respect, in my judgment, it is now rather too late in the day to make a request that the matter be send back to the High Court for the quantum of damages to be assessed.

[56] In my view the general rule has always been that the issue of liability and quantum of damages should be determined together once and for all at the trial. The determination of a claim should never be on a staggered or on an installment basis: determine the issue of liability first, and then to have another trial or inquiry to determine the quantum of damages. If the appellant/plaintiff had wanted the issue of quantum of damages to be determined at later stage of the trial, after the issue on liability had been determined first, then, this mode of trial must be pleaded in the statement of claim (which is not the case here), and the appellant/plaintiff must furnish good reason as to why there should be a separate exercise to determine the quantum of damages. And I must add here that a trial court should never easily accede to a request, even if made mutually by the parties (it is not the case in the present case), that the issue of liability and quantum of damages be determined on a staggered/installment basis, except in exceptional circumstances and good reason is given, and the trial judge is notified well in advance prior to the trial of the mutual desire of parties that the issue of quantum should only be determined after the issue of liability had been determined.

[57] With respect, I do not think that *Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd* [2006] 3 CLJ 1, cited by learned counsel for the

appellant/plaintiff establishes any principle of law as to the circumstances as to when an appellate court should order an assessment of damages. In the first place it is not clear from the judgment of the Federal Court as reported as to whether or not there is a prayer in the statement of claim for damages to be assessed at a later stage after liability had been determined. For all we know, there could have been such a prayer. But in our case it is clear that there is no such prayer.

[58] Accordingly, I am dismissing this part of the appellant's/plaintiff's appeal.

THE APPELLANT'S/PLAINTIFF'S APPEAL AGAINST THE AWARD OF DAMAGES IN FAVOUR OF THE RESPONDENT/DEFENDANT IN RESPECT OF ITS COUNTERCLAIM

[59] In my judgment, once the learned trial judge had made an order that the appellant/plaintiff had lawfully and validly terminated the APA as well as the ASA, she must be deemed to have accepted the submission of the appellant/plaintiff that the respondent/defendant bank had unlawfully repudiated *both* the APA and the ASA (and not just the APA). In my judgment, regardless of the inconsistent position taken by the learned trial judge in her grounds of judgment, on the facts, she is correct in law in making a finding, as reflected in the sealed order of the High Court, that the appellant's/plaintiff's termination of both the *al-istisnaa'* agreements, namely, the APA and the ASA, was lawful and valid. Legally, for the reason that I have explained earlier, it would not be logical for the court to hold that although the APA is lawfully and validly terminated yet the ASA is still valid and subsisting. And having made a declaratory order on the lawfulness and validity of the termination by the appellant/plaintiff of both the APA and the ASA, it would be contradictory or inconsistent on the part of the learned trial judge to allow the respondent's/defendant's counterclaim. It is a basic principle of law that a party cannot benefit from its own wrongdoing (*Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd* [1999] 3 ML J 489). Furthermore it is settled principle that once a contract is lawfully terminated the contract comes to an end and parties are absolved from all future obligations (see *Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd and another appeal* [1999] 2 MLJ 500 at p 506).

[60] In allowing the respondent's/defendant's counterclaim, the learned trial judge relied on *Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Anor* [1993] 2 MLJ 76; [1993] 2 CLJ 495. With respect, on the facts of that case I do not think that that case is relevant to the present case. The ruling in that case is based on the peculiar facts of that case. Moreover, the present case concerns an Islamic banking facility where the APA and the ASA are inter-dependant with one another. The appellant/plaintiff would not

have entered into the ASA with the respondent/defendant if not because of the respondent/defendant agreeing to execute the APA; and, conversely, the respondent/defendant bank would not have entered into the APA with the appellant/plaintiff if not because of the appellant/plaintiff agreeing to execute the ASA. In other words, the transaction is not a conventional lending transaction by an ordinary commercial bank.

[61] It is significant to observe from the grounds of judgment of the learned trial judge the following. First, although the learned trial judge allowed the counterclaim yet, with respect, she does not say whether the parties' rights and obligations under the ASA are still subsisting as a separate agreement. She appears to have simply glossed over the issue as to the legal status of the ASA, after having found that the respondent/defendant had unlawfully repudiated the APA. Secondly, the reason given by the learned trial judge in her grounds of judgment for allowing the counterclaim is merely that the appellant/plaintiff had benefitted from the two drawdowns. In the words of the learned trial judge:

> It is quite clear in the present case that the plaintiff benefitted from the agreement from the amount drawn down as earlier discussed. The plaintiff admitted that the amount paid pursuant to the drawdown on the facility was made for and on its behalf, and should be liable to pay back.

[62] In my judgment it is irrelevant that the appellant/plaintiff had 'benefitted' from the two drawdowns under the APA because the respondent's/defendant's claim under the counterclaim is not for the restoration of the sums released under the APA. It is not a claim for restitution. It is a claim in contract for breach of the ASA. It is a claim for full payment of the sale price of RM185,360,000 under the ASA — minus the sum under the third tranche of the APA that was not released to the appellant/plaintiff and any sum that had been paid by the appellant/plaintiff.

[63] Thirdly, with respect, the learned trial judge's understanding as to the basis of the respondent's/defendant's counterclaim appears to be inconsistent, if not confusing. At para 43 of her grounds of judgment, her understanding of the respondent's/defendant's counterclaim is that the counterclaim is based on the APA. She said in her grounds:

> The counterclaim by Defendant
>
> 43. The Defendant is counterclaiming from the Plaintiff for the outstanding balance due and payable under the APA based on the amount disbursed.

[64] However, at a later part of her grounds of judgment, at para 46, the learned trial judge has a different understanding of the

respondent's/defendant's counterclaim. She now says the respondent/defendant is counterclaiming based on the ASA. She said:

> Quantum of the Counterclaim
>
> 46. The Defendant raised issue on the computation of the quantum of the Defendant's counterclaim for failure of the Defendant to take into account unearned profit of the amount not drawn down. The counter claim of the Defendant is based on the sum under the ASA.

[65] There is also the further submission — which I accept — that that part of the order referring to 'the profits (if any) that are unearned at the date of full payment is vague and unenforceable and ought to be set aside.

[66] Accordingly, I am allowing the appellant's/plaintiff's appeal against the High Court's order pertaining to the respondent's/defendant's counterclaim.

[67] However, this is not the end of the matter as far as the appellant's/plaintiff's appeal on the counterclaim goes. For, I do not that in the appellant's/plaintiff's written submission at para 75 it is submitted in the alternative by the appellant/plaintiff that it is prepared to refund the sums disbursed by the respondent/defendant to it (I presume subjecting to deducting any payments that it had made to the respondent/defendant). Therefore, in allowing the appellant's/plaintiff's appeal on the counterclaim I am making an order that the appellant/plaintiff do return to the respondent/defendant the sum of RM58,715,934.84 that had been disbursed to it minus any repayments that it had made to the respondent/defendant.

THE RESPONDENT'S/DEFENDANT'S CROSS-APPEAL ON QUANTUM UNDER ITS COUNTERCLAIM

[68] In the light of my decision above in allowing the appellant's/plaintiff's appeal in respect of the learned trial judge's decision on the respondent's/defendant's counterclaim, I am therefore dismissing the respondent's/defendant's cross-appeal on the quantum in respect of its counterclaim.

[69] I am ordering that each party is to bear its own costs.

Aziah Ali JCA:

INTRODUCTION

[70] This is the majority judgment of the court. My learned brother, A Samah Nordin JCA has seen this judgment in draft, given his input and expressed his agreement with it.

[71] There are two appeals before us, namely, the appellant's appeal and the respondent's cross appeal against the decision of the learned judge in an action brought by the appellant against the respondent. The appellant's primary claim is for a declaration that its termination of the Al-Istisnaa' facility agreement dated 14 May 2001 is valid and lawful. By reason of the said lawful termination, the appellant seeks a further declaration that the respondent is not entitled to rely on or enforce, the following security documents:

(a) the deed of assignment;

(b) the debenture;

(c) the corporate guarantee;

(d) the directors' guarantee;

(e) the memorandum of deposit of investment account certificate executed by the plaintiff in favour of the defendant over RM1,000,000;

(f) the deed of assignment on insurance taken out in respect of the said project;

(g) the deed of assignment of performance bonds taken out in respect of the said project;

(h) the shareholder of support agreement; and

(i) the shareholder's undertaking.

All the abovesaid security documents were dated 14 May 2001.

[72] The appellant also seeks several other reliefs, including:

(a) an injunction restraining the respondent, by itself, its agents, servants or howsoever otherwise from acting on, placing reliance or enforcing the said security documents;

(b) special damages of RM78,247,014.53; and

(c) general damages, interest and costs.

[73] The respondent's counterclaim is for the balance of the sale price in the sum of RM143,590,488.09 and costs.

[74] After a full trial, the learned judge granted the declaration that the appellant's termination of the Al-Istisnaa' agreements was valid and lawful. As for general damages the learned judge only allowed nominal damages of RM50,000 on the ground that the appellant had failed to prove the damages and losses. The learned judge dismissed the rest of the appellant's claims.

[75] As for the counterclaim, the learned judge allowed the respondent's

counterclaim for the balance of the sale price in the sum of RM143,590,488.09 less the profits on the undisbursed amount of RM38,248,064.46 and less the profits (if any) that are unearned at the date of full payment.

[76] The appellant's appeal before us is against the quantum of general damages, the dismissal of the rest of its claims and against the award of counterclaim granted in favour of the respondent.

[77] The respondent's cross-appeal is only against the order of the learned judge allowing a sum of RM38,248,064.46 and the unearned profits (if any) at the date of full payment to be deducted from the balance of sale price of RM143,590,488.09.

BACKGROUND

[78] The appellant and the respondent entered into an Islamic financing arrangement by way of two Al-Istisnaa' agreements, namely the facility agreement, known as the Al-Istisnaa' purchase agreement ('the APA') and the Al-Istisnaa' sale agreement ('the ASA') both dated 15 April 2001. Under the APA, the respondent, at the request of the appellant, agreed to provide a banking facility in the sum of RM97m for the purpose of part-financing the appellant's project to develop and construct a Steckel Hot Strip Mill Plant to produce Hot Rolled Coils ('the project') and to redeem the land on which the Plant was to be constructed. The land was, at the material time, assigned to Public Merchants Bankers Bhd as security for earlier credit facilities.

[79] In accordance with the Al-Istisnaa' principle, the appellant firstly entered into the APA whereby it agreed to sell the project to the respondent and the respondent agreed to purchase the project from the appellant and immediately thereafter the respondent entered into the ASA to sell back the project to the appellant on deferred payment terms.

[80] The APA provides that the beneficial interest in the project shall pass from the appellant to the respondent upon the execution of the APA. The ASA provides that further to the APA, the respondent agrees to sell and the appellant agrees to purchase from the respondent the project at the price of RM185,360,000 ('the sale price') comprising the purchase price together with an agreed profit margin upon terms and conditions contained in the ASA. Similar to the APA, the ASA provides that the beneficial interest in the project shall pass from the respondent to the appellant upon the execution of the ASA.

[81] The RM97m was to be disbursed through the financing payable account ('the FPA') maintained by the respondent and was to be drawndown in

three tranches upon the appellant meeting all the conditions contained in the APA. As security for the Al-Istisnaa' facility the parties executed the abovesaid security documents.

[82] The respondent fully disbursed the RM97m into the FPA. It is not in dispute that out of the RM97m facility, the respondent had allowed the first drawdown of RM46,116,596.07 ('the first tranche') and a second drawdown of RM12,599,338.77 ('the second tranche') totalling RM58,715,984.84.

THE APPELLANT'S CLAIM

[83] The appellant alleges that the respondent had wrongly refused and/or withheld drawdown of the third and final tranche amounting to RM38,784,015.16. Hence the appellant claims that by its refusal in releasing the third tranche, the respondent has committed a fundamental breach of the APA which amounted to a repudiation of the respondent's obligations under the said agreement. The appellant states it had no alternative but to accept the respondent's repudiation of the APA and by letter dated 14 May 2001 terminated the APA (p 1027 of the appeal record Vol 6).

[84] The appellant contends that as a result of the respondent's repudiation of the APA, the appellant is discharged from its obligations and is no longer bound by the APA and the ASA and that the security documents are discharged and/or cancelled. Thus the appellant contends that it is not indebted to the respondent for repayment of the sums that had been drawndown or at all. According to the appellant, despite the respondent's repudiation of the ASA, the latter demanded repayment and threatened to enforce the security documents. It is the appellant's case that the respondent is not entitled to rely or/and enforce the security documents by reason of the termination of the facility agreement due to the fundamental breach of the APA committed by the respondent.

[85] The appellant commenced action against the respondent in the court below seeking, inter alia, the following reliefs:

(a) a declaration that the termination of the Al-Istisnaa' facility agreements dated 14 May 2001 by the appellant was valid and lawful;

(b) a declaration that by reason of the lawful termination of the Al-Istisnaa' facility agreements by the appellant, the respondent is not entitled to rely on or enforce as against the appellant the security documents;

(c) an injunction restraining the respondent by itself, its agents, servants or howsoever otherwise from acting on, placing reliance or enforcing in whatsoever manner the security documents as against the appellants;

(d) a declaration that all the security documents shall forthwith be discharged and be of no effect;

(e) the sum of RM78,247,014.53 representing the loss and damage suffered by the appellant;

(f) an order that the respondent account for all profits earned under the Al-Istisnaa' facility agreements;

(g) an order that the respondent repay to the appellant all such profits earned and paid to the respondent under the Al-Istisnaa' facility agreements upon taking such account;

(h) general damages, interests and costs.

The alternative claim for loss of profit in the sum of RM101,776,000 had been withdrawn.

[86] The sum of RM78,247,014.53 that the appellant claims as loss and damage suffered by the appellant comprise the following items:

Payments made for the redemption of the said Land under the previous facilities provided by Sime Merchant Bank Berhad towards initial Project cost	RM46,116,596.07
Payments made to suppliers and other local contractors	RM12,599,388.77
Payments due and owing to turnkey contractor as a debt (USD5,000,000.00 for cost of services rendered and USD300,000.00 for late payment at the exchange rate of RM3.526 per UAD1.00)	RM18,687,800.00
Cumulative total	RM78,247,014.53

THE RESPONDENT'S COUNTERCLAIM

[87] The respondent on the other hand contends that it was justified in refusing further drawdown of the facilities as the appellant has failed to satisfy a condition precedent under cl 5.1(v) of the APA which is to submit evidence satisfactory to the respondent that the appellant has secured facilities totalling approximately USD80 million from foreign EXIM banks. By way of a counterclaim the respondent claims against the appellant the whole of the sale price under the ASA amounting to RM185,360,000 less the amount that has not been drawndown and payments that had been made by the appellant. Therefore the respondent claims against the appellant the sum of RM143,590,488.09, costs and such other reliefs this court deems just and

appropriate.

FINDINGS BY THE TRIAL JUDGE

[88] The trial judge found that the refusal or withholding by the respondent of the drawdown of the third tranche amounted to a breach of the APA and the learned judge held that the appellant had rightly terminated the APA (see para 27 of the judgment). The respondent has not appealed against this decision.

[89] On the issue of damages, the learned judge found that the appellant has failed to prove its claim for damages. Her Ladyship found that it was virtually impossible to assess damages. Notwithstanding this finding the learned judge acknowledged that the appellant would suffer damage resulting from the respondent's breach. In the circumstances the trial judge allowed the declaratory order in terms of prayer (1) above but awarded a token sum of RM50,000 as damages with costs. The trial judge dismissed the appellant's prayers for various injunctive reliefs and discharge of the ASA and security documents.

[90] In respect of the appellant's claim for specific damages, the trial judge found that the RM46,116,596.07 which was the first tranche was used by the appellant to redeem the said land. Hence the appellant suffered no loss but on the contrary has benefited from the appreciation in the value of the said land. This claim was therefore dismissed. In respect of the appellant's claim for RM12,599,388.77 which was the second tranche drawndown, the trial judge found that there were discrepancies in the appellant's documents and evidence and Her Ladyship found that PW2, the appellant's witness, confirmed that the certification of claims by the appellant's consultant was not tendered in court. Upon consideration of the appellant's evidence the trial judge found that the appellant has failed to satisfactorily account for the non production of primary documents and no evidence was led to show that reasonable effort had been taken by the appellant to come under the exception to s 65(1)(c) of the Evidence Act 1950 to tender secondary evidence (*KPM Khidmat Sdn Bhd v Tey Kim Suie* [1994] 2 MLJ 627; [1994] 3 CLJ 1; *Kesang Leasing Sdn Bhd v Dato' Haji Mat @ Mat Shah bin Ahmad & Ors (No 2)* [2009] 2 MLJ 574; [2009] 1 LNS 74). Thus the trial judge found that this item, even if claimable, was not proven. In respect of the claim for RM18,687,800 (comprising of USD5,000,000 being costs due and owing to turnkey contractor for services rendered and USD300,000 for late payment charges) the trial judge found the evidence of the appellant's witnesses wanting and highly inconsistent and did not appear to be credible. The trial judge found that the appellant has failed to prove this item of loss.

[91] In respect of the respondent's counterclaim for the balance outstanding

under the ASA, the trial judge disagreed with submissions by counsel for the appellant that the respondent's counterclaim ought to be dismissed as the respondent ought not to be permitted to take advantage of its own breach (*Pentadbir Tanah Petaling v Swee Lin Sdn Bhd* [1999] 3 MLJ 489). The learned judge found that in the present case the principle in *Pentadbir Tanah Petaling* did not apply. The learned judge referred to *Bank Bumiputera Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd* [1993] 2 MLJ 76; [1993] 2 CLJ 495 in which despite the bank's breach of the loan agreement, the court allowed the bank's claim for the outstanding balance under the loan agreement. In its judgment the Supreme Court said, inter alia:

> The dismissal of the bank's counterclaim in respect of the sum owing by the first respondent to the bank on the overdraft facility on the ground that the bank was in breach of contract in recalling the overdraft prematurely cannot be justified. The bank's claim for recovery of the loan was entirely a separate matter from the first respondent's claim for damages against the bank.

Accordingly on the basis that the only defence relied on by the appellant was the respondent's breach, the leamed judge allowed the respondent's counterclaim in the sum of RM143,590.488.09 less profits on the amount of RM38,248,064.46 not drawndown and less profits (if any) that are unearned at the date of full payment. Against this decision the respondent has cross appealed.

THE APPEAL

[92] In considering this appeal we take note that the facility agreements under consideration are financial instruments in Islamic banking similar in essence to Bai Bithaman Ajil contract ('BBA contract'). In *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals* [2009] 6 MLJ 839; [2009] 6 CLJ 22, Raus Sharif JCA (as His Lordship then was) said as follows:

> A BBA contract is a financial instrument in Islamic banking … It is used to finance bank's customers to purchase and own properties or assets. It involves two distinct contracts, one a property purchase agreement and also a property sale agreement
>
> … BBA contract is in fact a trade transaction. It is a transaction between the customer and the bank. In such a transaction, there is a purchase agreement and a separate sale agreement between the customer and the bank.

On the question of what law applies His Lordship said:

> the law applicable to BBA contracts is no different from the law applicable to loan given under the conventional banking. The law is the law of contract and the same principle should be applied …

A DAMAGES

[93] Before us learned counsel for the appellant Dato' Harpal Singh Grewal submits that the learned judge erred in that, having found that the respondent was in breach, the learned judge ought to have made consequential orders including a date be set for an inquiry of damages before the High Court (*Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd* [2006] 3 CLJ 1). Counsel submits that the respondent's breach led to delay and suspension of the project. It is submitted that the learned judge has misdirected herself in concluding that damages is difficult to assess as difficulty in assessing damages is not a ground for refusing to make an award for general damages (*Nirwana Construction Sdn Bhd v Pengarah Jabatan Kerja Raya Negeri Sembilan Darul Khusus & Anor* [2008] 4 MLJ 157).

[94] Learned counsel for the respondent Hj Sulaiman Abdullah submits that ss 74 and 76 of the Contracts Act 1950 requires proof of damage. Counsel submits that the leamed judge has not erred in her findings that consequent to the breach by the respondent the appellant's remedy is in damages, but having considered the evidence Her Ladyship found insufficient proof. In the circumstances no order on damages could be made. Counsel further submits that in awarding nominal damages the learned judge has awarded more than what the appellant is entitled to.

[95] In respect of claims for damages, we agree with the learned judge that the burden is on the appellant to prove the damages claimed. We need only refer to the judgment of Ong Hock Thye FJ in the case of *Guan Soon Tin Mining Co v Wong Fook Kum* [1969] 1 MLJ 99; [1968] 1 LNS 43 wherein His Lordship said, inter alia, as follows:

> The respondent, as plaintiff, of course had to discharge the burden of proving both the fact and the amount of damages before he could recover. Where he succeeded in proving neither fact nor amount of damage he must lose the action or, if a right was infringed, he would recover only nominal damages. Where he succeeded in proving the fact of damage, but not its amount, he would again be entitled to an award of nominal damages only. This statement of the law is concisely stated in *Mayne & McGregor on Damages* (12th Ed), para 174. For its practical application I would quote Lord Goddard CJ in *Bonham-Carter v Hyde Park Hotel Ltd* (1948) 64 TLR 177 at p 178:
>
> The 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 and 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.

The case of *Mae Perkayuan* cited by the learned judge is essentially a claim for damages for breach of contract to lend money. The developer's claim for loss of

profit was allowed upon evidence given by the quantity surveyor of the project whose calculations showed that the respondent would make a profit of RM5.3m. However the claim for re-imbursement of damages paid to third party was disallowed since there was no evidence adduced from the third parties concerned. Therefore the trial judge's award of RM1,774,834.50 was set aside as the court found that this claim had not been properly substantiated. Despite the breach committed by the bank, the court allowed the bank's claim for outstanding balance under the loan agreement.

[96] In the present case we find that the learned trial judge has considered ss 74 and 76 of the Contracts Act 1950. The learned judge has considered each item of loss and damage claimed by the appellant (see paras 35 to 40 of the judgment) and the testimonies of the appellant's witnesses and documentary evidence. Having considered the evidence before her, Her Ladyship found no evidence to suggest that failure of the appellant's project could be contributed by the respondent's failure to allow drawdown of the third tranche. The learned judge found discrepancies in the appellant's documents, the certification of claims by the appellant's consultant was not tendered and the evidence of the appellant's witnesses wanting and highly inconsistent and did not appear to be credible. These findings were arrived at based on the learned judge's appreciation of the evidence and her assessment of the credibility and demeanor of the witnesses. A trial judge is a trier of facts and an award of damages made based on findings of facts from evidence adduced at the trial ought not to be disturbed unless it is shown that the findings are clearly wrong or erroneous or that the trial judge had not considered relevant matters or had taken into account irrelevant matters. In the case of *Tanjung Tiara Sdn Bhd v Paragro Sdn Bhd* [2010] 9 CLJ 400 (as cited by the respondent in its written submissions) Low Hop Bing JCA said, inter alia:

> The award of damages by the learned trial judge is primarily based on his finding of facts in the light of the evidence adduced at the trial. In the light of two conflicting versions, he has accepted the evidence adduced for the plaintiff company and rejected the defendant's evidence. As a trier of facts, the learned trial judge is entitled to do so.

We respectfully adopt a similar approach. We find that the appellant has not shown that the trial judge's findings on the issue of proof of damage are clearly wrong or erroneous or that the trial judge has erred in law and principle. We have perused and considered Her Ladyship's judgment and in her judgment the learned judge found that it was virtually impossible to assess damages. We are unable to agree with counsel for the appellant that the learned judge found it difficult to assess damages. Read in its proper perspective it is our considered view that the learned judge found it impossible to assess damages in the context of the evidence adduced or lack thereof. We find that as the learned judge had found that there was insufficient evidence from the appellant to prove damages, the learned judge has not erred in not making consequential orders for an

inquiry of damages.

SECURITY DOCUMENTS

[97] Counsel for the appellant submits that the trial judge ought to have found that the security documents are part and parcel of the facility agreement and cannot be segregated from and must be treated as one (*Glamour Green Sdn Bhd v Ambank Bhd & Ors & another appeal* [2007] 3 CLJ 413; *Manks v Whiteley* [1912] 1 Ch 735). Hence it is submitted that as a result of the termination of the facility agreement by the appellant, the security documents are therefore of no effect and are discharged and/or cancelled. Therefore it is submitted that the trial judge ought to have extended her finding and granted the reliefs prayed for in respect of the security documents. With respect we are unable to agree with counsel. In the House of Lords case of *Johnson and another v Agnew* [1980] AC 367 (cited by the respondent in their written submissions) Lord Wilberforce referred to the judgment of Lord Porter in *Heyman v Darwins Ltd* [1942] AC 356 as follows:

> … Strictly speaking, to say that on acceptance of the renunciation of a contract the contract is rescinded is incorrect, in such a case the injured party may accept the renunciation as a breach going to the root of the whole of the consideration. By that acceptance he is discharged from further performance and may bring an action for damages, *but the contract itself is not rescinded.* (Emphasis added.)

[98] Insofar as Islamic financing transaction before us is concerned which is similar to BBA, the property purchase agreement and the property sale agreement complete the transaction. The sale takes place immediately pursuant to the execution of the property purchase agreement and the property sale agreement. However the security documents do not form part of the BBA transaction. His Lordship Raus Sharif succinctly explains in *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals* as follows:

> … in BBA contract, the property purchase agreement and the property sale agreement completed the BBA transaction. But, invariably the bank will require security from the customer for the payment of the bank's selling price. If a separate title to the property has been issued, the customer will create a charge in favour of the bank. If a separate title has not been issued, the customer will execute a deed of assignment by way of security. However, *it should be noted that the charge or assignment is not part of the BBA transaction, it is a security arrangement Even without the charge or assignment the BBA contract will be completed.* (Emphasis added.)

The Al-Istisnaa' financing arrangement is similar to the BBA financing arrangement. There is a property purchase agreement and a property sale agreement. Following what has been said above, we find that the security documents herein are not part of the APA and the ASA. It is a separate security arrangement distinct from the facility agreement. Hence the learned judge has

not erred in her finding that the security documents were for the purpose of securing the amount owed by the appellant to the respondent. Since the security documents are a security arrangement and not part of the financing transaction, we find that the termination of the APA would not result in the security documents being rendered discharged and/or cancelled as contended by counsel for the appellant. Therefore the learned judge has not erred in refusing to grant the prayers sought for in respect of the security documents.

[99] It is trite that the rights, interests and obligations of all parties to the agreement are spelt out in the various sections of the agreement and it is within the four corners of the agreement that such rights, interests and obligations have to be interpreted and determined. Clause 4.2 of the ASA provides as follows:

> 4.2 Continuing Security
>
> The security hereby created is expressly intended to be and shall be a continuing security for all monies whatsoever now or hereafter from time to time owing by the Customer to the Bank until the whole of the Indebtedness shall have been paid to the Bank.

'Indebtedness' as defined under article I of the ASA 'means the Sale Price or any part thereof outstanding and all other monies whatsoever including but not limited to fees, costs (including legal costs on a solicitor client basis), charges and expenses due and payable to the Bank under the Security Documents'. 'Sale Price' is defined under article 1 as 'RM185,360,000.00'.

[100] The respondent's rights against the appellant are preserved by the terms of cl 4.4(b) and (c) of the ASA which provide as follows:

> 4.4 Primary Security
>
> The security constituted under this Clause 4 shall be primary and not merely collateral security and the Bank's rights against the Customer shall not be discharged or impaired by:
>
> > non-fulfilment for any reason (known to the Bank or not) of any of the conditions of any provision of any agreement with the Bank to which the Customer is a party …
> >
> > any other act, event or omission which would or might but for this Clause operate to impair or discharge the Customer's obligations to the Bank or the Bank's rights against the Customer

We find no reason why the respondent ought to be restrained from acting upon the security documents. In *Inglis v Commonwealth Trading Bank of Australia* (1971-1972) 26 CLR 161 cited by the respondent, Walsh J said:

> … it is not in dispute that there was an advance of money which were not repaid. Neither the existence of disputes as to the correct amount of that indebtedness nor the claim already mentioned that, whatever it was, it had been counterbalanced by the claim of the plaintiffs for damages is a ground, in my opinion, for preventing the mortgagee from exercising its rights under the mortgage instrument.

THE RESPONDENT'S CROSS-APPEAL

[101] The learned judge found that the only defence raised by the appellant was the respondent's breach but this did not wholly absolve the appellant from liability to pay. We agree with the learned judge and adopt what the Supreme Court has held in *Mae Perkayuan* that the borrower was liable to pay despite the breach by the bank which in fact caused a total failure of the project. It was held that the bank's claim for the recovery of the loan was an entirely separate matter from the borrower's claim against the bank. In the present case despite the failure of the respondent to allow drawdown of the third tranche, we find that this did not wholly absolve the appellant from liability to pay. The only issue is this: what is the correct amount that the respondent is entitled to counterclaim in view of its repudiation of the APA?

[102] The appellant submits that the respondent should only be granted the actual amount disbursed amounting to RM58,715,934.84. The respondent on the other hand submits that the appellant is liable to pay RM143,590,488.09 being the balance of the sale price less the amount that has not been drawndown and payments that had been made by the appellant. The learned judge ordered that the amount payable on the counterclaim should be less the profits on the amount of RM38,248,064.46 not drawndown and less profits (if any) that are unearned at the date of full payment.

[103] Profit in Islamic financing is different from interest. In *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals* Raus Sharif JCA said at p (MLJ), p 35 (CLJ):

> BBA contract is a sale agreement whereas a conventional loan agreement is a money lending transaction. The profit in BBA contract is different from interest arising in a conventional loan transaction …

The respondent's profit on the sale is included in the sale price and both parties had agreed on the sale price. In *Dato' Hj Nik Mahmud bin Daud v Bank Islam Malaysia Bhd* [1998] 3 MLJ 393; [1998] 3 CLJ 605 the Court of Appeal granted the order for sale for the full outstanding balance. But on the facts before us, we are unable to agree with the decision of the learned judge in allowing the counterclaim in the sum of RM143,590,488.09 less the profits on the undisbursed amount of RM38,248,064.46 and less the profit (if any) that

are unearned at the date of full payment. As it was the respondent who repudiated the APA resulting in its termination, we are of the view that the respondent is only entitled to counterclaim and recover the sums which were paid to the appellant by way of the first drawdown (RM46,116,596.07) and the second drawdown (RM12,599,338.77) totaling RM58,715,984.84 and the corresponding profits thereon after deducting the amount of repayment (if any).

[104] For the reasons adumbrated above, we dismiss the appellant's appeal in respect of the amount of nominal damages and the rest of its claims but we allow the appellant's appeal against the amount of counterclaim in the sum of RM143,590,488.09 and substitute it with an order that the respondent is only entitled to a counterclaim in the sum of RM58,715,984.80 plus the corresponding profit thereon less the amount of repayment (if any). The appeal by the respondent on the counterclaim is dismissed. We order each party to bear its own costs. Deposit is refunded to the appellant.

[105] The appellant's appeal allowed in part; the respondent's cross-appeal dismissed; each party to bear own costs.

Appellant's appeal allowed only in respect of amount of counterclaim and respondent's cross-appeal dismissed, with each party to bear its own costs.

Reported by Kohila Nesan