THE HIGH COURT OF MALAYA AT KUALA LUMPUR

(COMMERCIAL DIVISION)

[CIVIL SUIT NO. D-22NCC-345-2010]

BETWEEN

AL RAJHI BANKING & INVESTMENT CORPORATION (MALAYSIA) BHD
(NO SYARIKAT: 719057-X) **... PLAINTIFF**

AND

1. **HAPSAH FOOD INDUSTRIES SDN BHD**
   (NO SYARIKAT: 341885-T)

2. **NURHIDAYAH NIN**
   (NO K/P: 880316-01-5566)

3. **MD ISHAM MOHD DOM**
   (NO K/P: 860402-23-6471) **... DEFENDANTS**

(CONSOLIDATED ACTION DATED 2/8/2010)

THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(COMMERCIAL DIVISION)
[WRIT SUMMONS NO. D-22NCC-471-2010]

BETWEEN

HAPSAH FOOD INDUSTRIES SDN BHD **... PLAINTIFF**
(NO SYARIKAT: 341885-T)

AND

AL RAJHI BANKING & INVESTMENT CORPORATION (MALAYSIA) BHD
(NO SYARIKAT: 719057-X)) **... DEFENDANT**

GROUNDS OF DECISION

Civil Suit No. D-22NCC-345-2010 (where Al Rajhi Banking & Investment Corporation (Malaysia) Bhd is the Plaintiff) and Civil Suit No. D-22NCC-471-2010 (where Hapsah Food Industries Sdn Bhd is the Plaintiff) have been heard as a consolidated action.

In Suit D-22NCC-345-2010, the 2nd and 3rd Defendants are being sued in their capacity as guarantors.

I am allowing the claim by the Plaintiff Bank in D-22NCC-345-2010 as prayed in its Writ of Summons and Statement of Claim, prayers (i) and (ii) for the adjusted sum of RM4,888,701.43 for the TCF-i facility and RM84,839.17 for the SCF-i facility with costs of RM15,000.00 to be paid by the Defendants to the Plaintiff within one month from the date of this Order, with judgment to be entered accordingly.

As for Civil Suit No. D-22NCC-471-2010, I am dismissing the Plaintiff's (Hapsah Food's) claim with costs of RM50,000.00 to be paid by the Defendant to the Plaintiff within one month from the date of this Order.

I will now proceed to first provide my grounds in relation to Suit No. D-22NCC-345-2010.

This dispute essentially centres on the failure on the part of the 1st Defendant company, Hapsah Food Industries Sdn Bhd ("Hapsah"), to pay the "sale price" of two TCF-i disbursements (identified as TCP CB012 and TCF CB020), and the failure secondly, to pay the amount outstanding in respect of an SCF-i facility. The final amounts for these two facilities due and owing are:

TCF-i	RM4,888,701.43
SCF-i	RM84,839.17

The TCF-1 and SCF-i facilities are Islamic Financing Facilities described as a Trade Commodity Financing-i and Structured Commodity Financing-i. The former is granted for purposes of trade financing as a back-to back financing with a letter of credit facility granted. The latter facility is granted for purposes of working capital requirements. The TCF-i facility is based on Murabaha principles while the SCF works on Al Bai' Bithaman Ajil principles.

I feel an understanding of the basic mechanics of the Islamic facilities granted is crucial in this case to appreciate why, and in what circumstances, the 1st Defendant came to be in default.

It is customary in common law cases to appeal to equitable principles to achieve a legal conclusion that can be regarded as just and proper between the parties. I have to observe in this connection that these equitable principles should be accorded an even more heightened presence since these are Islamic facilities, where considerations of aqad and piety in commercial relations should be regarded as primary considerations.

I have taken note and paid particular attention to the mechanics of the Trade Financing Facility, in particular. It is evident that the essential basis of the financing is to provide trade financing to the 1st Defendant to import rubber products from Indonesian suppliers through two companies identified as Mirfit Manpower Sdn Bhd and Grand Reach Sdn Bhd. The rubber products imported would then be onsold to Mardec Processing Sdn Bhd, which would then pay for the products supplied to it under purchase orders issued by it to Hapsah. Letters of Credit are issued to ensure payments to these Indonesian suppliers. The LC facilities are granted by the Plaintiff bank and these would serve to pay Mirfit and Grand Reach for the shipments. It is then the obligation of the 1st Defendant to ensure payment of the LC amount and the bank's profit portion under express terms and conditions of the allied TCF-i facility, which in effect provides the specific working capital for payment of the LC amounts.

Evidence has been led during the trial that these LCs issued could be "sight" or "usance" LCs, but the TCF-i obligation to reimburse has a contractually determined maximum tenor of 45 days.

All the LCs issued in this case were sight LCs, namely the exporters were guaranteed and paid immediately upon receipt of shipment. Depending on the request made by Hapsah and approved by the banks, reimbursement could be for the maximum tenor of 45 days or earlier.

On the facts of this case, there were altogether 6 LCs issued, all being sight LCs, and 7 TCFs. Two were for a 45 day tenor, the rest for 30 days. (There are 7 TCFs because under the first LC there were two separate shipments.)

In the course of the trial much was said by the Defendants on this issue of tenor, inasmuch as stating and insinuating that the 1st Defendant had no choice and was forced to accept the shorter tenor of 30 days, and because this was so, loss was caused to the 1st Defendant.

It is ironic that the default on the facts here is not in relation to payment for the shorter tenor, but for the maximum tenor of 45 days.

With due respect, this line of attack by the Defendants is a red herring. I can only conclude after hearing the evidence of the witnesses of the Defendants in this connection, in particular the evidence of DW1 and DW2, either they have failed completely to understand the mechanics of the facilities accorded to the 1st Defendant, or they are simply untruthful witnesses. I prefer to be charitable and opt for the former category.

Built into the mechanics of payment are several security arrangements. These facilities are structured facilities in this sense. True enough, the structure is a complicated one because it involves Islamic financing which requires the interposition of a supply and exchange of commodities nominally done, but failure to comprehend

the exact nature of the facilities cannot be a reason not to comply with essential obligations on the part of the 1st Defendant.

I find on the evidence and the law, the 1st Defendant has blatantly disregarded its obligations not to supply to unauthorized third parties which have the effect of jeopardizing the security for payment provided to the Plaintiff in the form of the assignment of contract proceeds.

To ensure payment, the bank has required an assignment of the proceeds of the contract payable by Mardec, out of which 10% would be deducted to be emplaced in an escrow account or sinking fund. This is to be done after deducting the repayment of the financing amount. Any balance remaining will then be credited into the 1st Defendant's operating account. This was done as regards the first repayment amount that was credited into the escrow account. Thereafter the proceeds proved insufficient to maintain the sinking fund obligation and therefore no further amounts remained to transfer to the 1st Defendant's operating account.

The evidence disclosed, and this is admitted by the 1st Defendant, the 1st Defendant was supplying to third party unauthorized customers, namely Lee Rubber and Felda Rubber, for which there did not exist any assignment of contract proceeds.

This was done apparently because to have continued to sell to Mardec would have resulted in losses to the first defendant because of Mardec's stricter requirement on DRC or Dry Rubber Content.

The 1st Defendant then requested for an additional facility to finance its new contracts with Lee Rubber and Felda Rubber, at the time when it was already committing a major breach of its agreement with the Plaintiff.

The effect of the sale to unauthorized third parties is well expressed in the testimony of PW2. (Punitharaja) who said:

> "This assignment is important because it allows the Plaintiff to have control over the cashflow of the 1st Defendant. Basically, any proceeds received will first be utilized to settle any outstanding amount with the Plaintiff whereby any proceeds received are immediately credited into the non-checking proceeds account ie, escrow account to which the Plaintiff has a charge over it ...
>
> Therefore, by selling the goods ie, the rubbers imported, to other parties besides Mardec Processing, the 1st Defendant is actually in default of these clauses, since the 1st Defendant no longer provides a continuing security to the Plaintiff ...
>
> The Plaintiff could only enforce this assignment of proceeds against Mardec Processing, and since the 1st Defendant is not selling any goods to Mardec Processing ... it renders the

> security ineffective since the Plaintiff technically has no proceeds to recover from Mardec Processing."

It is clear on the evidence that the Plaintiff was willing to salvage the situation by requiring the 1st Defendant to provide Notices of Assignments from Lee Rubber and Feldqa Rubber, and a confirmation from Felda Rubber that the institution still owed the 1st Defendant payments for 30 containers as represented to the Plaintiff by Encik Dahlan (DW-1) of the 1st Defendant.

Although Encik Dahlan attempted to argue he had obtained and sent the original Notice of Assignment from Felda to the office of the Plaintiffs solicitors, his version of the facts appears to me improbable, and indeed was flatly contradicted by Encik Yahya Zakaria (PW-7), the solicitor who prepared the draft Notice of Assignment. I have no reason to doubt Encik Zakaria's version of the facts as against the version by Encik Dahlan, who has shown to be an evasive and untruthful witness. In any event, the evidence has now disclosed the Notice of Assignment by Felda Rubber was not signed by an authorized officer, and no payments were in fact made by Felda to the Plaintiff. It was also confirmed by the evidence that the 1st Defendant had supplied only six containers to Felda, not 30 containers. There was also no Notice of Assignment from Lee Rubber at all.

Thus on the evidence and the facts, there was legitimate cause for the Plaintiff to call a default and to terminate the facilities given to the 1st Defendant.

The case pleaded by the Defendant is to this extent highly improbable and has no plausible evidential basis. In short, the 1st Defendant attempts to build a case on a promissory *estoppel* and doctrine of forbearance, namely it was apparently clearly represented to the 1st Defendant that if the 1st Defendant could obtain the Notices of Assignments, the Plaintiff would not insist on its strict legal rights and hold the facilities in abeyance. These assurances were apparently made in the meetings in November and December 2009. Contrary to the 1st Defendant's claim, the evidence disclosed a major case of untruthful misrepresentation on the part of the 1st Defendant. There were no 30 containers supplied to Felda Rubber and the amount owing from Felda Rubber to the 1st Defendant was only in the region of RM800,000.

The 1st Defendant has tried to build up an improbable case based on equitable grounds of promissory *estoppel* and has relied on, *inter alia*, the cases of *Sim Siok Eng v. Government of Malaysia* [1978] 1 MLJ 15 and the leading case of *Boustead Trading v. Arab Malaysia Bank Berhad* [1995] 3 MLJ 331, but it is trite that he who comes to equity must come with clean hands. I am afraid I cannot on the evidence find that the conduct of the first defendant, and its relevant officers, provide an affirmation of this. As recognized in **Boustead Trading** itself (with its reference to the US Supreme Court

decision in *Dickerson v. Colgrove* [1880]), this equitable remedy is always applied so as to promote the ends of justice. The ends of justice will not be served if this court were to accede to the ground advanced by the 1st Defendant. I quote the relevant passage from Boustead Trading *(supra)*:

> "The width of the doctrine has been summed up by Lord Denning in the *Amalgamated Investment* case ([1982] 1 QB 84 at p 122; [1981] 3 All ER 577 at p 584; [1981] 3 WLR 565 at p 575) as follows:
>
> > The doctrine of *estoppel* is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary *estoppel*, *estoppel* by representation of fact, *estoppel* by acquiescence, and promissory *estoppel*. At the same time it has been sought to be limited by a series of *maxims*: *estoppel* is only a rule of evidence, *estoppel* cannot give rise to a cause of action, *estoppel* cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption - either of fact or of law - whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them - neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands. (Emphasis added.)

In *Lim Teng Huan v. Ang Swee Chuan* [1992] 1 WLR 113, an appeal from Brunei Darussalam, the Privy Council said that the decision in the *Taylor Fashions* case:

> ... showed that, in order to found a proprietary *estoppel*, it is not essential that the representor should have been guilty of unconscionable conduct in permitting the representee to assume that he could act as he did: it is enough if, in all the circumstances, it is unconscionable for the representor to go back on the assumption which he permitted the representee to make (per Lord Browne-Wilkinson at p 117).

The essential nature of the doctrine does not appear to be any different in American equity jurisprudence. This is reflected by the following passage in the opinion of the Supreme Court of the United States in *Dickerson v. Colgrove* [1880] 100 US 578 at p 580 (25 L Ed 618) delivered by Swayne J:

> The *estoppel* here relied upon is known as an equitable *estoppel*, or *estoppel* in pals. The law upon the subject is well settled. The vital principle is, that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person, to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied as to promote the ends of justice." (per Gopal Sri Ram J (as his lordship then was) at pp. 345 - 346)

The case of *Sim Siok Eng v. Government of Malaysia, supra,* is distinguishable on the facts, and furthermore this was a building contract case on the doctrine of forbearance. The Appellant in that cased had a judgment against him on two suits for breach of contract. The Appellant had undertaken to build some buildings for the Respondent but did not complete on the completion date. There had been an arrangement for the Respondent to supply certain building materials to the Appellant, as he had found difficulty in getting them. Subsequently the supply was stopped but no adequate notice was given to the appellant. The Federal Court held the evidence indicated the Appellant was clearly induced to believe that certain essential materials would be supplied to him. The Respondent promised to supply the materials to appellant whenever the latter asked for them and a considerable amount of materials were so supplied. Relying on the promise or assurance the Appellant had altered his position and his responsibilities to supply those materials had been suspended or kept in abeyance. For the Respondent to reimpose the contractual provision adequate notice should be given and the notice given was not reasonable. The Respondent was therefore in breach in terminating the contract.

The same degree of certainty in the evidence is simply not present on the facts of this instant case. Hapsah has simply not done its part to comply with the requirements of the Plaintiff. As I have indicated earlier and contrary to the 1st Defendant's claim, the evidence disclosed a major case of untruthful misrepresentation on the part of the 1st Defendant.

Upon a careful evaluation of the evidence, I have to observe that the conduct of the 1st Defendant does not merit any sympathy. I fully agree with Plaintiff's counsel's conclusion that the evidence shows there was never any intention on the part of the 1st Defendant to comply with the conditions required by the Plaintiff to assist it,

Hence, for the reasons adumbrated above, I am dismissing the claim by Hapsah in Suit No. D-22NCC-471-2010 and entering judgment for the Plaintiff Bank against the Defendants in Suit No. D-22NCC-345-2010 as earlier referred to. As for costs, counsel for Al-Rajhi pressed for higher costs to be awarded against Hapsah in D-22NCC-471-2010 in view of the unmeritorious claim instituted for the alleged loss of RM55,000,264.00. Counsel urged upon this Court that a strong signal must be sent that an unmeritorious claim such as this cannot be tolerated. Given the conduct of the Defendants, I have no hesitation to agree with the Plaintiff Bank's counsel. I am therefore awarding costs of RM50,000.00 in Suit No. D-22NCC-471-2010.

Sgd.
(**MOHAMAD ARIFF MD YUSOF**)
JUDGE
HIGH COURT MALAYA KUALA LUMPUR

Dated: 31 JANUARY 2011

COUNSELS

For the plaintiff - Mohd Zaid Daud (Edham with him); M/s Zulpadli & Edham

For the defendants - Azwan Ibrahim (Amir Ismail with him); M/s Azwan & Nadzim