

**Morsima Sdn Bhd**  
**Wong Yep Meng**

... **1<sup>st</sup> Appellant**  
... **2<sup>nd</sup> Appellant**

AND

**Perbadanan Tabung Amanah Islam Brunei**

... **Respondent**

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**(Court of Appeal of Brunei Darussalam)**  
**(Civil Appeal No. 9 of 2008)**

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Power, P; Mortimer and Davies, JJ.A.  
**27<sup>th</sup> November, 2008.**

Leave to appeal – whether judgment final or interlocutory – meaning of final – principles applicable to leave. Summary judgment – principles applicable. Syariah law – relevance to financial facility. Whether summary judgment should be granted for money sum. Leave to amend the defence in reliance on section 75 of the Contracts Act. Whether summary judgment should be granted for declaration and amount to be assessed.

The appeal, or application for leave to appeal, and the orders below.

Mr. Kelvin Lim Boon Khai of Messrs. K. Lim & Company for the Appellants.  
Mr. Lee Yew Choh of Messrs. YC Lee & Lee for the Respondent.

**Cases cited in the Judgment:**

*Banque de Paris des Pays-Bas (Suisse v De Navey)* [1984] 1 Lloyd's Rep21 at 23 per Ackner LJ.  
*Central Securities (Holdings) Bhd v Haron Bin Mohamed Zaid* [1980] 1 MLJ 304.  
*Chew Shau Boon v Choo Fook (M.W.)* [2000] Judgments of the Courts of Brunei Darussalam at 25.  
*Ex parte Bucknell* (1936) 56 CLR 221.  
*Haron Bin Mohamed Zaid v Central Securities (Holdings) Bhd* [1982] 2 MLJ 94.  
*Home and Overseas Insurance Co v Mentor Insurance Co (UK) Ltd (in liquidation)* [1990] 1 W.L.R. 153.  
*Jefferson Ford Pty Ltd v Ford Motor Company of Australia Ltd and ors* (2008) 167 FCR 372.  
*Lee Kuan Yew v Tang Liang Hong and anor* [1997] 3 SLR 489.  
*Niemann v Electronic Industries Ltd* [1978] VR 431.  
*Perbadanan Tabung Amanah Islam Brunei Act*, sections 4 and 14(4).  
*YKH Trading Pte Ltd v Schneider Singapore (Sales and Engineering) Pte Ltd* [1999] Judgments of the Courts of Brunei Darussalam 279.

**Davies, J.A.:**

This is an appeal or an application for leave to appeal from a judgment of the High Court on 8 March 2008 dismissing an appeal against orders for summary judgment made by a Registrar. The orders made by the Registrar were:

1. against the first appellant:-
  - (a) that the first appellant to pay the respondent the sum of B 11,292,451.09; and
  - (b) a declaration that the respondent was thereby entitled to be reimbursed by the first appellant in the sum of B\$6,227,066.10 or such sum as may be incurred by the respondent to complete the "Airport Mall";
2. against the second appellant, that the second appellant pay to the respondent the sum of B\$11,292,451.09;
3. that the first and second appellants pay interest on the sum of B\$11,292,451.09 at the rate of 6% per annum from the date of judgment until full and final settlement;
4. costs of the action to be paid by the first and second appellants to the respondent to be taxed if not agreed.

On appeal to the High Court the learned High Court Judge made the following orders:

1. that the appeal be dismissed;
2. that the orders of the learned Registrar dated 20 November 2007 be affirmed;
3. that the amount incurred by the respondent to complete the "Airport Mall" project be assessed by a Registrar;
4. costs of the appeal to be paid by the first and second appellants to the respondent to be taxed if not agreed.

There was a dispute between the parties in this Court as to whether the appellants needed leave to appeal from the judgment of the learned High Court Judge. If appeal were needed, the appellant sought leave. At the end of argument on this question the Court reserved its decision until after it had heard argument on the substance of the appeal. One reason for this was that, in order to determine whether to grant leave, if leave were necessary, it would be necessary to hear argument on the merits of the appeal.

**Is leave to appeal necessary?**

The judgment of the learned High Court Judge was made under Order 14 of the Supreme Court Rules. Rule 1 (1) thereof provides:

*“(1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.”*

And rule 3 (1) provides:

*“(1) Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.”*

It is of some significance, in our opinion, that, at least so far as the order for the money sum is concerned, rule 3 (1) provides that *“the Court may give...judgment”* and that that is the form of that order.

Section 20 (2)(f) of the Supreme Court Act provides that no appeal shall lie to this Court without the leave of the High Court or this Court from any interlocutory order of judgment. The question then is whether this judgment was interlocutory or final.

In this respect we think that a distinction must be made between the order for payment of a money sum, on the one hand and, on the other, the declaration and the order for assessment by a registrar.

As to the first of these it has been held by this Court that the question whether a judgment is final or interlocutory is whether it finally disposes of the rights of the parties: *YKH Trading Pte Ltd v Schneider Singapore (Sales and Engineering) Pte Ltd* [1999] Judgments of the Courts of Brunei Darussalam 279. This principle was applied to a summary judgment for a money sum by Roberts CJ in *Chew Shau Boon v Choo Fook (M.W.)* [2000] Judgments of the Courts of Brunei Darussalam at 25.

In both Malaysia and Australia a summary judgment for a money sum, at least where the rule is in the form in which it is here, has been held to be a final judgment. See *Central Securities (Holdings) Bhd v Haron Bin Mohamed Zaid* [1980] 1 MLJ 304; *Haron Bin Mohamed Zaid v Central Securities (Holdings) Bhd* [1982] 2 MLJ 94; *Jefferson Ford Pty Ltd v Ford Motor Company of Australia Ltd and ors* (2008) 167 FCR 372.

Accordingly the orders for payment of the money sum and interest thereon are final orders.

The declaration made by the Registrar in paragraph (b) of her orders, had it been limited to a declaration of entitlement in a specific sum, would also have been a final order. However, the addition of the words *“or such sum as may be incurred by the*

*[respondent] to complete the 'Airport Mall'” contemplated that something further was required before judgment could finally be given. And paragraph 3 of the judgment of the learned High Court provides that that sum be assessed by a registrar. We think, therefore, that those orders are interlocutory.*

The result is, therefore, that the appellant has an absolute right to appeal against the orders for payment of a money sum and costs but needs leave to appeal against the orders made in paragraph (b) of the orders made by the Registrar and the order made in paragraph 3 of the judgment of the learned High Court Judge.

### **Should leave to appeal be granted by this Court?**

At the outset on this question Mr Lee for the respondent opposed leave being granted at this stage; that is, after an appeal has been instituted as if leave were not necessary. It is true that, where leave to appeal is necessary, that leave must be sought before the appeal is instituted and leave must ordinarily be sought first from a High Court Judge; and that now the time for appealing has expired. However if, in this case, it is otherwise appropriate to grant leave to appeal, we think it also appropriate to grant any extensions of time necessary to achieve that and to treat the appeal as one instituted after leave granted.

### **The principles relevant to a grant of leave to appeal**

In *Lee Kuan Yew v Tang Liang Hong and anor* [1997] 3 SLR 489 the Chief Justice of Singapore, speaking for the Court of Appeal, said, after referring to some earlier Singapore decisions:

*“Hence, from the cases, it is apparent that there are at least three limbs which can be relied upon when leave to appeal is sought: (1) prima facie case of error; (2) question of general principle decided for the first time; and (3) question of importance upon which further argument and a decision of a higher tribunal would be to the public advantage.”*

Somewhat similarly, in Australia, ordinarily two cumulative tests are applied. The first is whether the decision below is plainly wrong or, at least, attended with sufficient doubt as to warrant its being reconsidered. And the second is whether, if that is so, substantial injustice would result if leave were refused. See, for example *Niemann v Electronic Industries Ltd* [1978] VR 431. However, the degree of doubt required for the first consideration may be less where the question involved is one of general importance; or where, unless leave were granted, the decision of the court below would, in a practical sense, finally determine substantive rights. See, for example, *Ex parte Bucknell* (1936) 56 CLR 221.

### **The application of those principles here**

For the reasons which we will explain in more detail below, we think that the orders for a declaration and for assessment to be made by a registrar are attended with sufficient doubt as to warrant their being reconsidered and, indeed, were wrongly made. If, as we think, they were wrongly made, substantial injustice would result to

the applicant if leave to appeal against those orders were refused. Accordingly we grant leave to appeal against those orders.

We turn out to the question whether the orders under appeal should have been made.

### **The principles applicable on a summary judgment application**

Order 14 is in the same terms as the former equivalent English Order 14 and we think that it should be given the same construction. The phrase “no defence to a claim” in rule 1 of the latter was interpreted as requiring a plaintiff to produce a claim strong enough to leave the Court with “no reasonable doubt that a plaintiff is entitled to judgment”: *Home and Overseas Insurance Co v Mentor Insurance Co (UK) Ltd (in liquidation)* [1990] 1 W.L.R. 153. It is not sufficient for the Court to conclude merely that the defendant was unlikely to succeed in his defence. And the requirement in rule 3 that “the defendant satisfies the Court with respect to the claim.....that there is an issue or question in dispute which ought to be tried” does not require the defendant to show a probability of a good defence on the merits. But for the defendant to raise a triable issue the Court must be satisfied that “there is a fair or reasonable probability of the defendant having a real or bona fide defence”: *Banque de Paris des Pays-Bas (Suisse v De Navey)*[1984] 1 Lloyd’s Rep21 at 23 per Ackner LJ.

### **The application of those principles here**

The appellant advanced four principal reasons why it said summary judgment ought not to have been given on either the money sum or the declaratory relief and consequent order. They were:

1. that the loans made by the two facilities were in breach of Syariah law;
2. that the respondent’s breaches of contract by delaying making payments of drawdown under each of the facilities and by failing to make payment of one drawdown under the first facility were a cause of the appellant's failure to make repayments under each of the facilities in accordance with its obligations;
3. that there is doubt as to the correctness of the amount for which judgment was given;
4. that, on the judgment given, the respondent would obtain repayment of the whole of its loans with interest, the cost of completing the project and, as well, would retain the property for itself; and that this would overcompensate the respondent for its loss.

There were other arguments advanced but none of any substance. We will make brief reference later to such of those as merit further discussion. Of the above arguments, the first can be disposed of immediately. The others require an examination of the relevant facts.

### **A breach of Syariah law?**

The respondent was obliged to operate its banking business, with the advice of the Religious Advisory Committee, in conformity with approved Islamic principles: *Perbadanan Tabung Amanah Islam Brunei Act*, sections 4 and 14(4). The way in which, it seems, this is ordinarily achieved is by a letter of facility or facility agreement, pursuant to which the customer sells property to the financier in terms which include payment of the purchase price by instalments and, on the same day the financier resells the property to the customer at a profit, repayment of the purchase price being payable by instalments. Pursuant to the facility are a number of security documents securing repayment of the facility. That is the form of transactions, in each case, here.

In paragraph 67 of its defence the appellant alleged that the amount sought by the respondent included unearned profits which was contrary to the Syariah principle of “riba”. In one sense it is correct that the claim to be entitled, on default, to the whole of the balance unpaid under both facilities includes unearned profits, that is the amount of the respondent’s profit included instalments which, but for the default, would not by then have fallen due. But that is the amount to which, pursuant to specific terms of the facilities and security documents, the respondent was entitled on default. See clause 10 of the Property Sale Agreement, clause 5 of the Deed of Assignment of Development Agreement and clause 5.1 of Facility B, all referred to below.

The appellant referred this Court, relevantly, to section 17 of Syariah Financial Supervisory Board Order 2006 which provides:

*“17. Where in any proceedings relating to Islamic banking business..... any question arises concerning a syariah matter, the court..... may take into consideration any written directive issued by the Authority pursuant to subsection (1) of section 5 or may refer such a question to the Authority for a ruling from the Board.”*

There is no evidence before us that any written directive of the kind referred to in this section has been issued, nor was any alleged. This leaves two possible questions for consideration under the section:

- (1) does any question concerning a syariah matter arise in this action; and, if it does
- (2) should this Court, in the exercise of its discretion, refer that matter to the Authority for a ruling from the Board.

It was contended that such a question arises in this action: the existence of a fatwa to the effect that a loan for \$1000 with the expectation of repayment of, say, \$1300 would be a sin. However it is plain that the transactions in this case were not of the kind. On the contrary, they consisted of sale and resale. For that reason, we think that no such question arises and that the appellant's arguments in this respect must fail.

Because consideration the other arguments requires some examination of the relevant facts we now turn to those.

### **The relevant facts**

The first appellant was the developer of a project known as “Airport Mall” pursuant to a development agreement with a third-party dated 7 October 1997 as subsequently varied. It sought and obtained finance from the respondent pursuant to a letter of facility (Facility A) dated 11 March 2002 in the sum of B\$10,429,494.02 , the sale price inclusive of profits under a Property Purchase Agreement dated 20 April 2002 and a Property Sale Agreement of the same date. This means of financing was in order to comply with the Syariah principle of Al-Bai’ Bithaman Ajil.

The letter of facility, signed also by the appellant, set out the method of repayment by the appellant, the security to be provided by it and the manner of disbursement of purchase price by the respondent. It also provided that, upon default by the appellant in payment of any monthly instalment, the respondent had the right to claim the full balance of the facility and costs. By the letter of facility the appellant was also obliged to sign the following documents: a property sale agreement, a property purchase agreement, a deed of assignment of development agreement, a deed of substitute power of attorney, a memorandum of deposit of title, a deed of assignment of rental and sale proceeds and a deed of assignment of leasehold rights by way of security.

Pursuant to a further finance facility (Facility B) dated 8 February 2005 the respondent advanced to the appellant a further B\$2,455,984.96. We will return later to a consideration of that facility and its performance.

The Property Purchase Agreement pursuant to Facility A, dated 20 April 2002, which governed the sale by the appellant to the respondent, provided by clause 2(a) that the facility (the moneys to be paid under that Agreement) be deposited by the respondent into a designated account in accordance with drawdown schedules or to pay to such other persons as instructed by the appellant, payments to be made by the respondent upon the receipt of architects certificates certifying progress in respect of which claims for payment have been made. Unfortunately, no drawdown schedules appear to have been annexed to the Property Purchase Agreement, leaving the obligation of the respondent to make repayments in accordance with and upon receipt of claims made pursuant to the architect’s certificates.

The Property Sale Agreement pursuant to Facility A, dated the same date, which governed the resale of the property to the appellant, provided by clause 2 and the second schedule that repayments were to be paid in 12 equal monthly instalments of \$26,902, for a grace period of 12 months, followed by 60 equal monthly instalments of B\$168,444 50. The initial grace period was later extended for a further three months and a further period of grace for payments was granted for a further six months at \$53,804 per month.

The Property Sale Agreement also provided that, in the event of default by the appellant, including default in payment of any instalment, the respondent might, upon the making of any declaration of default, be entitled to the entire sale price, including the full balance thereof, and might exercise any of its securities. It also included a non

waiver provision but limited to any failure by the respondent to exercise or enforce or to delay in enforcing any right, remedy or power.

By a Deed of Assignment of Development Agreement dated 20 April 2002 the appellant assigned to the respondent its rights under the development agreement. By clause 5 of that Deed, upon failure by the appellant to pay any amount drawn and outstanding to the respondent, all amounts drawn and outstanding and all sums payable in respect of the Facility became immediately payable and recoverable by the respondent. All sums payable in respect of the Facility included, by clause 2 of the Property Sale Agreement and the Second Schedule thereto, the whole of the balance of instalments under the Facility. By clause 6 of this Deed of Assignment the respondent, on such default, was entitled to exercise any and all of a number of rights and powers. One of these was to enter into possession of the property, to complete the construction work and to recover from the respondent, on demand, all monies expended in completing the work. A second was a power of sale or lease and to apply the proceeds thereof in satisfaction of its debt and costs but to pay the balance thereof to the appellant.

A Deed of Assignment of Rentals and Sale Proceeds, also dated the same date, was, as appears from its title, an assignment of any rentals or proceeds from the development property in payment of amounts due under the facility.

By a Deed of Assignment of Leasehold Rights, also dated the same day, the appellant assigned its leasehold interest in the development property to the respondent by way of mortgage as security for the payment of the facility sum. On default in payment the respondent had, by clause 5, the following rights and powers: to take possession of the property; to let it; or to sell it.

There is no evidence as to whether a deed of substitute power of attorney or a memorandum of deposit of title were ever signed. However, contained in the appellant's bundle of authorities, without explanation, is a copy of an order made by the Chief Registrar on 9 December 2006 in this action described as being "by consent and without prejudice" requiring the appellant to execute a power of attorney and legal charge over the development property. We assume that these are the above documents. It is unclear whether that order has been complied with.

By a Continuing Guarantee dated 20 April 2002 and a Deed of Assignment of Personal Income dated eighth of February 2005 the second appellant guaranteed performance by the first appellant of the facilities. It is sufficient hereafter to refer to the first appellant as the appellant.

There is a dispute between the parties as to whether there were breaches of the Property Purchase Agreement by the respondent, more importantly as to the effect of any of these, and as to the causes of breaches by the appellant of the Property Sale Agreement.

The breaches of the Property Purchase Agreement which the appellant alleges were committed by the respondent consist of late payment of amounts certified by the architect, and failure to pay one amount so certified, in consequence of which, the

appellant contends, it was financially disadvantaged both in paying its subcontractors and in the making repayments to the respondent.

It does not appear to have been disputed by the respondent in this Court that there was a substantial delay in paying the first drawdown. On 25 January 2002 the architect certified an amount of B\$1,200,000 to be paid. The appellant made a claim for this sum on 23 April 2002; approximately B\$400,000 of this was paid on 21 June 2002; but the balance of approximately \$800,000 was not paid until 11 December 2002 and only after a letter demanding payment was sent.

Thereafter the payments of drawdown were made approximately within one month of the making of the claim until up to and including the claim made on 17 November 2003. After payment of that claim \$300,000 of the facility remained unpaid.

On 12 February 2004 the architect certified the further \$342,940 to be payable and a claim for this sum was made on 13 February 2004. No part of that claim was ever paid. However a certified claim for a further \$126,000 made on 4 March 2005 was paid on 16 March 2005 and a further certified claim for \$12,000 was paid on 22 March 2005. This left \$162,000 of the first facility unpaid. Based on the architect's certificates, the respondent was in default in payment of drawdowns under this Facility from and including 12 February 2004. However the respondent asserts in these proceedings that this was because the appellant had, by then, defaulted in payment of its repayments under the Property Sale Agreement.

The appellant contends that the substantial delay in payment of the first drawdown and the failure to pay the certified claim of 12 February 2004, at least up to the balance of the undrawn facility, namely \$300,000, were breaches by the respondent which caused or contributed to the appellant's breaches in failing to make repayments to the respondent in due time.

The respondent, on its part, contends that the appellant was in breach of its obligations under the Property Sale Agreement in failing to make repayments to the respondent in accordance with that Agreement; and that that breach entitled the respondent to terminate its Facilities. Before turning to these contentions, some further description should be made of this second facility (Facility B) and of subsequent events. It is sufficient to say at this stage that a perusal of the repayment schedule tendered by the respondent in the summary judgment application gives cause to doubt whether, given the grace periods referred to earlier, accepted by the respondent, the appellant was in default in repayment in November 2003 and whether, thereafter it was in default before February or even March 2004.

The agreement for Facility B is dated 8 February 2005. It may be noted that this was some 18 months after the parties each later alleged breach by the other of Facility A and, on the respondent's part, the right to terminate the agreement and call up the whole of the Facility for that breach. The agreement recites Facility A, the appellant's application for additional financing from the respondent and the respondent's approval of that facility. Curiously the recitals did not refer to any breach by either party of Facility A, which might have been expected if the parties had accepted or then contended that any such breaches had occurred. No argument was advanced in this Court that the parties, by entering into Facility B, had waived breaches, each by

the other, of Facility A. The construction of the waiver clause, referred to earlier, may have been relevant to this, at least as to any waiver by the respondent.

The Facility Agreement of 8 February 2005 (Facility B) also recited that the purchase price should be drawn down progressively as agreed between the appellant and the respondent. However there appears to have been no agreement in this respect. It provided for repayment by the appellant by monthly instalments of \$6,668.35 for six months comprising the grace period and thereafter by monthly instalments of \$50,332.81.

Clause 5.1 of that Agreement provided that, upon failure by the appellant to pay, when due, any sum payable in the manner provided by the Agreement, the respondent could exercise all or any of a number of rights. These included by written notice declaring that the indebtedness defined in the Facility and or other moneys payable under the Agreement or securities including monies expended by the respondent to be then due. By clause 2.2 of the facility this indebtedness included the balance of the amounts due under the Facility. Clause 5.1, read with clause 2.2 is also relevant to the appellant's first contention referred to earlier.

Other powers included, by clauses 5 and 6, all powers given in the security documents under Facility A. By clause 7 the respondent was obliged on sale, after payment of its own costs and expenses (which plainly include any costs incurred in completing the project) and its debt, to pay the balance to the appellant. Facility B was in addition to Facility A and the parties' obligations under Facility A continued.

There was a delay of over two months in payment of the second progress claim under Facility B. The claim for \$500,000 was made on 9 May 2005 and was not finally paid until 16 July 2005. The appellant complained about that delay by letters of 2 June 2005 and 19 July 2005, asserting that this was holding up work and jeopardising the project.

The letters of demand from the respondent to the appellants, calling up the whole of the balance of the amount claimed to be owing under both facilities, was dated 18 July 2006. It alleged default in payment under Facility A since August 2003 and since April 2005 under Facility B. The contention of the respondent before this Court, however, was that default by the appellant in repayment under Facility A commenced from November 2003.

The reality, as it appears from the repayment summary, which does not appear to have been substantially disputed, seems to be that, although the appellant defaulted in due payment of its monthly instalments in 2003 and early 2004, once the second grace period under Facility A finished in either March or April 2004, the appellant fell into continuous default in repayments due under the Property Sale Agreement. The impression conveyed by a perusal of that schedule from May 2004 is that monthly repayments of \$168,000, which commenced at that time, were beyond the appellant's financial capacity. No payment at all was made under Facility A from May to October 2004 and thereafter payments were desultory and of amounts less than \$168,000. Thus, commencing, at the latest, from May 2004, the appellant fell into serious and, it seems, irretrievable default.

In the light of this, it is somewhat surprising that the respondent was prepared to enter into a new facility (Facility B) in February 2005. It is, perhaps, unsurprising, that the appellant met none of its repayment obligations under that Facility. However the appellant did complain of delay in repayment of the second drawdown, in letters in June and July 2005 and more generally about delay impeding progress but by then it was, as already mentioned, substantially and irretrievably in default under Facility A and already in default under Facility B.

The learned High Court Judge dealt with the appellant's contention that the respondent's delay in payment of drawdowns caused or contributed to its default under Facility A in the following way. She said first that the appellant was seriously in default under Facility A by April 2005 (she may well have meant April 2004) and under Facility B from the outset. That was plainly correct. The learned trial judge went on to say that the appellant's assertion that the respondent's delay caused it to default had no substance whatsoever, if the history of the accounts were examined from 2002.

No doubt because the appellant had fallen behind in its repayments and, apparently also, in the progress of its development, the appellant "on the instruction of" the respondent, on 4 October 2005, appointed HAHD Engineering to administer the development. Under Facility A the respondent had the right to "be involved in the management of" the appellant.

By January 2006 the respondent had indicated to HAHD that no further disbursements would be paid under either facility because of the appellant's persistent failure to make payments under either facility. By then, according to a letter from HAHD, dated 10 July 2006, it would have taken a further \$3.9 million approximately to finish the balance of the work and a total amount of \$6.2 million to complete that work together with additional and repair work which was required. (The appellant does not accept these sums.) At the same time it wrote to the appellant terminating its agreement with the appellant in view, it said, of the appellant's apparent financial incapacity to finish the project.

It may be added that the appellant was also in breach of clause 5.1 of its Building Agreement with a third party to complete the development within 24 months of 15 April 2002 which was, in turn, a breach of clause 2 of the Deed of Assignment of Development Agreement. However it appears from a letter from the respondent dated 29 May 2006 that, as between the parties, this date may have been extended to 30 June, 2005. In any event, by 2006 it was substantially behind in that development.

By this time the respondent had disbursed over \$300,000 under Facility B but received no repayments thereunder and, since March 2004, only a few desultory payments under Facility A, none in compliance with the appellant's contractual obligations. By this time the appellant was in arrears under Facility A to the extent of more than \$4 million.

It was only after all of these events, on 18 July 2006, that the respondent elected to call up the whole of the balance of the Facilities on the ground of the appellant's default. Whether or not the respondent was correct in its assertion in that letter that it was entitled to do this because of the appellant's default in repayment under Facility A

since August 2003, there can be no doubt that the appellant was in serious default, under both Facilities, long before the date of that letter.

Despite the powers, referred to earlier, under both the Property Sale Agreement and Facility B, there is no evidence before this Court that the respondent has exercised its power to take possession of the development and complete it; nor that it has exercised its power of sale.

It is on those facts that we may now consider the other principal arguments of the appellant.

**That the learned primary judge was wrong in concluding, as she did, that, by 18 July 2006, the respondent's breaches in delaying payment of drawdowns could not have caused in the appellant's failure to make repayments under each of the Facilities in accordance with its obligations?**

We are unable to say that the learned primary judge was wrong in that conclusion. On the contrary, we think that she was correct. It may well be that, in 2003, and even in early 2004, delay in payment of drawdowns under Facility A by the respondent was, in part, a cause of the failure of the appellant to keep up with its repayments. But thereafter and, in particular, from the time that repayments under Facility A had increased to \$168,000, it is, we think, very much more likely to the appellant's failure to meet its commitments was due to a much more general financial impecuniosity on its part. Once the periods of grace under the first facility expired in March or April 2004 it is plain that the appellant was unable to meet its more substantial repayment commitments. This inability was exacerbated by the additional commitment which it undertook under the second facility. And by the time of the respondent's delay in payment of the second drawdown under Facility B the appellant was already substantially and, it seems, irretrievably in default.

Looked at in retrospect, it appears very much more than likely that the appellant was never financially able to pursue this development from its own resources and with the monies advanced by the respondent, and to make its repayment commitments. The repayment schedule, referred to earlier, showed that, once its repayment obligations increased to \$168,000 per month, the appellant was able to make only a few token payments under Facility A and none under Facility B. and it showed that, by the time of the letter of demand, the appellant was more than \$4 million in default in its repayments. We find it impossible to conclude that this long standing state of serious and increasing default since April 2004 could have been caused by the delays in payment by the respondent of drawdowns under Facility A, referred to earlier, which had occurred well before then.

We are therefore satisfied that the learned primary judge was correct in concluding that the appellant's contention in this respect does not give rise to a triable issue in the sense in which we have used that phrase.

*That there a triable issue as to whether the judgment was given for an incorrect sum*

In order to answer this question it is necessary to refer to some further facts. Based on two affidavits of a former accountant for the appellant, the appellant claimed that \$251,540.50 of the amount claimed by the respondent cannot be accounted for. However, amounts totalling this sum are accounted for in a further affidavit filed on half of the respondent. All except three of those amounts were paid to subcontractors; the other three for legal fees and insurance, amounts payable by the appellant. Moreover the expenditure of these sums had been explained in two footnotes to exhibit 18 to the first affidavit of the respondent filed in the summary judgment proceedings, the schedules referred to earlier. That affidavit was filed some considerable time before the hearing of the summary judgment proceedings before the Registrar. Consequently the appellant would have had more than adequate time within which to check whether, as the respondent has affirmed, these amounts were in fact properly paid under the facilities.

It is arguable that the amounts paid by the respondent to subcontractors should not have been paid without the consent of the appellant. As mentioned earlier, the Property Purchase Agreement permitted the respondent to make payments to persons other than the appellant on the instructions of the appellant but not otherwise. However a breach of that provision provides no cause of action or defence to the appellant if, as has not been disputed by it, the amounts were paid to subcontractors to whom the appellant owed those amounts.

In our opinion, therefore, there is no triable issue on this question.

*That, under the judgment given, the respondent was overcompensated*

As the appellant's submission in this respect encompasses the declaratory order, the order for payment by the appellant of \$6,227,066.10 or such sum as may be incurred by the respondent in completing the Airport Mall and the order for assessment of that sum by the Registrar, we need first to consider the propriety of those orders.

No additional evidence was adduced on this question nor was any additional argument advanced. However it is relevant to repeat here that there was no evidence before this Court to the effect that the respondent had ever exercised any of its powers under the facilities or security documents other than its power to call up the balance of the money due.

On those facts, we find it difficult to see how such a declaration -that the respondent is entitled to be reimbursed for the cost of completing the project – may be made before the respondent has exercised its right to complete the project or even its right to enter into possession of the development property. We find it even more difficult to see how an order could be made requiring the appellant to pay the cost of completing the Airport Mall before any of those costs have been incurred, which is the effect of the orders made.

As mentioned earlier, clause 6 of the Deed of Assignment of Development Agreement entitled the respondent, on default in payment by the appellant, to complete the construction work and to recover from the appellant, on demand, all moneys expended thereon; and Facility B applied this right to any default under that Facility.

But it is plain that, until such expenditure is made, no right to reimbursement can arise.

We think, therefore, that the respondent was not entitled to the orders made in paragraphs 1(b) of the orders of the Registrar, affirmed by the learned High Court Judge, or the order made in paragraph 3 of the orders made by the learned High Court Judge. Those orders must be set aside.

However that is not the end of the appellant's submissions on this question. Indeed it is by no means clear that that was part of its submission. The submission seemed to assume, not only that the respondent was already in possession of the property and the work, but that, on the conclusion of the completion of the construction of the Airport Mall, the respondent could retain it for itself or, presumably, retain for itself the proceeds of any sale thereof. None of these assumptions is, upon the evidence before us, correct.

In the first place, there is no evidence that the respondent has gone into possession of the land or works. As already mentioned, on the evidence before this Court, the only power, under the Facilities or security documents, exercised by the respondent was to call up the whole of the money owing under the Facilities.

Secondly the balance of the submission is based on a misunderstanding of the legal effect of the Facilities and securities. The powers, referred to earlier, to complete the construction and to recover from the appellant moneys expended in that endeavour, and to sell or lease the property or any part, are powers given to the respondent in enforcement of its security for payment of the amounts due under the Facilities. If the respondent chooses to exercise any of those powers, it remains liable to pay to the appellant any balance due to it from sale of the property after payment to the respondent of its debt and costs and reimbursement of any additional amount expended by it in completing the development for the purpose of obtaining such payment.

The submission must therefore fail.

### **The appellant's other arguments**

The others of the appellants' arguments which merit further brief discussion are:

*-that it was coerced into appointing HAHD*

The contract between the appellant and HAHD recites otherwise. It provides, in clause 1. a., that the appellant agreed to engage HAHD "on the instruction of" the respondent. There is no credible evidence to the contrary of this. Moreover, under Facility A the respondent had the right to "be involved in the management of" the appellant.

In any event, we have difficulty in seeing where such a submission would lead. By the time HAHD was engaged, all except \$162,000 had been paid by the respondent under Facility A and the first three drawdowns, two of \$500,000 and one of \$244,800 had been paid under Facility B. And by this time the appellant was, as mentioned

earlier, substantially and irretrievably in default. The appointment of a manager for the project, though perhaps made too late, could not possibly have worsened the situation for the appellant.

*-that the respondent gave instructions to cease work on the project*

This seems to be a reference to work ceasing in early 2006 not to an earlier stoppage in 2002. What appears to have happened at this time is that the respondent stopped making payments under either facility and that fact was conveyed to subcontractors. By this time the respondent had been making payments directly to subcontractors as appears from the footnotes referred to earlier.

But again we cannot see that this point leads anywhere. By this time appellant's position was hopeless.

*-reliance on section 52 of the Contracts Act*

That section provides that when a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise. The mere statement of that provision shows that it can have no application here. There were no mutual obligations here which required simultaneous performance.

We turn now to a point which was not pleaded and not argued, either here or below.

**Is it arguable that clause 10 of the Property Sale Agreement in breach of section 75 of the Contracts Act?**

That section provides:

*“When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.”*

A perusal of this provision shows that it is a statutory enactment of the common law with respect penalties.

On considering the terms of the Property Purchase Agreement and of the Property Sale Agreement and the submissions of the parties, this Court thought that it might be arguable that clause 10 of the Property Sale Agreement came within the operation of the above section. Accordingly it heard further argument from the parties as to whether the appellant should be permitted now to rely on this section.

Counsel for the appellant, having submitted that, by paragraph 67 of its defence, the appellant had pleaded sufficient facts to support the application of the above section,

in the alternative sought leave to plead further facts to support a defence under this section.

It is plain that paragraph 67, which pleads that, as the amount sought by the respondent included unearned profit, this was contrary to the Syariah principle of "riba", does not raise a claim under section 75. And it is also arguable, we think, that clause 10 of the Property Sale Agreement is a penalty within section 75. Accordingly we think it appropriate, even at this stage of the matter, to permit the appellant to amend accordingly, provided that the respondent is adequately protected by costs.

However, even if this argument were to succeed, the respondent submitted that it would be entitled to recover the whole of the amounts paid by it to the appellant under the Property Purchase Agreement, less any amounts paid by the appellant to the respondent under the Property Sale Agreement. The appellant submitted to the contrary, arguing that amounts advanced by the respondent under the Property Purchase Agreement included a profit element. We do not think that that is correct. The respondent's profit element is contained solely within the Property Sale Agreement. No question of penalty could, we think, arise to the extent of this net sum.

Mr Lee, for the respondent, submitted that this net sum was \$8,478,076.62 made up as follows:

amount advanced under Facility A	\$7,908,600.50
amount advanced under Facility B	\$1,580,990.15
making a total of	\$9,489,590.65
less payments under Facility A	\$1,011,046.84
payments under Facility B	\$ 467.20

leaving the net amount above.

Mr Lim, for the appellant, did not contest the accuracy of these amounts.

Accordingly we think that the respondent is entitled to summary judgement on that net sum leaving the question whether it is entitled to any great sum to the trial of the action.

## **Orders**

Accordingly we make the following orders:

1. We allow the appeal against judgment for the respondent against the appellants for \$11,292,451.09 with interest at 6% from the date of judgment until full and final settlement.
2. In lieu thereof, we give summary judgment for the respondent against the appellants for \$8,478,076 62 with interest at 6% from the date of judgment until full and final settlement.

3. We set aside the order for a declaration that the respondent be and is hereby entitled to be reimbursed by the first appellant in the sum of \$6,227,066.10 or such other sum as may be incurred by the respondent to complete the "Airport Mall".
4. We set aside the order that the amount incurred by the respondent to complete the "Airport Mall" project be assessed by a registrar.
5. We give leave to the appellants to amend their defence and counterclaim as they may be advised in reliance on section 75 of the Contracts Act.
6. We give leave to the appellants to defend the balance of the action.
7. We make an order nisi that the appellants pay the respondent's costs here and below unless application is made to this Court on or before 10 a.m. on Thursday 27 November 2008.

**Power, P.**

**Mortimer, J.A.**

**Davies, J.A.**