

**IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
WILAYAH PERSEKUTUAN**

[COMMERCIAL DIVISION]

CIVIL SUIT NO: D4-22A-48-2003

Between

TAHAN STEEL CORPORATION SDN BHD

(Company No: 158039-V)

- PLAINTIFF

And

BANK ISLAM MALAYSIA BERHAD

(Company No: 98127-X)

- DEFENDANT

JUDGMENT

1. The parties had been directed to address submission on the following issue to determine if the action before the Court could be disposed off on the basis of it:

“Whether the transaction between the Plaintiff and the Defendant is within the principles of the Syariah

or whether the same offends such Syariah principles.”

2. It is not disputed the transaction between the parties carried the label “Al-Istinaa” and purported to be an Islamic facility that conforms with the Religion of Islam. It is also not disputed the Defendant Bank Islam Malaysia Berhad is a licensed Islamic Bank and as provided by Section 3 of the Islamic Banking Act 1983, it cannot carry on any business that contravenes any element of the Religion of Islam.

3. The Plaintiff Tahan Steel Corporation Sdn Bhd is involved in the erection of a Steckel Hot Strip Mill plant. The Defendant described the transaction between the Plaintiff and the Defendant as follows:

- a. The Defendant purchased a project from the Plaintiff;
- b. The project is defined to be a piece of land and a factory to be built on it;
- c. The price of this purchase is RM97.0 million and an Asset Purchase Agreement was entered into by the parties on 14.05.2001; and
- d. The Plaintiff then sold the project back to the Defendant at a price of RM185,360,000.00 and for this purpose an Asset Sale Agreement was entered into by the parties on 14.05.2001 also.

4. In subsequent submission the chronology was presented by the Defendant as follows:

e. The Letter of Offer in this matter was issued on 10.11.2000 by the Defendant to the Plaintiff:

- i. The Defendant ordered the development of the project at an agreed purchase price of RM97,000,000.00 by purchasing the project from the Plaintiff;
- ii. Thereafter, the Defendant sold the Project back to the Plaintiff at a selling price of RM185,360,000.00;
- iii. The Plaintiff was to settle the selling price by installments;
- iv. The purchase price was disbursed to a financing payable account and was disbursed as a facility to meet the part financing aspect of the project;
- v. A condition precedent to drawdown under the facility included the Plaintiff providing sufficient evidence that it has secured the other required portions of financing for the Project.

- f. The said letter of offer was accepted by the Plaintiff on 15.11.2000.
- g. Subsequently the Defendant and the Plaintiff executed a Al-Istisnaa Purchase Agreement on 15.4.2001 and immediately thereafter executed a Al-Istisnaa Sale Agreement on the same date.
- h. Pursuant to the said Al-Istisnaa Sale Agreement a sum of RM97,000,000.00 was disbursed by the Defendant into an Account Financing Payable for the Plaintiffs benefit on 27.04.2001.
- i. The first release of the facility amounting to RM46,116,596.07, to or for the benefit of the Plaintiff was made on 27.04.2001.
- j. Subsequently a second release was made from the Account Financing Payable to or for the Plaintiff's benefit on 29.05.2001 amounting to RM12,599,338.77.
- k. The Plaintiff in this matter was allowed to pay the Sale Price amounting to RM185,360,000.00 by way of 40 quarterly instalments (a period of 120 months or 10 years) commencing 3 months after the first release of the facility, namely 27.07.2001.

5. It is clear from the submissions the above facts are not disputed.

6. According to the Plaintiff the Defendant was only part financing the Project for the sum of RM97,000,000.00 in that the total cost of the Project was approximately RM760,000,000.00 to be financed by foreign banks, local banks and equity financing. Whether the Defendant's part is only a small part of the Plaintiff's overall project, and whether the balance of the project are financed by non-Islamic facilities are irrelevant to the consideration as to the precise nature of the purported Al-Istisnaa' transaction between the Plaintiff and the Defendant. In this regard, by its letter of 24.4.2000, the Plaintiff had invited the Defendant to provide financing:

"In Conclusion

We have currently secured RM300.0 million syndicated facilities under Sime Merchant Bankers Berhad. We wish to replace and reduce this syndication with RM96.6 million consisting of RM76.6 million term loan and RM20.0 million overdraft facilities.

We, at TSC, would like Bank Islam Malaysia Berhad to consider providing the financing package to our Company for the flat steel product. We would like to invite Bank Islam to be our strategic partner by

offering to Bank Islam an equity stake of up to 5% in TSC.

As such, we would like to thank you for your kind indulgence and we hope to receive a favourable respond (sic) in the near future.”

7. As set out earlier above, the Defendant came back with an offer on 10.11.2000. Dato’ Tai E King accepted the offer on behalf of the Plaintiff. The project that the Defendant was involved in was described in the Al-Istisnaa’ Purchase Agreement and the Al-Istisnaa’ Sale Agreement both of 14.5.2001 as follows:

“By a Contract for Supplies and Services dated the 28th day of February 1999 (hereinafter referred to as “the Contract for Supplies and Services”) between the Customer and the consortium (hereinafter referred to as “the Contractor”) constituted by VOEST-ALPINE Industrieanlagenbau GmbH, a corporation existing under the laws of Austria and with its principal office at Turmstrasse 44, Linz, Austria, VOEST-ALPINE Industrieanlagenbau (Malaysia) Sdn Bhd, a corporation existing under the laws of Malaysia and with its principal office at 6th Floor, 3 Cangkat Raja Chulan, 50200 Kuala Lumpur and an European company as the third member thereof, the

Customer has appointed the Contractor as the turnkey contractor for the erection on that part of the Master Land known as Lot A measuring in area approximately 119.9 acres (hereinafter referred to as "the Project Land") of a Steckel hot strip mill plant (hereinafter referred to as "the Project") upon the terms and subject to the conditions therein contained."

8. "The Customer" was the Plaintiff and "the Bank" referred to the Defendant. Both agreements described the facility that was granted as:

"Accordingly, on the Customer's application, the Bank has agreed to grant to the Customer an Al-Istisnaa' Facility in the sum of Ringgit Malaysia Ninety Seven (hereinafter referred to as "the Facility") firstly to redeem the Project Land from the Present Assignee and then to finance in part the Project."

9. The Al-Istisnaa' Sale Agreement described the Al-Istisnaa' Purchase Agreement as:

"By an Al-Istisnaa' Purchase Agreement of even date (hereinafter referred to as "the Al-Istisnaa' Purchase Agreement"), the Customer sold to the

Bank and the Bank purchased from the Customer the Project at the purchase price of Ringgit Malaysia Ninety Seven Million (RM97,000,000.00) only (hereinafter referred to as “the Purchase Price”) upon the terms and subject to the conditions therein contained and for the purpose of the Bank immediately thereafter selling the Project to the Customer on deferred payment terms.”

10. The main facts in this case are not disputed. It was submitted the issue is whether these facts show that the transaction between the Plaintiff and the Defendant, bearing the label as an *Istisnaa'* transaction, is, in general language, in fact within the principles of the *Syariah* or whether the same offends such *Syariah* principles. In more precise language under the Islamic Banking Act 1983 (Act 276), the question is whether the *Istisnaa'* transaction carried out in this case contains any element not approved in the Religion of Islam.

11. *Syariah* laws, such as the laws of the *muamalat* are not necessarily elements of the Religion of Islam. “Elements” are the essential fundamentals or rudiments. The Civil Court need not concern itself with the differences between the *mazhabs* nor seek to resolve them. The Federal Constitution of Malaysia does not prescribe the *mazhab* of Islam to be followed in Malaysia, leaving it as a matter for the States. A few States prescribe specifically the *mazhab* being followed. Even where a *mazhab* is specified in a State, such as in the case of Trengganu under section 54 of

Enakmen Pentadbiran Hal Ehwal Agama Islam (Terengganu) 1422H/2001M caution must be exercised since the religious authority to determine the elements for example of an *Istisnaa'* facility accords with the Religion of Islam in that State is the *Fatwa Council* and not the Syariah Advisory Council under, for the purposes of this case, the Central Bank of Malaysia Act 1958 (Revised 1994) (Act 519). The rulings of the Syariah Advisory Council under the Act are binding only upon arbitrators when sought, not otherwise, and not upon the Courts.

12. In the absence of binding rulings by relevant Fatwa Councils that an *Istisnaa'* facility as conducted in this case, accords with *mazhab Syafie* or such other *mazhab* of the Religion of Islam as followed in the State within the jurisdiction of the relevant Fatwa Council, the Civil Court must cope by relying on the basis of the general element in which there is consensus, that *riba* is absolutely prohibited but profit from trade or sale is allowed. This is contained in the primary and unquestionable source of elements of the Religion of Islam, the Qur'an. This distinction between trade and a loan and the absolute prohibition of *riba* is the foundation of Islamic financing. For the removal of doubt, financing is not inherently prohibited. It is the increase added upon a loan sum that is absolutely prohibited as *riba*. Thus a *qard al-hasan* loan, being an interest free loan is permissible. On the other hand an increase, normally termed a profit, from a sale or trade is permitted. But caution must be exercised that for it must be borne uppermost in mind the injunction or prohibition of an omniscient and omnipresent *Allah*, not of man, is involved. Hence,

mere craftiness of language, of legalisms or even semantics, or even statutory authority to make definitions, cannot mask the true nature of a transaction from *Allah*.

13. The decision and reasoning as to the elements of the Religion of Islam and their application as set out in **Arab-Malaysian Finance Berhad v. Taman Ihsan Jaya Sdn Bhd & 2 Ors and a Third Party (D4-22A-067-2003)** delivered today are applicable and to be read as part of this judgment.

14. The submission for the Defendant relied upon the definition by Dr. Muhammad Imran Ashraf Usmani in *Meezan Bank's Guide to Islamic Banking* at page 60 as to Istisnaa':

"Istisna' is a sale transaction where a commodity is transacted before it comes into existence. It is an order to a manufacturer to manufacture a specific commodity for the purchaser. The manufacturer uses his own material to manufacture the required goods."

15. The concept of Istisnaa' is not the issue. The issue is that when a party sells a thing to another and then at the same time purchases it back from the party to whom it was sold, it is impossible to hold that the transaction was in fact a bona fide trade and intended as such. The Plaintiff is not the manufacturer but is itself the purchaser from a contractor to build the mill, and in addition needed

the funds to redeem the land. This is self evident from the Al-Istisnaa' Purchase Agreement as well as the Al-Istisnaa' Sale Agreement between the parties. Hence, there are no unobservable intentions or perverse intentions as mentioned by Dr. Wahbah Al-Zuhayli in his Financial Transactions in Islamic Jurisprudence, Volume 1 at page 115 which should be left to *Allah* to judge:

“The Shafi’is and Dawud of the Zahiri school ruled that this contract is valid but disliked. Their proof is that the contract’s cornerstone of valid offer and acceptance is satisfied, and a contract may not in their opinion be invalidated based on unobservable intentions. Thus, the status of the contract is determined for them by its apparent characteristics, while perverse intentions are left for Allah to judge.”

16. The essence of financing a customer’s purchase, be it an Istisnaa' or Al-Bai' Bithaman Ajil financing is that the customer does not yet own the thing, and seeks financing to enable him to do so. The Al-Istisnaa' is similar in concept to the Al-Bai' Bithaman Ajil where payment of the sale price by an agreed number of deferred instalments, except that the Al-Istisnaa' applies in respect of things that is yet to be made or manufactured. The Al-Istisnaa' Purchase Agreement between the Defendant and the Plaintiff shows clearly in this case that the Defendant did not purchase from another but from the Plaintiff. It was evidently to release and make available to the Plaintiff money to be used by the Plaintiff, being the classic financing

transaction. In itself, as financing, it is permissible, but the payments under the Al-Istisnaa' Sale Agreement show an increase of RM88,360,000.00, which in the case of financing, is the prohibited and condemned *riba* in the Religion of Islam. Nothing has been shown that an Istisnaa' transaction in the form and the manner conducted in this case has been approved by any recognised authority.

17. In the event, the Court finds that the purported Al-Istisnaa' transaction between the parties contained an element contrary to the Religion of Islam, and in breach therefore of the Islamic Banking Act 1983. The Al-Istisnaa' Purchase Agreement as well as the Al-Istisnaa' Sale Agreement of 14.5.2001 executed at the same time are, as a purported Islamic financing transaction, therefore illegal and thus void *ab initio*.

18. The Court is satisfied that in this case both parties had proceeded upon the transaction in the belief that it was lawful and binding. Now that it is found to be void, section 66 the Contracts Act 1950 (Revised 1974) (Act 136) is applicable to require that the Plaintiff restores any advantage it had received under the two agreements to the Defendant:

“66. Obligation of person who has received advantage under void agreement, or contract that becomes void.

When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.”

19. In this case, it is not disputed the Defendant had released the sum of RM46,116,596.07 (hereinafter referred to as “the First Tranche Payment”) of the facility of RM97,000,000.00 to facilitate the redemption of the said Land from the existing assignee, and on or about 29.5.2001, the Defendant released a further sum of RM12,099,338.77 (hereinafter referred to as “the Second Tranche Payment”) to the Plaintiff to finance in part the said project. It is part of the Plaintiff’s case that:

“18. On or about August 2001, the Defendant underwent a change in management policies. With this change in policies, the Defendant had undertaken a general review of its banking commitments to its customers, including the Al-Istisnaa’ Facility Agreements with the Plaintiff. To the extent that the Defendant had reviewed the Al-Istisnaa’ Facility Agreements and sought clarification on various aspects of the said Project and financing pre conditions, the Plaintiff fully cooperated and provided the requisite information.

19. The Defendant however in the meantime, wrongfully and without just cause suspended all further drawdown under the Al-Istisnaa' Facility Agreements and instead sought to impose new terms and conditions never intended by the parties under the Al-Istisnaa' Facility Agreements. Wherever possible, the Plaintiff at all times cooperated with the Defendant and provided credible explanations on queries raised by the Defendant. The explanations provided by the Plaintiff in respect of various issues raised were never questioned or doubted by the Defendant and was in fact accepted by the Defendant.

20. The Plaintiff's full cooperation and explanations as aforesaid, the Defendant froze any further drawdown under the Al-Istisnaa' Facility Agreements without just cause and/or lawful excuse. In doing so, the Plaintiff contends and will contend that the Defendant was acting in breach of the Al-Istisnaa' Facility Agreements as follows:-

- a. So long as the conditions precedent for drawdown had been met, the Defendant was contractually obliged to allow for a drawdown from the facility for RM97,000,000.00;

- b. Notwithstanding that the Defendant (by its new management policies) sought a review of the Al-Istisnaa' Facility Agreements, the Defendant was contractually obliged upon all conditions precedent being met, to disburse monies under the facility for RM97,000,000.00;
- c. In refusing further drawdown under the facility for RM97,000,000.00, the Defendant was not fulfilling its contractual obligations to finance in part, the said Project;
- d. The Defendant by its unlawful conduct in not releasing payment, wrongfully caused a suspension of the said Project and created uncertainty over the future of the said Project.

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25. On or about 18.4.2002, the Defendant purported unilaterally to impose four (4) new conditions under the Al-Istisnaa' Facility Agreements as pre conditions for further drawdown under the facility for RM97,000,000.00, stating that

it had approved the request for further drawdown subject to the fulfilment of those conditions. In doing so, the Defendant purported to alter the contractual arrangement between the parties and to rewrite the Al-Istisnaa' Facility Agreements, on terms never intended by the parties thereunder.

.....

26. In doing so and by wrongfully suspending the said Project for more than eight (8) months without just cause and lawful excuse, the Defendant had acted in fundamental breach of the Al-Istisnaa' Facility Agreements. On or about 26.4.2002, the Plaintiff elected and accepted the Defendant's repudiation of the Al-Istisnaa' Facility Agreements.

27. As a result of the Defendant's fundamental breaches as aforesaid, the Plaintiff's contractors and the turnkey contractor have abandoned the said Project. At all material times, the Plaintiff on the other hand, fully serviced the RM97,000,000.00 facility in terms of repayment and interest payments in compliance with the Al-Istisnaa' Facility Agreements, right up to termination of the Al-Istisnaa' Facility Agreements exercised by the Plaintiff.

28. By reason of the Defendant's fundamental breaches as aforesaid, the Plaintiff has suffered loss and damage and has been put to expense.

.....

30. On or about 14.4.2003, the Defendant acting through its solicitors purported to accept the termination of the Al-Istisnaa' Facility Agreements and demand repayment of amounts disbursed under the First and Second Tranche Payments totalling RM58,715,934.84 together with alleged profits to a total sum of RM143,590,488.09.

31. By reason of the fundamental breaches of the Defendant and the loss and damage suffered by the Plaintiff as a result thereof, the Plaintiff contends and will contend that it is not indebted to the Defendant for repayment of the sums as aforesaid or at all as alleged.

32. Notwithstanding that the Al-Istisnaa' Facility Agreements is at an end by acceptance of repudiation by the Plaintiff of the Defendant's fundamental breaches as aforesaid, the Defendant has threatened to enforce the Al-Istisnaa' Facility Agreements against the Plaintiff, apart from demanding repayment, by king to enforce the

Security Documents executed in tandem with the
Allstisnaa' Facility Agreements.

.....”

20. It is evident the finding of the Court affects the basis and course of the Plaintiff's action above. The Court leaves it to the parties to review, in the circumstances, their options in pursuing their action in further case management.

Sgd.

(DATUK ABDUL WAHAB BIN PATAIL)

Judge

High Court of Malaya

Kuala Lumpur

Dated: 18th July, 2008

Solicitors for the Plaintiff:

**MESSRS BODIPALAR
PONNUDURAI NATHAN**

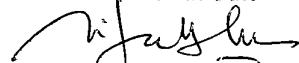
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Salinan Diakui Sah



DATIN TIPAH HJ AHMAD

Setiausaha Kepada

Y.A. Datuk Abdul Wahab bin Petail
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3-9-08