

IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
WILAYAH PERSEKUTUAN

[COMMERCIAL DIVISION]

SUIT NO: D4-22A-145-2003

Antara

ARAB-MALAYSIAN MERCHANT BANK BERHAD
(Company No: 23742-V) - PLAINTIFF

And

SILVER CONCEPT SDN BHD
(Company No: 322560-H) - DEFENDANT

JUDGMENT

1. By an agreement dated 29.03.1996 ("the Facility Agreement"), between the Defendant, Plaintiff as agent and a consortium of banks and financial institution comprising of the Plaintiff itself and Arab-Malaysian Finance Berhad ("the Vendors"), the Plaintiff as arranger and agent and the Vendors agreed to grant to the Defendant a revolving Al-Wujuh facility ("the Revolving Al-Wujuh Facility") to partly

pay the development costs of 2,076 acres 1 rood and 24.52 poles of land in Daerah Ulu Selangor, Negeri Selangor ("the Land") comprising of:-

- a. Al-Bai' Bithaman Ajil facility ("the ABBA Facility") with a sale price of RM96,225,000.00 ("the Sale Price") comprising of a purchase price of RM60,000,000.00 ("the Purchase Price") and a profit element; and
- b. Revolving drawing rights on the account managed by the Plaintiff as agent of the Vendors relating to the Revolving Al-Wujuh Facility ("Marginal Deposit Account") based on the terms and conditions stated in the Al-Wujuh Agreement.

2. The Revolving Al-Wujuh Facility gave the Defendant revolving drawing rights on the Marginal Deposit Account up to a maximum amount of RM60,000,000.00. Under the ABBA Facility, the Plaintiff purchased the Land for RM60,000,000.00 and resold it back to the Defendant with a profit element for RM96,225,000.00, with the Defendant to pay the Sale Price by the specified instalment dates. It was agreed the amounts payable as instalments could be revised or varied at the Plaintiff's discretion so long as such sums in the aggregate do not exceed the Sale Price and that each drawing on the Marginal Deposit Account under the Revolving Al-Wujuh Facility shall be repaid in full on the Instalment Payment Dates as provided for in Facility Agreement.

3. It is also a term of the Facility Agreement that should the Defendant default in any of the payment(s) when due, the Plaintiff can and if so instructed by the Vendors will by written notice to the Defendant:-

- a. Declare the unpaid Sale Price and all Drawings (as defined in the Facility Agreement) to be immediately due and payable together with any sum then owed by the Defendant under the Transaction Documents (as defined in the Facility Agreement); and/or
- b. Declare that the Purchase Price shall cease to be due and payable, whereupon the same shall be cancelled and the Vendor's obligations in respect thereof shall be discharged; and
- c. Declare the Al-Bai' Facility and drawings rights on the Marginal Deposit Account to be cancelled whereupon both will be cancelled.

4. It was submitted for the Defendant that the lands were charged to the Plaintiff pursuant to the terms of the Al-Bai' Facility and the Al-Wujuh Facility shows that those Agreements are loan agreements and not any sale and purchase agreement. Further, the Defendant had also issued a Debenture dated 29-3-1996 in favour of the Plaintiff to create fixed and floating charges over the Defendant's assets as security for the Al-Wujuh Facility granted by the Lenders. Therefore,

it was submitted, the Al-Wujuh Facility cannot in fact and in law be a sale transaction but a loan transaction and is in fact and in law a loan agreement between the parties.

5. These submissions, insofar as they rely upon the same grounds traversed in the ABBA Facility are rejected for the same reasons. Provision of security for payments of instalments are not by themselves objectionable. Although the same lands appear to have been sold under the ABBA Facility, they were in fact sold on the same day. If the lands had sold previously under the ABBA Facility and then sold again, then there is something amiss. But if they were sold at the same time it merely means the same lands were sold for the combined price under the ABBA Facility and the Al-Wujuh Facility, and that is not impossible.

6. In addition, it was submitted that the Plaintiff had only disbursed to the Defendant the sum of RM13,398,547.20 and not RM60,000,000 under the Al-Wujuh Facility which was for 7 years, that is expiring on 29.3.2003 which however was cancelled by the Plaintiff about 2 years after the date of agreement on 10.3.1998. The Defendant sought to found a counter-claim upon this basis. That only RM13,398,547.20 was disbursed and not the sale price of RM60,000,000 does call into question requiring further examination as to the nature of the transaction described as an Al-Wujuh Facility so that the parties and the Court gets the facts right, as it is always the facts that determine what the transaction really is, not just the mere labels used. I would order further submissions as to:

- a. Whether on the evidence before the Court a determination can be given;
- b. If not, whether additional evidence can be added by further affidavits or require oral testimony;
- c. As to the true nature of the Al-Wujuh Facility as a sale.

Sgd.

(DATUK ABDUL WAHAB BIN PATAIL)
Judge
High Court of Malaya
Kuala Lumpur

Dated: 18th July, 2008

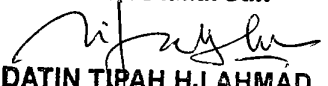
Plaintiff's Solicitors:

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Defendant's Solicitors:

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Salinan Diakui Sah


DATIN TIPAH HJ AHMAD
Setiausaha Kepada
Y.A. Datuk Abdul Wahab bin Petail
Hakim Mahkamah Tinggi Malaya
Kuala Lumpur