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Modern Islamic finance has seen a significant increase in utilisation since its inception in the 1960s, and its continuing development demands that the legal framework within which Islamic finance in Malaysia is to thrive must keep pace. The Federal Court case of Maple Amalgamated Sdn Bhd & Anor v Bank Pertanian Malaysia Berhad ("**Maple Amalgamated**") represents the latest in a long line of developments which will inevitably play a key role in shaping the legal framework of Islamic finance in Malaysia.

The decision in Maple Amalgamated is the much-anticipated resolution of a protracted dispute between the company Maple Amalgamated Sdn Bhd and one other ("**the Appellants**") and Bank Pertanian Malaysia Berhad ("**the Respondent**") in a suit arising, amongst others, over the impugned legality of Asset Sale and Asset Purchase Agreements ("**Asset Sale and Purchase Agreements**") entered into as part of a *Bai' Bithaman Ajil* ("**BBA**") financing facility when such Asset Sale and Purchase Agreements appear to contravene Section 214A of the National Land Code 1965 ("**S.214A**").

Such BBA financing facilities as can be seen in Maple Amalgamated generally involve the bank purchasing a particular asset owned by the customer for the value of the financing to be provided. Subsequently, the bank will then sell the same asset back to the customer at a price greater than the value obtained by the customer which is to be paid on a deferred and instalment basis. The agreements by which this exercise is carried out are known as asset purchase and asset sale agreements respectively.

In Maple Amalgamated, the Appellants sought to impugn the legality of the Asset Sale and Purchase Agreements on the grounds that the land which was the subject matter of the Asset Sale and Purchase Agreements was estate land and, pursuant to S.214A, any transfer, conveyance or disposal of estate land would require the consent of the Estate Land Board, something which had not been obtained by the parties. The matter was commenced in the

High Court where the Court ruled in favour of the Respondent.[1] A similar ruling was also handed down by the Court of Appeal[2] whereupon the Appellant sought leave to appeal from the Federal Court.

In granting leave to appeal, the sole question of law which the Federal Court agreed to hear was this:

> *"Whether an unconditional agreement for the sale and purchase of an estate land by way of asset purchase agreement and asset sale agreement ('Asset Sale & Purchase Agreements') pursuant to Bai Bithaman Ajil financing is in breach of section 214A of the National Land Code 1965 when no prior approval is obtained from the Estate Land Board before entering into the said Asset Sale & Purchase Agreements?"*

At a glance, this question appears to be a simple matter of the construction of statute. However, an analysis into the decision reveals deeper implications in respect of the law with regards to BBA financing and similar Islamic financing facilities in which the transfer of assets form part of their operating mechanisms.

The Federal Court's decision which affirmed the earlier rulings of the Court of Appeal and High Court touched upon three issues of law, namely the legislative intent behind S.214A, how S.214A should be construed in light of such legislative intent, and whether or not the Asset Sale and Purchase Agreements were illegal. In brief, the Federal Court made the following findings:

1. Based upon the Parliamentary Hansard introducing S.214A, the legislative intent behind the aforesaid provision was to prevent the fragmentation of estate land and the consequent dispossession of labourers working on said land;

2. As no actual transfer of ownership had resulted from the Asset Sale and Purchase Agreements and there was therefore no fragmentation of the land, the aforesaid agreements were not in contravention of S.214A; and

3. In determining whether a commercial contract is illegal, the Courts ought to consider the commercial reality of such a transaction and the purpose of the law which the contract is purported to breach. In this instance, as no actual transfer of the land had occurred and the intent behind S.214A had not been contravened, the Federal Court was of the view that the Asset Sale and Purchase Agreements were similarly not in contravention of S.214A and were therefore not illegal.

The approach taken by the Federal Court in this instance has been to view the Asset Sale and Purchase Agreements within the wider context of the BBA financing facility to determine whether the effect of such agreements in their entirety is to contravene the legislative intent of S.214A. The Federal Court found that there had been no real transfer of

the ownership of the land in law or in equity and as such there could not be said to have been any dealings in land which would be caught by S.214A. The Asset Sale and Purchase Agreements, it was held, were mere formalities which formed a necessary part of the Islamic financing facility and which otherwise had no real effect towards the ownership of the asset. As such, being bereft of any real effect on the land, the Asset Sale and Purchase Agreements did not contravene S.214A.

A similar approach had previously been adopted in the Court of Appeal case of *Low Chin Meng v. CIMB Islamic Bank Berhad*[3] ("**Low Chin Meng**"). In Low Chin Meng, one of the matters for deliberation was whether Asset Sale and Purchase Agreements involving the repurchase of a company's own shares (which in any other case would be prohibited pursuant to Section 67 of the Companies Act 1965) were illegal. The Court of Appeal held that as the impugned transactions were just a means of observing the formalities of the Islamic financial transaction of BBA rather than an actual attempt at share buyback, the impugned transaction could not be said to be illegal within the meaning of the Companies Act. While Low Chin Meng had not been specifically referred to in the decision of the Federal Court in Maple Amalgamated, the same had been relied upon in the decisions of the High Court and Court of Appeal.

These decisions represent a more nuanced approach to the way in which the underlying agreements forming part of Islamic financing facilities ought to be viewed and affirms the method of prioritising substance over form in their construction. It would appear that as long as the effect of the Islamic financing facility taken as a whole is to not contravene statute or the legislative intent of the statute, then regardless of the purported effects of the underlying agreements forming part of the facility, the facility itself can be valid in law.

The case of Maple Amalgamated itself represents a continuing trend in the liberalisation of Islamic financial transaction mechanisms in Malaysia. While the scope of the question posed in Maple Amalgamated is rather narrow, it is nonetheless anticipated that the said ruling will be instructive in assisting the Courts to come to a decision in cases where the formalities of Islamic commercial transactions appear, on their face, to run contrary to statutory provisions. In the field of Islamic financial and commercial law, and in particular where the transfer of assets form part of the underlying mechanisms behind financing facilities, the Maple Amalgamated case will form a solid legal bedrock to indicate that it is the substance of the facility as a whole rather than its form which is significant in determining whether the transactions underlying such facilities are contrary to the law. In any event, as far as S.214A is concerned, the narrower question of whether Asset Sale and Purchase Agreements as part of BBA financing facilities are caught by the said provision is definitively answered by the case of Maple Amalgamated in the negative.

In this regard, the ruling in Maple Amalgamated cannot be understated as it provides a firm legal foundation to answer questions of whether any one Islamic financial transaction is in contravention of a particular statutory provision. While the validity of such Islamic financial

transactions will necessarily depend on the facts and circumstances of each case brought before the Courts, the principles set out in Maple Amalgamated will certainly be of use in guiding the decisions in such cases.

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[1] Maple Amalgamated Sdn Bhd & Anor v Bank Pertanian Malaysia Berhad [2019] 1 LNS 395
[2] Maple Amalgamated Sdn Bhd & Anor v Bank Pertanian Malaysia Berhad [2020] MLJU 382
[3] [2015] 5 CLJ 324

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