

Interpretation of Statute & Contract: Apex Court favours “Commerciality” over “Illegality”

In *Maple Amalgamated Sdn Bhd v Bank Pertanian Malaysia Bhd*,¹ the single specified issue before the Federal Court of Malaysia was whether an Islamic banking facility known as *Bai Bithaman Ajil* (“BBA”) transaction is invalid for violating section 214A of the National Land Code (“NLC”). In dealing with that specific issue regarding BBA, the Federal Court also made broader pronouncements on the applicable legal principles when the Court is asked to invalidate a commercial transaction. The latter would have a much wider implication in the commercial world.

Facts

The BBA transaction in this case comprised of the typical Asset Purchase Agreement and Asset Sale Agreement, Charge and the Guarantee & Indemnity Agreement of an estate land² (collectively referred to as the “BBA Agreement”) between a borrower, guarantor and bank. The borrower and guarantor defaulted in the BBA Agreement. Disputes arose between the parties and they had engaged in a number of legal proceedings. This appeal originated from the fourth suit brought by the borrower and guarantor (“Appellants”) in the High Court for amongst others, a declaration that the BBA Agreement is null and void by reason of illegality for breaching section 214A of the NLC.

The Appellants were unsuccessful both before the High Court and Court of Appeal.

Issues

The Federal Court granted leave to the Appellants to appeal on this sole question of law:

“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?”

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¹ *Maple Amalgamated Sdn Bhd v Bank Pertanian Malaysia Bhd* [2021] 1 LNS 976 (Federal Court).

² Pursuant to section 214A(11) of NLC, an “estate land” means any agricultural land under 1 or more than 1 title the area or aggregate area of which is not less than 40 hectares and the alienated lands constituting such area are contiguous.

In responding to the above question of law, the Federal Court formulated four sub-issues which may need to be addressed: (1) does section 214A of the NLC apply to the BBA Agreement; (2) if yes, is the BBA Agreement void for illegality; (3) if yes, are the Appellants caught by the *res judicata* principle; and (4) if the BBA Agreement is void, what is the appropriate remedy.

Ultimately, the Federal Court appears to have only addressed the first and second sub-issues.

Is the BBA Agreement caught by section 214A of the NLC?

The Federal Court started by affirming that its decision in *Gula Perak Bhd v Datuk Lim Sue Beng*³ remains good law. In that case, the Federal Court held that a sale and purchase agreement of an estate land conditioned upon the Estate Land Board’s approval was valid. The conditional agreement in *Gula Perak (supra)* can be contrasted with the unconditional agreement in this appeal. The Federal Court then clarified that the *ratio decidendi* in *Gula Perak (supra)* was that the purpose of section 214A of the NLC is to prevent fragmentation of an estate land. The Federal Court then went on to make a number of significant pronouncements on statutory interpretation.

First, the determination of the legislative intent of a particular statute, *Hansard* or speeches made in the Parliament is “*merely the starting point on interpretation and not the end-goal*”. *Hansard* is used when the Court is required to ascertain the meaning of the words used in statutes. The Court remains obligated to construe statutes based on the language employed by applying the settled canons of construction. The Court is not bound by what Parliamentarians say if it departs from the actual language of the statute.

Second, the entire section 214A of the NLC (including all of its subsections) must be construed in the natural and ordinary meaning in light of their object and purpose and as a whole, having regard to all its subsections which are inter-dependent on each other.

Third, the maxim of *noscitur a sociis* – associated words rule was employed to interpret the words “*transfer, convey or dispose of*” in section 214A of the NLC. Such analogous words, when used in such a context should operate to confine the meaning of the more general word to the more restricted one. This is similar to the *ejusdem generis* rule. The Federal Court noted that “convey” and “dispose of” were inserted by way of an amendment in 1972 to tighten the prohibition of transfer of land in all ways thinkable without the Board’s prior approval. If the Parliament had intended to prohibit the transaction in the nature of the present appeal, it would have stated so clearly.

³ *Gula Perak Bhd v Datuk Lim Sue Beng* [2019] 1 CLJ 153 (Federal Court).

Therefore, in relation to the first issue, the Federal Court concluded that the BBA Agreements are not caught by section 214A of the NLC, as there had not been actual transfer of ownership of the land. No memorandum of transfer was executed and the borrower remained the registered proprietor at all material times. The arrangement under the BBA Agreement was merely a means to finance an Islamic facility.

Is the BBA Agreement illegal under Contract Law?

The Federal Court went on to consider whether the BBA Agreement is illegal under the contracts law. The Court held that the Court should be slow in invalidating contracts when dealing with statutes regulating commercial transactions. An agreement, which is in breach of a statutory provision, is not automatically void for illegality, unless there is such clear intention of the statute or law.

In view of the object and purpose of the law, if there are two possible interpretations, the one which avoids finding of illegality is to be preferred. The Federal Court held that the public and reasonable commercial people would organise their affairs on the assumption that what they are doing is not prohibited by law. Therefore, the Court preferred the interpretation which does not result in the finding of contravening section 214A of the NLC in this appeal.

The Federal Court further held that the words “*transfer, convey and dispose of*” being analogous words, should have their meaning confided to the legislative intention to prevent actual or attempted outright transfers and fragmentation of estate land. Therefore, in relation to the second issue, the Federal Court held that the BBA Agreement is not void for illegality.

Commentary

As reflected in this decision, the Federal Court is in favour of affirming as opposed to invalidating commercial agreements. It discourages defaulting parties from running argument of illegality, which is more often than not an afterthought to avoid contractual obligations. Unless there is a clear contravention of the law and there is no alternative interpretation, the Court would prefer not to strike down a contract on grounds of illegality, in view that parties had willingly executed the contract knowing fully their respective obligations.

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