IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)
Civil Appeal No. 02(f)-54-09/2020(A)

Between

1. Maple Amalgamated Sdn Bhd
2. Liew Hon Kong @ Liew Kwan Voon … Appellants

And

Bank Pertanian Malaysia Berhad … Respondent

Coram:

Tengku Maimun binti Tuan Mat, CJ
Rohana binti Yusuf, PCA
Mohd Zawawi bin Salleh, FCJ
Zabariah binti Mohd Yusof, FCJ
Hasnah binti Mohammed Hashim, FCJ

JUDGMENT OF THE COURT

Introduction

[1] The courts in the common law systems or jurisdictions often remind themselves of the 'common sense warning'; that courts ought not to be too quick to assume illegality or invalidity of contracts when dealing with statutes regulating commercial transactions.

[2] This is because in many cases the mere existence of penal sanctions against the impugned transaction is not itself a sufficient ground to render the entire commercial transaction void for illegality unless the

law very clearly (expressly or impliedly) intended it to be so even without an express savings clause.

[3] The most recent pronouncement of this Court endorsing the above proposition of law is *PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals* [2021] 2 CLJ 441 (‘*PJD Regency*’).

[4] The essential issue in this appeal is whether the Asset Purchase Agreement and Asset Sale Agreement in the *Bai Bithaman Ajil* (‘BBA’) transaction is invalid for being in violation of section 214A of the National Land Code 1965 which is now the National Land Code (Revised 2020) [Act 828] (‘NLC’).

Background Facts

[5] The 1st appellant was granted BBA facility by the respondent bank, with the 2nd appellant as the guarantor.

[6] The BBA facility was executed through an Asset Purchase Agreement dated 24.6.2008, where the respondent “purchased” the Land from the 1st appellant for RM48,000,000.00 and then through an Asset Sale Agreement of the same date, the 1st appellant “repurchased” the Land from the respondent at the price of RM81,088,810.32 to be paid on instalment basis. The respondent bank also concluded a Guarantee & Indemnity Agreement dated 24.6.2008 with the 2nd appellant to guarantee the selling price payable under the Asset Sale Agreement. A Supplemental Agreement to amend certain provisions of the Asset Sale Agreement was concluded between the parties on 25.7.2008.

[7] We use the words “purchase” and “repurchase” in this way because BBA agreement is different from a conventional loan agreement. BBA is a sale and purchase transaction of an asset to be paid on a later date (deferred payment) based on a price, which include profit margin agreed to by both contracting parties. As such the profit in BBA contract is different from ‘interest’ arising from a conventional loan transaction.

[8] The 1st appellant as the registered proprietor of an estate land held under title H.S(D) 20109, Lot 11445, Mukim Durian Sebatang, Perak (‘the Land’), charged the Land to the respondent to secure the payment. The charge over the Land was registered vide Charge Presentation No. 44692/2011 (‘charge’) on 3.10.2011.

[9] Both parties conceded that at all material times, no memorandum of transfer was effected pursuant to any provisions of the NLC or any other law on real property in respect of the Land.

[10] In this judgment, for convenience, the Asset Sale Agreement, the Asset Purchase Agreement, the Supplemental Agreement and the Guarantee & Indemnity Agreement will be referred to collectively as the ‘BBA agreement’.

[11] The 1st appellant defaulted on the BBA agreement and the respondent accordingly terminated it. Thereafter, parties were engaged in a series of suits with the respondent essentially seeking to recover the monies it is owed and the appellants denying responsibility to repay the same.

[12] The first of these suits is Civil Suit No. WA-22M-39-03/2017 ('Suit 39') filed by the respondent in the High Court in Malaya at Kuala Lumpur against the appellants for a money judgment on the BBA agreement. The respondent successfully obtained judgment against the appellants.

[13] The second suit is Suit No. AA-24FC-526-06/2017 ('Suit 526') filed by the respondent in the High Court in Malaya at Ipoh seeking an order for sale against the Land. The order for sale was granted and the appellants were unsuccessful in their appeals against the same before the Court of Appeal and this Court.

[14] The third suit is the one filed by the appellants against the respondent in the High Court in Malaya at Ipoh vide Suit No. AA-24NCvC-343-08/2017 ('Suit 343') to either set aside or invalidate the charge on the Land. The appellants however withdrew Suit 343 on the date it was fixed for decision.

[15] This brings us to the fourth suit from which this appeal arises. It was filed by the appellants in the Ipoh High Court by way of an Originating Summons. The reliefs sought are as follows:

> "(1) A declaration that the Asset Purchase Agreement dated 24.6.2008, Asset Sale Agreement dated 24.6.2008 and Supplemental Agreement dated 25.7.2008 between the 1st Plaintiff and the Defendant ('Asset Sale and Purchase Agreements') consequently the Charge Presentation No. 44692/2011 ('Charge') registered on 3.10.2011 by the Defendant over the land known as H.S.(D) 20109 Lot 11445, Mukim Durian Sebatang, Perak Darul Ridzuan ('Land') owned by the 1st Plaintiff and Guarantee Indemnity by 2nd Plaintiff dated 24.6.2008 ('Guarantee and Indemnity')

are null and void by reason of illegality for breach of section 214A of the National Land Code 1965;

(2) An order that the Charge be expunged from the Land Registration by the Perak Registrar of Titles within (7) days from the service of the sealed order;

(3) An order that the 2nd Plaintiff is released from all his obligations under the Guarantee and Indemnity;

(4) A restitution of all proceeds, benefits, payments and monies of RM18,276,257.99 paid by the 1st Plaintiff to the Defendant;

(5) Interest thereon at the rate of 10% per annum or such rate determined by this Honourable Court on the said sum of RM18,276,257.99;

(6) Costs;

(7) Such further and other reliefs that this Honourable Court may deem fit to grant."

Decision of the High Court

[16] The High Court dismissed the appellants' suit with costs. The High Court rejected the appellants' argument that the BBA agreement amounted to a 'transfer, conveyance or disposal' of the Land which is prohibited by section 214A of the NLC and is thus void for illegality. The High Court's decision was based on two reasons.

[17] The first reason was the decision of this Court in *Gula Perak Bhd v Datuk Lim Sue Beng & other appeals* [2019] 1 CLJ 153 ('*Gula Perak*') in which, according to the High Court, the Federal Court's decision supports

the conclusion that a BBA agreement using a estate land as security for the BBA transaction is not in breach of section 214A of the NLC.

[18] The second reason was his Lordship found separately that the Asset Sale and Asset Purchase agreements did not fall within the purview of section 214A of the NLC and hence, the question of the BBA agreement being void in contravention of it did not arise. In the learned judge's view, the BBA was not caught within the meaning of the words 'transfer, convey or dispose of' in section 214A(1) of the NLC. His Lordship opined that while there may have been a "purchase" and "repurchase" of the land, no actual 'transfer, conveyance or disposal' ever took place.

Decision of the Court of Appeal

[19] The Court of Appeal affirmed the decision of the High Court and dismissed the appellants' appeal.

[20] The Court of Appeal noted that the scheme of the BBA was well accepted and endorsed judicial decisions, primarily the judgment of the Court of Appeal in *Bank Muamalat Malaysia Bhd & Ors v Redha Resources Sdn Bhd & Ors* [2017] 2 MLJ 686 ('*Redha Resources*'). In the usual scheme of the BBA, the transaction was not an asset sale and purchase transaction *simpliciter*. There was no actual conveyance or disposal of the subject land by the mere execution of the Asset Sale Agreement and Asset Purchase Agreement to avail the Islamic Banking Facility.

[21] The Court of Appeal rejected the appellants' argument that *Gula Perak* was distinguishable for the reason that the agreement impugned in

that case was conditional (the condition being the prior approval of the Estate Land Board). The Court of Appeal found that in *Gula Perak*, the Federal Court had examined the legislative intent of section 214A of the NLC and had concluded that it was only intended to apply to outright transfers.

[22] In summary, the Court of Appeal found that section 214A was not violated and that the BBA agreement was not therefore void for illegality. Accordingly, the charge which stood on the BBA agreement is also valid.

Proceedings in the Federal Court

[23] The appellants obtained leave to appeal to this Court on the sole question of law as follows:

> "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?"

[24] The question is a narrowly confined one. The appellants focussed their argument on the question whether an unconditional agreement, in this case a BBA financing agreement, breaches section 214A of the NLC. It is important to state that learned counsel did not make the argument in any way whatsoever that the validity of the charge may be assailed separately from that agreement.

[25] The question of whether the charge was validly registered directly in accordance with section 214A of the NLC, quite apart from the validity of the BBA agreement itself, was not argued or advanced on any other points for our consideration.

Summary of Parties' Submissions

The Appellants' Case

[26] Learned counsel for the appellants Datuk Seri Gopal Sri Ram advanced the following arguments.

[27] Firstly, that the BBA agreement was concluded in contravention of section 214A of the NLC. Applying the provision of section 24 of the Contracts Act 1950 and common law principles, the BBA agreement is utterly void and unenforceable. Learned counsel contended that the agreement is invalid because it is caught by the words 'dispose of' in section 214A of the NLC. He urged us to examine the BBA agreement in substance to find that there was a breach of section 214A.

[28] Secondly, and flowing from the first argument, learned counsel argued that the charge has no leg to stand on and it is as such void as well. This is because the charge must fall with the BBA agreement. Learned counsel rests this argument on section 340(4)(b) of the NLC for the proposition that if the BBA agreement is void, then the charge is defeasible and may be set aside.

[29] Thirdly and finally, learned counsel for the appellants maintained that as the BBA agreement is void for illegality, if this Court determines

that neither party was aware of the illegality, then this Court ought to order for restitution under section 66 of the Contracts Act 1950. In this regard, the appellants submitted that the amount that had been disbursed by the respondent shall be returned by the first appellant.

The Respondent's Case

[30] The respondent submitted that firstly, the BBA agreement does not fall within the purview of section 214A of the NLC. In support of this submission, learned counsel, Mr Khoo Guan Huat, placed significant reliance on the decision of this Court in *Gula Perak*. Learned counsel for the appellants had argued that *Gula Perak* is inapplicable as it concerned a conditional agreement. Here, the appellants maintained that the BBA agreement is unconditional and the respondent does not dispute this.

[31] Learned counsel for the respondent further submitted that even if the BBA agreement is deemed void for illegality, the charge remains indefeasible. Learned counsel did not directly address the appellants' argument on section 340(4)(b) but instead suggested that the Court shall only have regard to the Forms relevant to the charge and that the BBA agreement is not part of that assessment.

[32] Thirdly, the respondent argued that the appellants should be prevented from bringing this action on account of abuse of process of the courts and the equitable doctrine of res judicata. Mr Khoo argued that the appellants had ample opportunity to address the illegality argument raised in this case in the previous three suits involving the parties namely Suits 39, 526 and 343. The respondent emphasised that the appellants appear to be mounting their defence in instalments to circumvent or delay their

respective obligations under the BBA agreement to repay the debt. The appellants should therefore be estopped from raising the illegality issue which could and should have been raised in those three earlier suits.

[33] On this point, the appellants had contended that illegality of contracts may be raised at any time and in later suits even if the allegation could have been raised in an earlier suit. They argued that res judicata does not apply and that there has been no abuse of process.

[34] Finally, on the remedy, the respondent rejected outright the notion of restitution and in response argued that allowing the appellants' claim as prayed for would result in them being unjustly enriched.

Analysis/Decision

[35] Given the line of arguments and the narrow question posed, we think that the sub-issues that need to be addressed may generally be summarised as follows.

[36] First, does section 214A of the NLC apply in relation to the BBA agreement? Second, if section 214A applies, is the BBA agreement void for illegality? Third, if the BBA agreement is void for illegality, are the appellants precluded from raising this issue by reason of the res judicata principle and finally, if the BBA agreement is void, what is to be the appropriate remedy. If this Court finds against the appellants on the first issue, the result would be that we do not have to express our opinion on the other issues.

[37] And, in discussing the issue on the applicability of section 214A of the NLC, this Court will invariably have to discuss its decision in *Gula Perak*.

Gula Perak Bhd v Datuk Lim Sue Beng & other appeals [2019] 1 CLJ 153

[38] The facts in *Gula Perak* were briefly these. Gula Perak Bhd was the borrower and Datuk Lim Sue Beng was the guarantor for a syndicated term loan. Gula Perak was unable to repay the syndicated term loan. The lenders commenced a civil suit against the borrower and the guarantor seeking repayment of the monies loaned. They also pursued a winding up order which they successfully obtained. Consequent to the winding up order, Gula Perak was taken over by court appointed liquidators.

[39] One of the creditors, AmBank, settled the outstanding debt with Gula Perak through the issuance of secured bonds as full and final settlement of the loan. The bonds were secured by a legal charge in favour of AmBank over an oil palm estate known as Sitiawan Estate which was later substituted with a deed of assignment. This arrangement also proved unfruitful to AmBank as Gula Perak also defaulted on this agreement.

[40] When it sought to realise the deed of assignment to settle the monies it was owed, AmBank was met with a caveat lodged by one Faithmont Estate Sdn Bhd (‘Faithmont’). The basis of the caveat was that Faithmont claimed specific performance of a sale and purchase agreement in respect of the estate land against Gula Perak. The three parties namely, Gula Perak, AmBank and Faithmont were able to resolve the matter between themselves and accordingly moved the Court for a compromise order to sell off the land.

[41] The dispute arose when a contributory and creditor of Gula Perak, one Yakin Tenggara, opposed the compromise order on the basis that the land was estate land and that the prior approval of the Estate Land Board was necessary. Yakin Tenggara was unsuccessful in its bid in the High Court but was successful in the Court of Appeal. Gula Perak and related parties accordingly appealed to this Court to restore the compromise order.

[42] Numerous questions were framed for leave to appeal to this Court but they were summed up into the following sole question:

> "Whether a conditional agreement to sell an estate land (SPA) to a purchaser with a condition precedent that the sale was subject to obtaining the approval of the Estate Land Board is in breach of section 214A(1) of the NLC when no prior approval is obtained from the Board before entering into the said SPA?"

[43] Principally, the majority of this Court held that the agreement being a conditional one did not breach section 214A(1) of the NLC; that a conditional agreement is merely a manifestation of the parties' intention to transfer the land and the condition signifies their explicit acceptance of the requirement of the law; and that it is their express acceptance that any sale and purchase or transfer of the land would not take effect until and unless the approval of the Estate Land Board was first obtained. This Court accordingly allowed the appeal and restored the compromise order of the High Court.

The Legislative Intent Behind Section 214A of the NLC

[44] Premised on the above, and as stated earlier, the appellants posited that *Gula Perak* was wrongly decided in that section 214A also prohibits conditional agreements and that in any event, as the BBA agreement in this case is unconditional, the facts of the present appeal are entirely distinguishable. The respondent essentially urged us to read *Gula Perak* in its proper context and to extract a wider *ratio decidendi* which learned counsel submitted is applicable to the present case.

[45] The following question thus arises: what is the *ratio decidendi* of the *Gula Perak* case? This requires us to analyse the reasoning of the Court in that case. It is worth mentioning that learned counsel for the appellants had attempted to review the *Gula Perak* decision on procedural grounds but that application for review was dismissed. As it stands, *Gula Perak* remains good law (see *Yong Tshu Khin & Anor v Dahan Cipta Sdn Bhd & Anor And Other Applications* [2021] 1 CLJ 631).

[46] In coming to its decision in *Gula Perak* and in interpreting section 214A of the NLC, the majority of this Court applied standard canons of interpretation. The Court also examined the legislative history of the provision and opined that the essential purpose of its enactment into law was to prevent fragmentation of estate land. It concluded that the conditional agreement in that case did not breach the said section.

[47] After perusing the Parliamentary Hansard introducing the amendment which gave rise to section 214A on 25 May 1972, this is what Ramly Ali FCJ observed:

"[43] The emphasis from the above speech is that "adalah bertujuan untuk mengawal dengan lebih ketat lagi pemecahan ladang atau kumpulan ladang-ladang yang berkembar yang luasnya tidak kurang daripada 500 ekar". In short, the sole object or intent of the amendment tabled was to prohibit or prevent fragmentation of estate land. The court can only use the trite tools of interpretation of statute which, in essence, is to give it a meaning which promotes the objective of the statute concerned.

[44] Our view is that in order to correctly interpret s. 214A(1) of the NLC we need to read and consider the section as a whole, not only sub-s. 214A(1). That subsection should not be construed in isolation. **All the subsections in the section are inter-dependent of each other. Each subsection throws light on the next. All the 12 subsections relate to the same object or intent ie, to control and prevent fragmentation of estate land.**".

[Emphasis added]

[48] This Court attributed the above speech to the Minister. With respect, the person who moved the Bill to amend the NLC was the then Attorney General Tan Sri Abdul Kadir bin Yusof and not the Minister. In any case, we have perused the same portion of the Hansard for ourselves and we have also arrived at the same conclusion that the purpose of the introduction of section 214A of the NLC was to prohibit fragmentation of estate lands.

[49] At pages 1521-1522, an exchange took place between the Attorney General and Mr Lim Cho Hock (from the opposition). The latter highlighted how the amendment was welcomed because it helped to cull fragmentation of estate land. The following is an excerpt of that exchange:

"**Tuan Lim Cho Hock:** (*Dengan izin*) Mr Speaker, Sir, there are two limbs to this Amendment Bill. The first one is on the tightening up of the restriction on

> the transfer of estate land, and I welcome this amendment. Sad to say, it has come at least three years too late. Hundreds of labourers in the Suffolk Estate had been retrenched because that estate was fragmented by way of private treaties.
>
> **Tan Sri Abdul Kadir bin Yusof:** … (*Dengan izin*) Sir, he said this law is three years too late. I said in the beginning in the National Language when I brought this Bill that this law has been in existence just after the 13th May, 1969 and it is already in force during that time and now we are making it into permanent law. So it cannot be true to say that it is too late by three years. It has been in existence since after May, 1969. Now, since it is in English, I hope you understand it, Yang Berhormat.".

[50] It is clear that it was within the contemplation of Parliament that the purpose of the insertion of section 214A was for the express purpose of preventing transfers which had the effect of dispossessing labourers of their work and to that extent, 'transfer' ought to include fragmentation of the land.

[51] Learned counsel for the appellants also referred to the Hansard dated 12 March 1971 as evidence of Parliament's intention to introduce section 214A into the NLC. With respect, that debate which took place was not a motion by the Government to introduce the Bill. It was instead a session in which the relevant Minister was answering questions put to him in Parliament. In any case, in that session, the Honourable Minister for Agriculture and Land, Tan Sri Haji Mohamed Ghazali bin Haji Jawi expressed, even prior to the actual bid to amend the NLC to insert section 214A in 1972, the reason for the introduction of subsections (1) and (10A).

[52] After setting out the text of the proposed amendments, the Honourable Minister stated that the intention of the Government in moving the amendment was to 'prohibit the transfer of estate land' to more than one person. In his words, at page 1059:

> "Jadi, di-sini nampak-lah kapada Dewan ini ia-itu pehak Kerajaan ada-lah menjalankan segala chara dan ikhtiar untok menyekat daripada tanah^{2} estet ini daripada di-pechah^{2}-kan atau di-jualkan lebeh daripada sasaorang.".

[53] We are aware that the Hansard is not a definitive corpus on the law. The speeches are relevant in terms of statutory construction when the courts are required to ascertain the meaning of the words used in statutes. The courts retain the obligation to construe an Act of Parliament based on the language employed by applying settled cannons of construction but they are by no means bound by what Parliamentarians say what the law means if the actual language of the statute is broader or narrower than the intent expressed or implied in the process of passing that statute. It could therefore be said that the Hansard is merely the starting point on interpretation and not the end-goal.

[54] At this juncture, we only refer to the Hansard to appreciate the reasoning of this Court in *Gula Perak*. In our view, the *ratio decidendi* of the decision is that the purpose of section 214A of the NLC was to prevent the fragmentation and transfer of estate land. While the language of that lengthy section is prohibitive and restrictive, this Court reconciled its language by reading it consonant with commercial realities in arriving at the conclusion that conditional agreements are not caught by the reach of that section. This is apparent from the majority judgment which had regard to all twelve sub-sections of the Act and after it had read the provisions as

a whole. The emphasis on commercial realities is amply borne out by the following dictum of Ramly Ali FCJ:

> "[54] … The court ought to have taken a common sense approach and consider the practical aspect of commercial transactions involving the sale and purchase of estate lands.".

Statutory Construction and Section 214A of the NLC

[55] Having summarised *Gula Perak*, determined its *ratio decidendi* and determined the legislative purpose for the introduction of section 214A, the only other issue which befalls this Court is to determine the scope and extent of the application of section 214A on the facts of this appeal.

[56] For ease of reference, the material provisions of section 214A presently provide as follows:

> "**Control of transfer of estate land**
>
> **214A.** (1) Notwithstanding anything contained in this Act, no estate land is capable of being transferred, conveyed or disposed of in any manner whatsoever unless approval of such transfer, conveyance or disposal has first been obtained from the Estate Land Board (hereinafter referred to as "the Board") established under subsection (3).
>
> …
>
> (10A) (a) Any person who transfers, conveys or disposes of or attempts to transfer, convey or dispose of in any manner whatsoever, any estate land in contravention of subsection (1), shall be guilty of an offence and shall, on conviction, be liable

to imprisonment for a term of not more than five years or to a fine not less than one hundred thousand ringgit and not more than one million ringgit, or to both.

(b) For the purposes of this section, the execution of an agreement to convey or dispose of the whole of an estate to two or more persons, or to convey or dispose of any portion or portions of an estate land to one or more persons, without the approval of the Board, shall be conclusive proof that the estate land is conveyed or disposed of in contravention of subsection (1); and any act to demarcate an estate land or to cause or permit the demarcation of estate land otherwise than in accordance with the provisions of this Act shall be *prima facie* proof that the person so acting, causing or permitting attempts to transfer, convey or dispose of the estate land in contravention of subsection (1).".

[57] Subsection (10A) has undergone some amendments to its language and the punishments contained in subsection (10A)(a) have also been enhanced over the years. Nevertheless, the above provisions which represent the current iterations of the provisions remain substantially the same. They do not therefore materially affect the outcome of our decision and our interpretive exercise.

[58] Taking heed from *Gula Perak*, the subsections and the rest of section 214A 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.

[59] This brings us to the words 'transfer, convey or dispose of' which are in issue in this appeal. The appellants contended that the BBA

agreement when construed as a whole in particular by reference to clauses 1, 6 and 12 as well as clauses 1 and 4 of the Asset Purchase Agreement, means that the Land was effectively disposed of to the respondent. These clauses in effect state that 1st appellant in consideration of the Islamic banking facility sum unconditionally sells and the respondent unconditionally purchases the Land from the 1st appellant. The said clause 12 in effect vests beneficial ownership and rights in the Land to the respondent.

[60] In our view, the words 'transfer, convey or dispose of' employed in section 214A ought to be construed having regard to the maxim of *noscitur a sociis* – the associated words rule. According to learned author Ruth Sullivan in *Statutory Interpretation* (2nd Edition, Irwin Law Inc., 2007), at page 175, this cannon of construction operates thus:

> "When two or more words or phrases perform a parallel function within a provision and are linked by "and" or "or," the meaning of each is presumed to be influenced by the others. The interpreter looks for a pattern or a common theme in the words or phrases, which may be relied on to resolve ambiguity or to fix the scope of the provision.".

[61] The author cites an example of the application of the maxim by reference to the judgment of Martin JA of the Court of Appeal of Ontario in *R v Goulis* (1981) 33 O.R. (2d) 55 ('*Goulis*').

[62] The issue in *Goulis* was whether the accused, who was declared a bankrupt, was guilty of 'concealing' items of his property in his statement of property to the trustee. The facts were such that he did not disclose the relevant information to the trustee. The question was whether the word

'conceal' required a positive act of concealment or whether the failure to simply disclose sufficient information itself amounted to 'concealment'. Section 350 of the statute in question, provided as follows:

> "**350.** Everyone who,
>
> (a) with intent to defraud his creditors,
>
> (i) makes or causes to be made a gift, conveyance, assignment, sale, transfer or delivery of his property, or
>
> (ii) removes, conceals or disposes of any of his property, or
>
> (b) with intent that any one should defraud his creditors, receives any property by means of or in relation to which an offence has been committed under paragraph (a), is guilty of an indictable offence and is liable to imprisonment for two years.".

[63] *Goulis* was acquitted on the charge as the Court of first instance found that the failure to disclose information did not amount to 'concealment'. On appeal, the decision was affirmed by the Court of Appeal. In particular, this is what Martin JA held:

> "It is an ancient rule of statutory construction (commonly expressed by the Latin maxim, *noscitur a sociis*) that the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it… **When two or more words which are susceptible of analogous meanings are coupled together they are understood to be used in their cognate sense. They take their colour from each other, the meaning of the more general being restricted to a sense analogous to the less general…**

> In this case, the words which lend colour to the word "conceals" are, first, the word "removes", which clearly refers to a physical removal of property, and second, the words "disposes of", which, standing in contrast to the kind of disposition which is expressly dealt with in subpara. (i) of the same para. (a), namely, one which is made by "gift, conveyance, assignment, sale, transfer or delivery", strongly suggests the kind of disposition which results from a positive act taken by a person to physically part with his property. In my view the association of "conceals" with the words "removes" or "disposes of" in s. 350(a)(ii) shows that the word "conceals" is there used by Parliament in a sense which contemplates a positive act of concealment.".
>
> [Emphasis added]

[64] His Honour further referred to the drafting history of the statute to conclude that it was the intention of the drafters of the statute to limit 'concealment' to a positive act. The emphasised portion of the above passage attracts our attention because it sheds light on the approach Courts should take when analogous words are used in the same context to the extent that they may be considered to be cognate expressions. There is no doubt that the words 'transfer', 'convey' and 'dispose' when construed in their ordinary and natural context are analogous expressions. The Ontario Court of Appeal appears to suggest that 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 another cannon of construction – the *ejusdem generis* rule.

[65] The appellants submitted quite forcefully that each and every word must be given a meaning as otherwise, Parliament will have legislated in vain. We accept that as a trite principle but we do not otherwise agree that applying *noscitur a sociis* to section 214A renders Parliament's use of the words 'transfer, convey or dispose' in vain. This is after having regard to

the additional words attached to that phrase namely, the phrase 'in any manner whatsoever'.

[66] The original version of section 214A(1) of the NLC which was introduced during the time of emergency vide Act A26 in 1969 provided as follows:

> "Notwithstanding anything contained in this Act, no estate land is capable of being transferred to two or more persons unless approval of such transfer by the Estate Land Board (hereinafter referred to as "the Board") established under subsection (3) has been obtained.".

[67] The words 'convey' and 'dispose of' were missing in its first version. 'Convey' and 'dispose of' were only inserted into section 241A in 1972. This is also true of subsection (10A) in particular paragraph (b) which was also inserted in 1972. There is not much in the form of direct explanation in the Hansard in 1972 as to why this change was effected. However, it can be gleaned from the general debate in 1969 and in 1972 that the purpose remained the same, that is, to prevent transfers by way of private treaties and to prohibit fragmentation.

[68] At least one author, Judith Sihombing in her celebrated book, *National Land Code: A Commentary* (Second Edition, Malayan Law Journal, 1992) has this to say in her commentary on section 214A of the NLC on the use of the word 'convey' and which should also explain analogously the words 'dispose of', as follows at page 413:

> "The use of the word 'conveyance' and its derivatives is inexplicable for it refers to the change in ownership for land formerly held under the deeds system in Penang and Malacca prior to the coming into force of the *National*

Land Code (Penang and Malacca Titles) Act No 2 of 1963, as amended by Act No 55 of 1965. The word 'conveyance' has a similar meaning to 'transfer' though the effect is different; execution of a conveyance acts to assign the legal estate whilst execution of a transfer may assign an equitable estate but registration alone will vest and divest title.".

[69] The intention in grouping the words 'transfer, convey and dispose of' and their derivatives therefore was to tighten the prohibition of transfer of land in all ways thinkable which explains the even more stringent use of the word. But the general intent remains that the purpose of section 214A is to prevent transfers in any form whatsoever or fragmentation of estate land to the extent that proprietorship or ownership in that estate land cannot be effected without prior approval of the Estate Land Board.

[70] Support for the above conclusion is also found in the speech of the Attorney General in pages 1514-1515 of the Dewan Rakyat Hansard dated 25 May 1972, where he expressed as follows:

"(iii) Berkenaan dengan pindaan[2] kapada Sekshen 214 (A) pula maka pindaan itu adalah bertujuan untok mengawal dengan lebeh ketat lagi pemechahan ladang atau kumpulan ladang[2] yang berkembar yang luas-nya tidak kurang daripada 500 ekar. Di bawah pindaan[2] yang di-chadangkan itu, maka adalah menjadi satu kesalahan yang boleh dihukum di-dalam mahkamah bagi sa-siapa yang memindah milek ladang atau chuba memindah milek ladang tanpa mendapat kebenaran terlebeh dahulu dan boleh juga di-hukum dengan hukuman penjara dan juga di-denda, pada hal di bawah Sekshen 214 (A) sa-belum dipinda dahulu yang melakukan kesalahan itu tidak-lah dapat di-hukum di mahkamah. Tindakan yang boleh di-ambil hanya-lah sa-takat tidak mendaftarkan pemindahan milek ladang berkenaan itu sahaja. Sa-lain daripada itu di-bawah sekshen-kechil 10A (b) adalah di-nyatakan satu

> persatu perbuatan saperti yang di-sifatkan sa-bagai perbuatan yang di-lakukan bersalahan dengan peruntokan sekshen ini atau melanggar Undang[2] ini.
>
> **Ini untok mengelakkan sa-barang keraguan yang mungkin akan timbul tanpa penerangan yang dikanunkan.**". [Emphasis added]

[71] The mover of the Bill clarified that the amendments to section 214A were inserted to remove any doubt as to the application of the provisions. If Parliament had intended to prohibit the transfer, conveyance or disposal of the land in the manner suggested by the appellants, it should have stated so clearly.

[72] The undisputed fact remains in this case that there has been no actual transfer of ownership of the Land from the 1st appellant to the respondent. No memorandum of transfer was executed and the 1st appellant remained the registered proprietor of the Land at all material times. Even if the BBA agreement purports to vest beneficial ownership in the respondent, it is clear that in fact no such vesting ever took place. The respondent never in law or in equity became the owner of the land as the arrangement was merely a means to finance an Islamic facility. Our courts have held that Islamic Financing Facilities transacted in this way, for example the BBA in this case, are valid and are recognised financial transactions (see *Dato' Hj Nik Mahmud bin Daud v Bank Islam Malaysia Berhad* [1998] 3 MLJ 393).

[73] Accordingly, we agree with the respondent that the BBA agreement is not caught by the terms of section 214A of the NLC.

Illegality in Contract Law

[74] There is another point as to why we do not think the BBA agreement is illegal. It relates to our opinion expressed earlier that if Parliament had intended for section 214A to apply to the transactions in the nature impugned in this case, it would have said so clearly.

[75] The point we are here referring to is the same point made in *Goulis* (supra) in respect of the method of interpretation in criminal cases. Where a provision or inference is ambiguous and is capable of more than one construction, the Court ought to prefer a construction which is most favourable to the accused.

[76] For instance, in *Goulis*, the Ontario Court of Appeal was of the view that 'conceal' could naturally refer to an active act of concealment or it could refer to a situation where a person wilfully chooses not to disclose a certain fact. As the latter interpretation is a narrower one and which favours the accused, the Court preferred that approach. This is a trite and tested method of construction in criminal cases, which could assist the Courts in determining the issue of illegality in respect of contracts.

[77] One authority for the above proposition is the judgment of Devlin J (as he then was) in *St John Shipping Corporation v Joseph Rank Ltd* [1956] 3 All ER 683 ('*St John Shipping*'). At page 690, his Lordship observed:

> "The fundamental question is whether the statute means to prohibit the contract. The statute is to be construed in the ordinary way; one must have

regard to all relevant considerations and no single consideration, however important, is conclusive.

Two questions are involved. The first — and the one which hitherto has usually settled the matter —is: **does the statute mean to prohibit contracts at all?** If this be answered in the affirmative, then one must ask: does this contract belong to the class which the statute intends to prohibit? For example, a person is forbidden by statute from using an unlicensed vehicle on the highway. If one asks oneself whether there is in such an enactment an implied prohibition of all contracts for the use of unlicensed vehicles, the answer may well be that there is, and that contracts of hire would be unenforceable. But if one asks oneself whether there is an implied prohibition of contracts for the carriage of goods by unlicensed vehicles or for the repairing of unlicensed vehicles or for the garaging of unlicensed vehicles, the answer may well be different. **The answer may be that collateral contracts of this sort are not within the ambit of the statute**.

…

In my judgment contracts for the carriage of goods are not within the ambit of this statute at all**. A court should not hold that any contract or class of contracts is prohibited by statute unless there is a clear implication, or "necessary inference", as Parke, B, put it, that the statute so intended.** If a contract has as its whole object the doing of the very act which the statute prohibits, it can be argued that you can hardly make sense of a statute which forbids an act and yet permits to be made a contract to do it; that is a clear implication. But unless you get a clear implication of that sort, I think that a court ought to be very slow to hold that a statute intends to interfere with the rights and remedies given by the ordinary law of contract. **Caution in this respect is, I think, especially necessary in these times when so much of commercial life is governed by regulations of one sort or another which may easily be broken without wicked intent.**". [Emphasis added]

[78] The above dictum is generally understood to mean that the courts are slow to strike down contracts for illegality. The observation was made in the context that an agreement in breach of a statutory provision is not always void for illegality unless it is the intention of the statute or law in question very clearly (expressly or impliedly) intending it to be so (see also: *Lori Malaysia Bhd v. Arab- Malaysian Finance Bhd* [1999] 3 MLJ 81 which is a decision of the Supreme Court expressing the same view).

[79] In this regard, the starting point for this discussion is sections 24(a) and (b) of the Contracts Act 1950 which provides as follows:

> "**24.** The consideration or object of an agreement is lawful, unless –
>
> (a) it is forbidden by law;
>
> (b) it is of such a nature that, if permitted, it would defeat any law;
>
> …"

[80] The approach all this while has largely been that when courts interpret sections 24(a) and 24(b) of the Contracts Act 1950, they do so on the premise that the agreement has contravened some provision of the law. The only thing to do then is to determine the effect of the contravention on the validity of the agreement. Case law has not otherwise been as direct to explain how it ought to be determined in the first place whether the law has been contravened. As such, the approach taken in *Goulis* (supra) and the general theory of interpreting criminal law in favour of the accused commends itself to us as regards the determination of whether an agreement in the first place breaches any law.

[81] In our assessment of paragraphs (a) and (b) of section 24, the interpretive approach to be taken is much the same. It is often difficult and technical to make a distinction between those two paragraphs because what is 'forbidden by law' is also something which is 'of such a nature that, if permitted, it would defeat any law'. Further, if something is 'of such nature that, if permitted, it would defeat any law', it would mean that the agreement would have been void for it being 'forbidden by law'. In this regard, learned author Visu Sinnadurai notes in his acclaimed treatise *Law of Contract* (3rd edition, Volume I, LexisNexis Butterworths, 2004), at page 395, that the courts have more often than not relied upon section 24 without indicating which of those two subsections ((a) or (b)) they are invoking.

[82] Suffice to say, the law in this country has always recognised and more so now with the growing advent of commercial transactions, that the courts should move slowly to strike down agreements for illegality. This approach must necessarily be factored into the initial assessment as to whether the agreement in question in the first place contravenes the statute in question. And, even if the agreement is illegal, the courts must be slow to conclude that the agreement is automatically void. In avoiding this result, Parliament may or may not intervene.

[83] In cases where Parliament intervenes, it may provide for savings provisions such that even if the law has been breached, the agreement will not be void for illegality unless the law says so very clearly either explicitly or implicitly (see for example *Coramas Sdn Bhd v Rakyat First Merchant Bankers Bhd & Anor* [1994] 1 MLJ 369; *Tekun Nasional v Plenitude Drive (M) Sdn Bhd & Other Appeals* [2018] 4 MLJ 567 and *Yango Pastoral Pty Ltd v First Chicago Australia Ltd* (1978) 21 ALR 585).

[84] Even in *PJD Regency* (supra), at paragraph 76, this Court most recently endorsed the principle that even if an agreement was formed on the basis of an illegal act (in that case the collection of booking fees), it would be against sound policy to declare so readily that the agreement is void as that would defeat the purpose of the social legislation in question. In making those observations, this Court relied on the judgment of the Privy Council in *Kiriri Cotton Co Ltd v Dewani* [1960] 1 All ER 177.

[85] The overall tenor of the judgments above-cited and the development of the law suggests that in determining whether an agreement in the first place contravenes the law, primacy and due regard must be given to the object and purpose of the law which is said to have been breached. And, where two possible constructions are possible on the law or the facts, that is, one which results in contravention and one that does not, the interpretation which favours commercial sense (the one that avoids the finding of illegality) is to be preferred. The overarching theory behind this thought process, as seen from Lord Devlin's dictum in *St John's Shipping* (supra) for example is that the public and reasonable commercial people will have organised their affairs on the assumption that what they are doing or have done is not prohibited by law. It is only when the force of the law is abundantly manifest (whether expressly or impliedly) that such a commercial transaction is in breach of the law and an illegality. And, even then, the armoury of the law is wide enough to not immediately render the agreement void for illegality even in the face of such contravention. In all situations, this illegality assessment depends on the facts of every case and the policy as well as language of the law said to have been contravened.

[86] We have ascertained thus far that section 214A is intended to prevent actual and attempted transfers to the extent that it dispossesses the registered proprietor of any legal or equitable interest in the estate land. The raison d'être of the section is also to prevent fragmentation of estate land. All of this was done to alleviate the plea and plight of indigent estate workers. As gathered from *Gula Perak* (supra), the purpose of the provision is also not to restrict or limit dealings with estate land as conditional agreements are nonetheless valid if the precondition is such that the Estate Land Board is first obtained.

[87] We have also determined on the facts that the BBA agreement does not amount either in form or in substance to a 'transfer, conveyance or disposal'. It is a valid financial commercial transaction as permitted by the law.

[88] To clarify, there are two possible approaches in considering the application of section 214A to the facts of the present appeal. The first is the one suggested by the appellants that the Land has been 'disposed of'. The other is that on the true nature of the agreement there was no actual 'transfer, conveyance or disposal of' the Land when considering the nature of the BBA agreement and the intention of the parties when they concluded it. As the latter avoids the possibility of contravening the law having regard to the Parliamentary intent behind section 214A as articulated earlier and good commercial sense, we prefer this method of construction.

[89] To further illustrate our approach, we find guidance in the judgment of Syed Agil Barakbah J (as he then was) in *Erico Estates Sdn Bhd & Anor v The Registrar of Titles, Kedah* [1980] 2 MLJ 293 ('*Erico Estates*'). The

facts of the case, which was an appeal from the decision of the Registrar of Titles, were as follows. The Registrar of Titles rejected the appellant's memorandum of transfer to register certain plots of land on the basis that they amounted to 'estate land' because they were 'contiguous' to estate land under subsection (11) of section 214A of the NLC. In fact, the lots in question were separated by State land and they did not directly border any estate land. The sole question before the Court was whether the facts presented lead to the conclusion that the land in question was 'contiguous' to estate land and thus rendering it of the same status.

[90] The learned Judge allowed the appeal. His Lordship held that the approval of the Estate Land Board was not necessary. This is because the learned Judge found that the land was not estate land. He construed the word 'contiguous' strictly, such that it refers to lands that 'touch' estate lands and not necessary lands which 'neighbour' estate land. At page 294, His Lordship stated as follows:

> "In construing an Act of Parliament the court must look at the object of the Act, the subject matter of the section, the surrounding circumstances of the case and construe the words as a whole. The object of section 214A of the National Land Code is to prevent fragmentation of estate land and Parliament has introduced certain conditions and restrictions as embodied in the section so that any application for the transfer of estate land, requires more stringent enquiry than in cases of ordinary transfer… For the reasons that I have dealt with earlier and in line with the canon of construction **I am of the opinion that the clause by subsection (11) ought to be construed in line with the intention of Parliament, i.e. in its ordinary and strict meaning of "touching" and not "neighbouring"**." [Emphasis added]

[91] The approach recommended by Syed Agil Barakbah J was to interpret section 214A strictly in its natural and ordinary meaning in light of the intention of Parliament. Four years after the decision, Parliament moved to clarify its intent as is expected of it as an elected legislative body. The National Land Code (Amendment) Act 1984 [Act A587] was passed to reword subsection (11) and to introduce a new subsection (12) to work around the decision in *Erico Estates*, such that 'contiguous' is no longer strictly confined to 'touching' lands but 'neighbouring' lands. The post-1984 amended subsection (12) (which has undergone further amendments not relevant to this appeal) stipulates thus:

> "(12) For the purpose of this section, the said lots shall be taken to be contiguous if they are separated from each other only by such land as is used, required or reserved for roads, railways or waterways.".

[92] In our view, the above case and the amendments that came thereafter fortify our approach to section 214A that it ought to be read strictly and that the words 'transfer, convey and dispose of' being analogous words, should have their meaning confined to the intention of Parliament to prevent dispossession of land whether in law or equity. This in our view does not render those words tautologous as argued by the appellants. The words read independently still mean different things, as suggested by Judith Sihombing above. But, whatever be those minute differences, they were only meant to cater to a comparatively narrow intent of preventing actual or attempted outright transfers and fragmentation. Reading the law this way also avoids any imputation of contravention of the law and favours commercial transactions such as the one entered into in this case.

[93] Accordingly, we are unable to sustain the appellants' argument that the BBA agreement breaches section 214A and is thus void for illegality.

Validity of the Charge, Res Judicata and The Appropriate Remedy

[94] To recapitulate, there are rivalling contentions on the application of sections 340(2)(b) and 340(4)(b) of the NLC on the validity and supposed defeasibility of the charge. However, these arguments are predicated on the assertion that the BBA agreement is void for illegality as it amounted to a 'transference, conveyance or disposal'. Parties did not otherwise address us on the specific argument on whether the charge itself amounts to a 'transfer, conveyance or disposal'. Our above finding that section 214A does not apply to the BBA agreement renders the contentions on section 340 of the NLC moot.

[95] The respondent also canvassed the argument of res judicata and abuse of process as one of their sub-arguments. This is a procedural argument which we find unnecessary to deal with on the facts, in light of our substantive decision that the BBA agreement is not caught by section 214A of the NLC.

[96] Finally, on the appellants' argument that restitution should be ordered under section 66 of the Contracts Act 1950. This argument was anchored on the assumption that the BBA agreement is void for illegality. Given our finding that the BBA agreement is valid and enforceable, we similarly find no necessity to consider this point.

Conclusion

[97] In the circumstances and for convenience, we reproduce the question and our answer as follows:

> "**Question:**
>
> 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?
>
> **Answer:** Negative."

[98] For the foregoing reasons, we find no merit in this appeal and it is hereby dismissed with costs. The orders of the High Court and the Court of Appeal are affirmed.

Dated: 23rd July 2021

signed

(TENGKU MAIMUN BINTI TUAN MAT)
Chief Justice,
Federal Court of Malaysia.

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