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CIMB BANK BHD

v.

MAYBANK TRUSTEES BHD & OTHER APPEALS

B FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ
RAUS SHARIF PCA
ABDULL HAMID EMBONG FCJ
SURIYADI HALIM OMAR FCJ
C AHMAD MAAROP FCJ
[CIVIL APPEALS NO: 02(f)-27-04-2012(W),
02(f)-28-04-2012(W), 02(f)-29-04-2012(W),
02(f)-30-04-2012(W) & 02(f)-33-04-2012(W)]
10 FEBRUARY 2014
D [2014] CLJ JT(3)

COMPANY LAW: *Lifting of corporate veil - Whether corporate veil should be lifted - Issuance of public Islamic bonds for financing of government contracts - Bond-issuer fraudulently making off with*
E *redemption monies due to bondholders - Whether corporate veil to be lifted to make directors of bond issuer liable*

CONTRACT: *Exemption clause - Effectiveness - Bond-issuer fraudulently made off with redemption monies due to bondholders causing latter to hold bonds facility agent and trustee company liable for loss -*
F *Whether facility agent and trustee negligent in causing loss to bondholders - Whether lead arranger entitled to exclude liability arising from Information Memorandum*

SECURITIES: *Bonds - Public Islamic bonds - Issuance of public*
G *Islamic bonds for financing of government contracts - Bond-issuer fraudulently made off with redemption monies due to bondholders causing latter to hold bonds facility agent and trustee company liable for loss - Whether facility agent and trustee negligent in causing loss to bondholders - Duty of lead arranger - Duty of trustee - Responsibility for verifying*
H *information in Information Memorandum - Whether trustee may claim indemnity against bond issuer*

Pesaka Astana (M) Sdn Bhd ('Pesaka') (owned by Mohamad Rafie and his wife Murnina, both of whom also controlled the
I Amdac Group of Companies) had obtained three government contracts. Pesaka proposed a financing scheme through the

issuance of public Islamic bonds worth RM140 million ('the bonds'). Pesaka appointed KAF Investment Bank Bhd ('KAF') as the lead arranger, facility agent and issue agent for the issuance of the bonds. This was contained in the subscription and facility agreement ('the SFA') entered into between KAF, Pesaka and the primary subscriber ('Kenanga'). Pesaka then set up a Due Diligence Working Group ('the DDWG'). The DDWG gathered all information required for the bonds scheme to formulate the information memorandum ('IM'). The IM was put together based on the information presented by Pesaka to the DDWG. Under the bonds scheme, Pesaka's contracts with the government will be charged as security. The bondholders will provide funds to Pesaka to finance the contracts. In return, the bondholders will be repaid on the maturity date. To ensure the financial interest of the bondholders were secured, the bonds scheme was structured with Maybank Trustees Berhad ('MTB') as the trustee, where all the proceeds from the government contracts due to Pesaka will be deposited in Syariah designated accounts. No one could use the monies in these accounts except the trustee of the accounts and in the manner and for the purpose as specified in the trust deed *ie*, the designated account would be completely ring fenced. As it turned out, instead of opening up new Syariah designated accounts, upon Pesaka's request, the DDWG agreed to use the existing conventional accounts belonging to Pesaka as the designated accounts and to convert them by making MTB the sole signatory. However, these designated accounts were not fully converted as MTB was not made the sole signatory to these accounts. Pesaka was still the signatory and had complete control over these accounts. The bonds funds paid by the bondholders were deposited into the designated accounts. Having control over the accounts, Pesaka utilised the monies in the designated accounts for its own purposes and failed to redeem the bonds and repay the bondholders on the maturity date. The bondholders commenced action for recovery of the monies against 12 separate defendants including KAF. The bondholders entered a consent judgment against Pesaka (first defendant), Rafie (fourth defendant) and the Amdac Group (sixth to 12th defendants) for the full sum of claim ('the consent judgment') and subsequently withdrew their action against Murnina (fifth defendant). The bondholders however chose not to execute the consent judgment against Pesaka or to assess the damages as against Rafie and the Amdac Group.

A Instead, the bondholders proceeded to trial against KAF and MTB. The High Court allowed the bondholders' claim against MTB and KAF for breach of contract and negligence. The learned High Court Judge ('the judge') denied KAF any indemnity against Pesaka and apportioned liability between KAF and MTB on 60:40 B basis. On appeal, the Court of Appeal affirmed the findings of the High Court but re-apportioned liability between KAF and MTB on 50:50 basis. The Court of Appeal further granted KAF an indemnity of 2/3 of the sum of RM149,300,000 as against Pesaka. Five separate appeals were filed to the Federal Court and were C heard together.

Held (allowing CIMB's appeal against MTB and dismissing MTB's counter claim; dismissing Murnina's appeal against MTB and setting aside order on indemnity by Court of D Appeal; allowing KAF's appeal and setting aside orders of High Court and Court of Appeal; allowing MTB's appeal and ordering full indemnity against Pesaka; dismissing appeal by Pesaka, Rafie and Amdac Group)
Per Arifin Zakaria CJ, Raus Sharif PCA, Abdull Hamid E Embong, Suriyadi Halim Omar & Ahmad Maarop FCJJ:

(1) The judge erred in imposing a duty on KAF to verify the information contained in the IM against the original documents. The finding by the High Court went against the F duties and obligations of KAF as spelt out in the SFA. (paras 29 & 30)

(2) The word 'agreement' in s. 65 of the Securities Commission Act 1993 ('SCA'), must be given its ordinary meaning, which would mean some kind of contract between two or more G parties. The IM on the face of it is not a contractual document. It had been issued by KAF on behalf of Pesaka to provide information to potential investors. The IM was not part of the issue documents which required the approval of the Securities Commission. Hence, the IM was not an H agreement falling within s. 65 of the SCA. Therefore, KAF was free to include the important notice in the IM to exclude any liability arising from any claim that may arise from the IM. (para 34)

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(3) The bondholders were sophisticated investors with vast experience in the capital market. They were not ordinary investors. The important notice shifted the burden of verifying the content of the IM on the potential investors rather than KAF. (paras 50 & 51)

(4) KAF as lead arranger was entitled to exclude liability arising from the IM through the important notice. KAF could not be held liable for any information found in the IM. Accordingly, the findings made by the High Court and the Court of Appeal that KAF was liable for damages suffered by the bondholders consequent upon their reliance on the IM was set aside. (para 52)

(5) KAF was only required to obtain the confirmation and the mandates from Pesaka that the designated accounts had been opened. The letters from Pesaka dated 15 March 2004 relating to the designated accounts clearly stated that Pesaka had opened the designated accounts to be managed and operated by MTB. Hence, it was justified for KAF to be satisfied that the designated accounts had been opened and the MTB had been made the sole signatory to the designated accounts. KAF had no knowledge that the designated accounts had not been opened what more ring fenced. There was no contractual duty in the issue documents for KAF to independently verify that MTB had been made the sole signatory to the designated accounts. Under the SFA, KAF's duty as the lead arranger was merely to ensure that Pesaka had opened the designated accounts and that the mandates in form and content were acceptable to KAF. (paras 74, 75 & 77)

(6) The most proximate cause of the loss was the failure on the part of MTB to ring fence the designated accounts or alternatively to stop Pesaka from operating the designated accounts. MTB could have done that by using its powers and rights as vested upon it by the trust deed and the power of attorney. MTB was wholly to blame for the loss and not KAF. MTB was 100% liable to the bondholders. (para 87)

(7) There was no serious dispute as to the total sum of monies that was received and dissipated by Pesaka from the RA which did not exceed RM107 million. Hence, judgment could not be entered for the sum of RM149,315,000 against MTB in favour of the bondholders, which sum represented the redemption value of the bonds. (para 95)

(8) The Court of Appeal had erred in allowing pre-judgment interest, which the High Court had correctly refused, on the premise that the parties had agreed that no interest will be payable. In deciding the question of interest, the court must consider the express agreement of the bondholders in the trust deed. In this case, the trust deed as specified under cl. 39 clearly provided that no interest shall be payable. (para 101)

(9) Clause 14.1 of the trust deed clearly provides that MTB would be indemnified "save and except for its gross negligence, wilful default, wilful breach or fraudulent actions". The High Court did not make a finding that MTB was guilty of "gross negligence, wilful default, wilful breach or fraudulent actions". As such the High Court had erred in denying MTB's claim for indemnity against Pesaka. (para 111)

(10) It was not just and equitable to allow Pesaka to keep the ill-gotten gains or any part of it. This was especially so when the bondholders had not taken any step to enforce the consent judgment entered between Pesaka and the bondholders and instead focus their attention to MTB on the basis that MTB was in the position to satisfy the bondholders' claim. Thus, by allowing indemnity in full, Pesaka would be called to meet its obligation in full. (para 115)

(11) Murnina allowed herself to be used by Rafie in carrying out the design to move monies out of the trust account as well as to be the recipient of monies on the assets which were in her name. The Court of Appeal and the High Court were therefore not wrong in lifting the corporate veil and in finding her liable. The various entities, Pesaka included, were a mere facade to perpetrate the acts. The corporate veil could not be a defence for Murnina from the claim for indemnity by MTB. Murnina was guilty of having been in "knowingly receipt" of the revenue. (paras 127 & 128)

(12) CIMB could not be construed as being dishonest in the ordinary standards of reasonable and honest people, with itself knowing, based on the subjective dishonest test, that what it did was dishonest when transferring the monies to other accounts. (para 148)

(13) MTB was liable for failing to ring fence the designated accounts. MTB had been unprofessional and indifferent when it failed to take action despite being aware of the inaction of Pesaka. CIMB was not liable for the monies disposed on the instruction of Pesaka from the designated account and instead MTB was totally liable. (paras 149-150)

(14) Notwithstanding MTB's breach of duty or negligence, there was no excuse for Pesaka by its fraudulent misappropriation, to deprive the bondholders of the monies. Pesaka must indemnify MTB. Hence, MTB was given full indemnity against Pesaka. (para 166)

Bahasa Malaysia *Translation Of Headnotes*

Pesaka Astana (M) Sdn Bhd (dimiliki oleh Mohamad Rafie dan isterinya, Murnina, yang kedua-duanya juga mengawal Kumpulan Syarikat Amdac) telah memperolehi tiga kontrak kerajaan. Pesaka mencadangkan skim pembiayaan melalui pengeluaran bon awam Islam bernilai RM140 juta ('bon-bon tersebut'). Pesaka melantik KAF Investment Bank Bhd ('KAF') sebagai penanggung utama, ejen kemudahan dan ejen pengeluaran bagi pengeluaran bon-bon tersebut. Ini terkandung dalam perjanjian langganan dan kemudahan ('PLK') yang dimasuki antara KAF, Pesaka dan pembeli utama ('Kenanga'). Pesaka kemudian membentuk Kumpulan Kerja Usaha Wajar ('KKUW'). KKUW mengumpul kesemua maklumat yang diperlukan bagi skim bon-bon tersebut untuk membentuk memorandum maklumat ('MM'). MM dibentuk berdasarkan maklumat yang diberikan oleh Pesaka kepada KKUW. Di bawah skim bon-bon tersebut, kontrak Pesaka dengan kerajaan akan dicagarkan sebagai jaminan. Pemegang-pemegang bon akan memberikan dana kepada Pesaka untuk membiayai kontrak-kontrak tersebut. Sebagai balasan, pemegang-pemegang bon akan dibayar semula pada tarikh matang. Untuk memastikan kepentingan kewangan pemegang-pemegang bon terjamin, skim bon-bon tersebut distrukturkan dengan Maybank Trustees Berhad ('MTB')

A sebagai pemegang amanah, di mana kesemua hasil daripada kontrak kerajaan yang perlu dibayar kepada Pesaka akan didepositkan dalam akaun Syariah yang ditetapkan. Tiada siapa yang boleh menggunakan wang dalam akaun-akaun ini kecuali pemegang amanah akaun tersebut dan dalam cara dan untuk tujuan seperti B yang dinyatakan dalam surat ikatan amanah iaitu akaun yang ditetapkan tersebut akan 'dipagar' sama sekali. Tetapi, di sebalik membuka akaun Syariah yang ditetapkan yang baru, atas permintaan Pesaka, KKUW bersetuju untuk menggunakan akaun konvensional sedia ada milik Pesaka sebagai akaun yang ditetapkan C dan menukarnya dengan menjadikan MTB sebagai satu-satunya penandatangan. Walau bagaimanapun, akaun yang ditetapkan ini tidak ditukar secara menyeluruh kerana MTB tidak dijadikan satu-satunya penandatangan akaun-akaun ini. Pesaka masih menjadi penandatangan dan mempunyai kawalan penuh terhadap akaun- D akaun ini. Dana bon-bon tersebut yang dibayar oleh pemegang-pemegang bon didepositkan ke dalam akaun yang ditetapkan tersebut. Dengan memiliki kawalan terhadap akaun-akaun ini, Pesaka menggunakan wang dalam akaun yang ditetapkan untuk tujuannya sendiri dan gagal menebus bon-bon tersebut dan E membayar pemegang-pemegang bon pada tarikh matang. Pemegang-pemegang bon memulakan tindakan terhadap 12 orang defendan yang berlainan termasuk KAF untuk mendapatkan semula wang tersebut. Pemegang-pemegang bon tersebut memasuki penghakiman persetujuan terhadap Pesaka (defendan pertama), F Rafie (defendan keempat) dan Kumpulan Amdac (defendan keenam hingga ke-12) untuk jumlah tuntutan penuh ('penghakiman persetujuan') dan kemudian menarik balik tindakan mereka terhadap Murnina (defendan kelima). Pemegang-pemegang bon, walau bagaimanapun, memilih untuk tidak melaksanakan G penghakiman persetujuan terhadap Pesaka atau untuk mentaksir ganti rugi terhadap Rafie dan Kumpulan Amdac. Sebaliknya, pemegang-pemegang bon meneruskan perbicaraan terhadap KAF dan MTB. Mahkamah Tinggi membenarkan tuntutan pemegang-pemegang bon terhadap MTB dan KAF bagi kemungkiran kontrak H dan kecuaian. Hakim Mahkamah Tinggi ('hakim') menafikan KAF apa-apa indemniti terhadap Pesaka dan membahagikan liabiliti antara KAF dan MTB atas dasar 60:40. Atas rayuan, Mahkamah Rayuan mengesahkan dapatan Mahkamah Tinggi tetapi membahagikan semula liabiliti antara KAF dan MTB atas dasar I 50:50. Mahkamah Rayuan selanjutnya memberikan KAF indemniti

2/3 daripada jumlah RM149,300,000 terhadap Pesaka. Lima rayuan berasingan difailkan ke Mahkamah Persekutuan dan didengar bersama.

Diputuskan membenarkan rayuan CIMB terhadap MTB dan menolak tuntutan balas MTB; menolak rayuan Murnina terhadap MTB dan mengenepikan perintah untuk indemniti oleh Mahkamah Rayuan; membenarkan rayuan KAF dan mengenepikan perintah-perintah Mahkamah Tinggi dan Mahkamah Rayuan; membenarkan rayuan MTB dan memerintahkan indemniti penuh terhadap Pesaka; menolak rayuan oleh Pesaka, Rafie dan Amdac Group)
Oleh Arifin Zakaria HB, Raus Sharif PCA, Abdull Hamid Embong, Suriyadi Halim Omar & Ahmad Maarop HHMP:

(1) Hakim telah terkhilaf dalam mengenakan kewajipan ke atas KAF untuk mengesahkan maklumat yang terkandung dalam MM terhadap dokumen-dokumen asal. Dapatan Mahkamah Tinggi adalah bertentangan dengan tanggungjawab dan kewajipan KAF seperti yang terkandung dalam PLK.

(2) Perkataan 'perjanjian' dalam s. 65 Akta Suruhanjaya Sekuriti 1993 ('ASS'), perlu diberikan tafsiran biasa yang membawa maksud sesuatu kontrak antara dua atau lebih pihak. MM, pada asasnya, bukan dokumen kontrak. Ia telah dikeluarkan oleh KAF bagi pihak Pesaka untuk memberikan maklumat kepada pelabur-pelabur berpotensi. MM bukan sebahagian dokumen-dokumen isu yang memerlukan kelulusan Suruhanjaya Sekuriti. Dengan itu, MM bukan perjanjian yang terangkum dalam s. 65 ASS. Maka, KAF adalah bebas untuk memasukkan notis penting dalam MM untuk mengecualian apa-apa liabiliti yang berbangkit daripada apa-apa tuntutan yang mungkin berbangkit daripada MM.

(3) Pemegang-pemegang bon adalah pelabur-pelabur yang canggih dengan pengalaman luas dalam pasaran kewangan. Mereka bukan pelabur-pelabur biasa. Notis penting mengalihkan beban untuk mengesahkan kandungan MM ke atas pelabur-pelabur berpotensi dan bukan KAF.

(4) KAF sebagai penanggung utama berhak untuk mengecualikan liabiliti yang berbangkit daripada MM melalui notis penting. KAF tidak boleh diputuskan sebagai bertanggungjawab bagi apa-apa maklumat yang didapati dalam MM. Dengan itu,

A dapatan yang dibuat oleh Mahkamah Tinggi dan Mahkamah Rayuan bahawa KAF bertanggungjawab bagi kerugian yang dialami oleh pemegang-pemegang bon disebabkan oleh sandaran mereka terhadap MM diketepikan.

B **(5)** KAF hanya diperlukan untuk memperoleh pengesahan dan mandat daripada Pesaka bahawa akaun yang ditetapkan telah dibuka. Surat-surat daripada Pesaka bertarikh 15 Mac 2004 berkaitan dengan akaun yang ditetapkan jelas menyatakan bahawa Pesaka telah membuka akaun yang ditetapkan untuk C diuruskan dan dikendalikan oleh MTB. Maka, adalah wajar bagi KAF untuk berpuas hati bahawa akaun yang ditetapkan telah dibuka dan MTB telah dijadikan satu-satunya penandatangan kepada akaun yang ditetapkan. KAF tidak mempunyai pengetahuan bahawa akaun yang ditetapkan D tidak dibuka apatah lagi telah 'dipagar'. Tidak ada kewajipan kontrak dalam pengeluaran kontrak untuk KAF mengesahkan secara persendirian bahawa MTB telah dijadikan satu-satunya penandatangan dalam akaun yang ditetapkan tersebut. Di bawah PLK, kewajipan KAF sebagai penanggung utama E adalah semata-mata untuk memastikan bahawa Pesaka telah membuka akaun yang ditetapkan tersebut dan mandat-mandat dalam bentuk dan kandungan yang diterima oleh KAF.

F **(6)** Sebab paling hampir bagi kerugian tersebut adalah kegagalan pihak MTB 'memagar' akaun yang ditetapkan atau secara alternatifnya menghentikan Pesaka daripada mengendalikan akaun yang ditetapkan. MTB boleh berbuat demikian dengan menggunakan kuasa dan haknya yang telah diletakhakkan G kepadanya melalui surat ikatan amanah dan surat kuasa wakil. MTB bersalah sepenuhnya bagi kerugian tersebut dan bukan KAF. MTB bertanggungan 100% kepada pemegang-pemegang bon.

(7) Tidak ada pertikaian serius mengenai jumlah keseluruhan H wang yang diterima dan dilupuskan oleh Pesaka daripada RA yang tidak melebihi RM107 juta. Maka, penghakiman tidak boleh dimasukkan bagi jumlah RM149,315,000 terhadap MTB memihak kepada pemegang-pemegang bon, yang jumlahnya mewakili nilai penebusan bon-bon tersebut.

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(8) Mahkamah Rayuan telah terkhilaf dalam membenarkan faedah sebelum penghakiman, yang mana Mahkamah Tinggi telah dengan betulnya menolak, atas dasar bahawa pihak-pihak telah bersetuju tidak ada faedah yang boleh dibayar. Dalam memutuskan persoalan berkaitan faedah, mahkamah harus mempertimbangkan perjanjian langsung pemegang-pemegang bon dalam surat ikatan amanah. Dalam kes ini, surat ikatan amanah seperti yang dinyatakan di bawah kl. 39 jelas memperuntukkan bahawa tidak ada faedah yang boleh dibayar.

(9) Klausa 14.1 surat ikatan amanah jelas memperuntukkan bahawa MTB akan dibayar ganti rugi "save and except for its gross negligence, willful default, willful breach or fraudulent actions". Mahkamah Tinggi tidak membuat dapatan bahawa MTB bersalah atas "gross negligence, wilful default, wilful breach or fraudulent actions". Oleh itu, Mahkamah Tinggi telah terkhilaf dalam menafikan tuntutan MTB bagi bayaran ganti rugi terhadap Pesaka.

(10) Adalah tidak adil dan berekuiti untuk membenarkan Pesaka menyimpan wang yang diperoleh secara haram atau sebahagian daripadanya. Ini adalah lebih khusus lagi apabila pemegang-pemegang bon tidak mengambil apa-apa langkah untuk melaksanakan penghakiman persetujuan yang dimasuki antara Pesaka dan pemegang-pemegang bon dan sebaliknya menumpukan perhatian mereka kepada MTB atas dasar bahawa MTB berada dalam kedudukan untuk memenuhi tuntutan pemegang-pemegang bon. Oleh itu, dengan membenarkan indemniti dengan penuh, Pesaka akan bertanggungan sepenuhnya.

(11) Murnina membenarkan dirinya dipergunakan oleh Rafie dalam melakukan tindakan untuk mengeluarkan wang daripada akaun amanah tersebut dan juga menjadi penerima wang tersebut atas aset-aset yang dalam namanya. Mahkamah Rayuan dan Mahkamah Tinggi oleh itu adalah tidak salah dalam menyingkap tabir penubuhan dan mendapatinya bertanggungan. Entiti-entiti yang berasingan, termasuk Pesaka, adalah semata-mata *facade* untuk melakukan tindakan-tindakan tersebut. Tabir penubuhan tidak boleh menjadi pembelaan kepada Murnina daripada tuntutan indemniti oleh MTB. Murnina bersalah kerana telah menerima hasil tersebut "dengan pengetahuan".

(12) CIMB tidak boleh ditafsirkan sebagai tidak jujur dalam standard biasa seseorang yang munasabah dan jujur, dengan ia sendiri mengetahui, berdasarkan kepada ujian subjektif ketidakjujuran, bahawa apa yang dilakukannya adalah tidak jujur apabila memindahkan wang ke dalam akaun lain.

(13) MTB bertanggungan bagi kegagalan 'memagar' akaun yang ditetapkan. MTB telah bertindak secara tidak profesional dan tidak peduli apabila ia gagal mengambil tindakan walaupun menyedari ketidakgiatan Pesaka. CIMB tidak bertanggungan bagi wang yang telah dilupuskan atas arahan Pesaka daripada akaun yang ditetapkan dan sebaliknya MTB adalah bertanggungan sepenuhnya.

(14) Walaupun dengan kemungkiran kewajipan dan kecuaian MTB, tidak ada alasan untuk Pesaka bagi pelesapan secara fraud, untuk menafikan pemegang-pemegang bon wang tersebut. Pesaka mesti membayar MTB semula. Dengan itu MTB diberikan indemniti penuh terhadap Pesaka.

Case(s) referred to:

Andrew Brown and Others v. InnovatorOne Plc and Others [2012] EWHC 1321 (Comm) ***(refd)***

Antaios Compania Naviera SA v. Salen Rederierna AB [1985] AC 191 ***(dist)***

Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor And Other Appeals [2009] 6 CLJ 22 CA ***(refd)***

Barnes v. Addy [1874] LR 9 Ch App 244 ***(refd)***

Bartlett v. Barclays Bank Trust Co Ltd (No 2) [1980] 2 All ER 92 ***(refd)***

Belmont Finance Corporation Ltd v. Williams Furniture Ltd [1979] 1 All ER 118 ***(refd)***

Caparo Industries plc v. Dickman [1990] 2 AC 605 ***(refd)***

Carl-Zeiss-Stiftung v. Herbert Smith & Co (a firm) (No 2) [1969] 2 All ER 367 ***(refd)***

Datuk M Kayveas v. See Hong Chen & Sons Sdn Bhd & Ors [2013] 5 CLJ 949 FC ***(refd)***

Dubai Aluminum Company v. Salam & Ors [2003] 1 All ER 97 ***(foll)***

Fernrite Sdn Bhd v. Perbadanan Nasional Bhd [2011] 9 CLJ 1 ***(refd)***

Go Dante Yap v. Bank Austria Creditanstalt AG [2010] SGHC 220 ***(refd)***

Hassan Kadir & Ors v. Mohamed Moidu Mohamed & Anor [2011] 5 CLJ 136 FC ***(refd)***

HIH Casualty and General Insurance Ltd & Ors v. Chase Manhattan Bank & Ors [2003] 2 Lloyd's Rep 61 ***(refd)***

IFE Fund SA v. Goldman Sachs International [2007] EWCA Civ 811 ***(refd)***

JP Morgan Chase Bank & Others v. Springwell Navigation Corporation [2008] EWHC 1186 (Comm) ***(refd)***
Karak Rubber Co Ltd v. Burden [1972] 1 All ER 1210 ***(refd)***
Karsales (Harrow) Ltd v. Wallis [1956] 1 WLR 936 ***(refd)***
Lipkin Gorman v. Karpnale Ltd [1992] 4 All ER 331 ***(refd)***
Paragon Finance v. Thimbleby [1999] 1 All ER 400 ***(refd)***
Raiffeisen Zentralbank Osterreich AG v. Royal Bank of Scotland plc [2010] EWHC 1392 (Comm) ***(foll)***
Re Montagu's Settlement Trusts Duke of Manchester v. National Westminster Bank Ltd [1992] 4 All ER 308 ***(refd)***
Rowlandson v. National Westminster Bank Ltd [1978] 3 All ER 370 ***(refd)***
Royal Brunei Airlines v. Tan [1995] 3 All ER 97 ***(refd)***
Selangor United Estates Ltd v. Craddock (No 3) [1968] 2 All ER 1073 ***(refd)***
Springwell Navigation Corporation (a body corporate) v. JP Morgan Chase Bank (a body corporate) (formerly known as the Chase Manhattan Bank) & Others [2010] EWCA Civ 1221 ***(refd)***
Standard Chartered Bank v. Ceylon Petroleum Corporation [2011] EWHC 1785 (Comm) ***(refd)***
Suisse Atlantique Societe d'Armement Maritime SA v. NV Rotterdamsche Kolen Centrale [1967] 1 AC 361 ***(refd)***
Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***
Target Holdings Ltd v. Redfrens [1995] 3 All ER 785; [1996] AC 421 ***(refd)***
Titan Steel Wheels Limited v. The Royal Bank of Scotland [2010] EWHC 211 (Comm) ***(foll)***
Twinsectra Ltd v. Yardley [2002] 2 All ER 377 ***(foll)***

Legislation referred to:
Securities Commission Act 1993, ss. 38(4), 65

(Civil Appeal No: 02(f)-27-04-2012(W))
For the appellant - Tommy Thomas (Alan Adrian Gomez & Nur Ashikin Abdul Rahim with him); M/s Tommy Thomas
For the respondent - Robert Lazar (Mark Lau, Tan Ch'eng Leong & Gopal Sreenevasan with him); M/s Sreenevasan Young

(Civil Appeal No: 02(f)-28-04-2012(W))
For the appellant - Wong Kian Kheong (Karen Lee Foong Voon & Geraldine Oh Kah Yan with him); M/s Wong Kian Kheong
For the respondent - Robert Lazar (Mark Lau, Tan Ch'eng Leong & Gopal Sreenevasan with him); M/s Sreenevasan Young

(Civil Appeal No: 02(f)-29-04-2012(W))
For the appellant - Cecil Abraham (Rishwant Singh, Mohamed Zaini Mazlan, Mawar Ahmad Fadzil & Amrit Gill with him); M/s Zaini Mazlan
For the 1st - 10th respondents - Tommy Thomas (Alan Adrian Gomez & Nur Ashikin Abdul Rahim with him); M/s Tommy Thomas

For the 11th respondent - Malik Imtiaz Sarwar (Jenine Gill, Sia Siew Mun & Lee Zhen Yeap with him); M/s Sia Siew Mun & Co
For the 12th respondent - Robert Lazar (Mark Lau, Tan Ch'eng Leong & Gopal Sreenevasan with him); M/s Sreenevasan Young

(Civil Appeal No: 02(f)-30-04-2012(W))
For the appellant - Robert Lazar (Mark Lau, Tan Ch'eng Leong & Gopal Sreenevasan with him); M/s Sreenevasan Young
For the 1st - 10th respondents - Tommy Thomas (Alan Adrian Gomez & Nur Ashikin Abdul Rahim with him); M/s Tommy Thomas
For the 11th respondent - Cecil Abraham (Rishwant Singh, Mohamed Zaini Mazlan, Mawar Ahmad Fadzil & Amrit Gill with him); M/s Zaini Mazlan
For the 12th - 20th respondents - Malik Imtiaz Sarwar (Jenine Gill, Sia Siew Mun & Lee Zhen Yeap with him); M/s Sia Siew Mun & Co
For the 21th respondent - Wong Kian Kheong (Karen Lee Foong Voon & Geraldine Oh Kah Yan with him); M/s Wong Kian Kheong

(Civil Appeal No: 02-33-04-2012(W))
For the appellant - Malik Imtiaz Sarwar (Jenine Gill, Sia Siew Mun & Lee Zhen Yeap with him); M/s Sia Siew Mun & Co
For the 1st respondent - Robert Lazar (Mark Lau, Tan Ch'eng Leong & Gopal Sreenevasan with him); M/s Sreenevasan Young
For the 2nd respondent - Cecil Abraham (Rishwant Singh, Mohamed Zaini Mazlan, Mawar Ahmad Fadzil & Amrit Gill); M/s Zaini Mazlan

Reported by Amutha Suppayah

JUDGMENT

Arifin Zakaria CJ, Raus Sharif PCA, Abdull Hamid Embong, Suriyadi Halim Omar, Ahmad Maarop FCJJ:

Introduction

[1] There are five appeals before this court and they are:

(i) Civil Appeal No: 02(f)-27-04-2012(W) with CIMB Bank Berhad as the appellant and Maybank Trustees Berhad as the respondent;

(ii) Civil Appeal No: 02(f)-28-04-2012(W) with Datin Murnina bt Dato' Haji Sujak as the appellant and Maybank Trustees Berhad as the respondent;

(iii) Civil Appeal No: 02(f)-29-04-2012(W) with KAF Investment Bank Berhad as the appellant and MIDF Amanah Investment Bank Berhad & 11 others as the respondents;

(iv) Civil Appeal No: 02(f)-30-04-2012(W) with Maybank Trustees Berhad as the appellant and MIDF Amanah Investment Bank Berhad & 20 others as the respondents; and

(v) Civil Appeal No: 02(f)-33-04-2012(W) with Pesaka Astana (M) Sdn Bhd & eight others as the appellants and Maybank Trustees Berhad & Another as the respondents.

For convenience, we will first deal with the third appeal.

Civil Appeal No: 02(f)-29-04-2012(W) – Appeal No. (iii) (KAF's Appeal)

[2] This court had on 5 April 2012 granted leave to appeal to KAF Investment Bank Berhad ('KAF') on the following questions of law:

(i) What liability in law is assumed by an Issuer, Lead Arranger, Facility Agent and Issue Agent with respect to matters contained in an Information Memorandum?

(ii) To whom do the Lead Arranger, Facility Agent and Issue Agent owe duties in contract, tort and/or statute, and in light of the express contractual obligations, duties and liabilities either by way of contract or under an Information Memorandum?

(iii) Whether and to what extend are sophisticated investors, with the benefit of independent and professional advice, allowed to expressly apportion their obligations, duties and liabilities either by way of or under an Information memorandum?

(iv) Whether and to what extend is the Lead Arranger allowed to:

(a) Place experienced and sophisticated investors on notice as to the extend to which such investors are entitled to rely on information contained in an Information memorandum? and

(b) Limit any liability arising from any party reading and relying on the Information Memorandum?

(v) Is an Information Memorandum an agreement within the meaning of s. 65 of the Securities Commission Act 1993, and if so, who are parties to the Information Memorandum and how does the doctrine of privity of contract apply?

A (vi) Where a party has benefitted in pecuniary form from its fraudulent actions, in what circumstances will a court of law countenance or permit that party to retain the benefit of that fraud?

B (vii) Where parties to a contract provide that a party will indemnify the other in full for any and all expense, loss, damage or liability arising out of the second party carrying out its duties under the contract in question:

C (a) Whether a court of law can interfere with the agreed contractual indemnity and order that only a partial indemnity be given?; and

(b) What circumstances will justify a court making such an order in law?

D (viii) Whether and to what extend can a court of law, to the exclusion of the Syariah Advisory Council, determine or ascertain Islamic Law for the purpose of Islamic financial business within the meaning of ss. 56 and 57 of the Central Bank of Malaysia Act 2009?

E (ix) Where a trial court makes a finding that there is no misrepresentation on a particular state of facts, in the absence of an appeal from that decision by an affected party, can a Court of Appeal intervene and set aside that part of the High Court decision? If the answer to this question is yes, then to what extend, if any, does the doctrine of *res*

F *judicata* apply?

(x) On the issue of liability for the default of the issuer in repaying the bonds:

G (a) In light of the fact that the Lead Arranger, Issue Agent and Facility Agent owe no duties in contract, tort or under statute to the trustee, can the Lead Arranger, Issue Agent and Facility Agent, in law, be held to be contributorily liable with the trustee for the default in the repayment of the bonds;

H (b) What is the test for the apportionment of liability where more than one party is found liable and what part does a party's knowledge in respect of the default play in the apportionment of liability? and

I (c) Is the question to be asked whether (1) what is the proximate cause of the loss, or (2) what was the real effective cause of the *causa causans* of the loss?

(xi) In a contractual context, can a statement of intent as to an event that is to take place in the future constitute a misrepresentation under the law (including s. 18 of the Contracts Act 1950)?

(xii) Whether the Court of Appeal was correct as a matter of fact and law in holding that the Securities Commission must approve an Information Memorandum bearing in mind s. 38(4) of the Securities Commission Act 1993 and if so, whether any party who wishes to issue an Information Memorandum is obliged to obtain prior approval of the Securities Commission?

[3] We do not propose to answer the questions of law posed individually, but we will answer them in so far as they are relevant to the appeal before us.

Brief Facts

[4] Pesaka Astana (M) Sdn Bhd ('Pesaka') had obtained three government contracts. Pesaka proposed a financing scheme through the issuance of public Islamic bonds worth RM140 million (the bonds). Pesaka appointed KAF as the lead arranger, facility agent and issue agent for the issuance of the bonds. This is contained in the subscription and facility agreement ('the SFA') entered into between KAF, Pesaka and the primary subscriber ('Kenanga').

[5] Pesaka then set up a due diligence working group ('the DDWG'). The DDWG gathered all information required for the bonds scheme to formulate the information memorandum ('the IM'). The IM was put together based on the information presented by Pesaka to the DDWG.

[6] Under the bonds scheme, Pesaka's contracts with the government will be charged as security. The bondholders will provide funds to Pesaka to finance the contracts. In return, the bondholders will be repaid on the maturity date. The security for the bonds exercise was the contracts which Pesaka had signed with BOMBA and the Ministry of Defence ('MINDEF'). The proceeds of these contracts were to be paid into Pesaka's accounts which were to have Maybank Trustees Berhad ('MTB') as trustee and sole signatory.

A **[7]** To ensure the financial interest of the bondholders are secured, the bonds scheme was structured with MTB as the trustee, where all the proceeds from the government contracts due to Pesaka will be deposited in Syariah designated accounts.

B **[8]** The designated accounts will be under the sole control of the trustee. No one can use the monies in these accounts except the trustee of the accounts and in the manner and for the purpose as specified in the trust deed. In other words, the designated accounts will be completely ring fenced.

C **[9]** Pesaka appointed MTB as the sole trustee to manage and control the designated accounts. This was done under the trust deed entered into between MTB and Pesaka.

[10] As it turned out, instead of opening up new Syariah
D designated accounts, upon Pesaka's request, the DDWG agreed to use the existing conventional accounts belonging to Pesaka as the designated accounts and to convert them by making MTB as the sole signatory. Thus, Pesaka's existing accounts were used as the designated accounts. However, these designated accounts
E were not fully converted as MTB was not made the sole signatory to these accounts. Pesaka was still the signatory and had complete control over these accounts.

[11] Under the scheme, the bonds were first issued to Kenanga
F as the primary subscriber. Kenanga then on sold the same to the plaintiffs (the bondholders). The bonds funds paid by the bondholders were deposited into the designated accounts, under the control of Pesaka.

G **[12]** Having control over the accounts, Pesaka utilised the monies in the designated accounts for its own purposes and failed to redeem the bonds and repay the bondholders on the maturity date.

[13] On 25 October 2005, MTB arranged an informal meeting
H for Pesaka to table a debt repayment proposal. The following details were, *inter alia*, revealed during the 25 October 2005 meeting:

(i) Dato' Mohamad Rafie bin Sain ('Rafie') reported that he would like to come clean with the bondholders and disclosed
I that Pesaka had actually received the monies, amounting to RM109 million, sometime between June and August 2004.

(ii) In response to queries from the bondholders as to where the monies were, Rafie mentioned that the funds had been fully utilised to support Pesaka's overseas operation and overheads.

(iii) The bondholders asked the trustee as to how that could have happened and the trustee reported that KAF had disbursed the bonds proceeds before the signatory was changed.

(iv) The bondholders then turn to KAF with the question as to how KAF could have disbursed the funds when the documents stated that the trustee should have been the sole signatory prior to the disbursement

(v) Farid Mohd Yusof reported that KAF had acted on the advice of Messrs Abu Talib Shahrom & Zahari ('the transactional solicitor').

(vi) Miss Kim Lim of transactional solicitor explained that the condition precedent only required Pesaka to confirm that it had opened the designated accounts and that the board had passed a resolution to change the signatories. It does not mention the need for KAF to get confirmation that the changes had been effected.

(vii) Pesaka then requested for indulgence until mid December to come up with a repayment proposal.

High Court

[14] Aggrieved, the bondholders then commenced action in the High Court against 12 separate defendants which includes KAF. The bondholders were the parties who purchased the bonds in the secondary market from Kenanga. The bondholders' claims against KAF in the High Court were fivefold, namely:

(a) that the three trustee accounts which formed part of the designated accounts were not Syariah compliant;

(b) that the bonds proceeds were not deposited into the disbursement account under MTB's control;

(c) that the government contracts proceeds were never deposited into the revenue accounts under MTB's control;

(d) that the foreign exchange claim was not RM31,529,338; and

A (e) that BOMBA had not agreed to compensate Pesaka on its foreign exchange losses and therefore, there were misrepresentations in the IM.

[15] The bondholders then entered a consent judgment against
B Pesaka (first defendant), Rafie (fourth defendant) and the Group (sixth to 12th defendants) for the full sum of claim ('the consent judgment'). The bondholders then withdrew their action against Datin Murnina bt Dato' Haji Sujak (fifth defendant) (Murnina).

[16] Having entered consent judgment for the full sum of the
C claim against Pesaka, the bondholders however chose not to execute the consent judgment against Pesaka or had the damages assessed as against Rafie and the Amdac Group. Instead, the bondholders proceeded to trial against KAF and MTB.

D **[17]** The learned judge dismissed the claim in paras. 14 (d) and (e) and no appeal was brought by the bondholders against the dismissal.

[18] The High Court allowed the bondholders' claim in paras. (a),
E (b) and (c). The High Court found for the bondholders against MTB and KAF for breach of contract and negligence

[19] The learned judge denied KAF any indemnity against Pesaka and apportioned liability between KAF and MTB on 60:40 basis.

F **Court Of Appeal**

[20] On appeal, the Court of Appeal affirmed the findings of the High Court but re-apportioned liability between KAF and MTB on 50:50 basis. The Court of Appeal further granted KAF an
G indemnity of 2/3 of the sum of RM149,300,000 as against Pesaka.

KAF's Liability Under The IM

[21] KAF is defined in the IM as the lead arranger. As lead arranger in a securitisation transaction, KAF is to advise the issuer
H on how to go about obtaining a loan in a bond market. It is also tasked with the duty to make submission of the proposal to the Securities Commission ('SC'), as the regulatory body, and to prepare all the required documentation in order to obtain the necessary approval from the SC.

I

[22] KAF is also responsible for:

(a) organising and identifying the apportionment of relevant advisers/parties (if applicable) in relation to the private debt securities/Islamic securities for and on behalf of the issuer;

(b) organising the formation of DDWG. It should be noted however that the DDWG was set up by Pesaka; and

(c) participating as a member of DDWG, assisting in the preparation of IM, liaising with local rating agency, marketing the securities to potential investors, monitoring the compliance of the conditions precedent prior to issuance and supervising the documentation of the Islamic securities to the financial close.

High Court

[23] The High Court held that KAF as lead arranger owed a duty of care to the bondholders. This duty of care, according to the High Court, arose out of the proximity of the relationship between KAF and the bondholders which made it foreseeable that the bondholders would rely on the IM which KAF had played a substantial role in putting together. The learned judge, therefore, held that KAF owed a duty of care to the bondholders to ensure that the contents of the IM or otherwise known as the prospectus under the Securities Commission Act 1993 ('the SCA') was neither false nor misleading.

[24] The learned judge also found that it was KAF's duty as lead arranger, not only to put together the information contained in the IM and to make submission to the SC for approval, it was also KAF's duty to verify the information that was given by Pesaka against the original documents.

[25] The learned judge held that KAF was liable in negligence in failing to verify the content of the IM, as a result of which, the bondholders suffered damages.

[26] Learned counsel for KAF in his submission contended that the High Court Judge in coming to her decision failed to take into consideration the fact that the IM is not KAF's document, but that of Pesaka. In fact, the letter from Pesaka dated 15 March 2004, in the IM, clearly acknowledged that the IM was prepared by KAF based on information provided by Pesaka. Therefore, KAF should not be held liable for the information contained in the IM.

[27] He further contended that in coming to her decision, the learned judge failed to consider the effect of the important notice in the IM.

[28] With respect, we agree with learned counsel for KAF that the learned judge erred in saying that the IM had to be submitted to SC for its approval under s. 38(4) of the SCA, whereas the said section merely requires a person issuing the IM, to deposit a copy of the IM within seven days after it is first issued. Therefore, it is clear that the IM is not a document which requires approval of the SC.

[29] The learned judge further imposed a duty on KAF to verify the information contained in the IM against original documents. We do not know how and on what basis this duty to verify arose. The learned judge made no reference to any agreement or any statutory provision requiring KAF to verify the information contained in the IM.

[30] The finding by the High Court in fact appears to go against the duties and obligations of KAF as spelt out in the SFA. For instance, cl. 14.2(a) of the SFA clearly stipulates that KAF shall not assume or be deemed to have assumed any obligation to or fiduciary relationship with the primary subscriber other than those for which specific provision is made by this agreement or any obligation to or fiduciary relationship with the issuer. Clause 14.2(b) of the SFA further provides that the facility agent shall not be liable for any failure of any other party to this agreement, or the trustee to duly and punctually perform any of their respective obligations under the issue documents.

Court Of Appeal

[31] In affirming the decision of the High Court, the Court of Appeal went on to hold that the important notice had no legal effect for two reasons, namely:

(i) there was no approval from the SC for the important notice; and

(ii) KAF could not contract out its statutory duties or liabilities as it contravenes s. 65 of the SCA.

[32] Like the High Court, the Court of Appeal fell into error in saying that the IM needs the approval of the SC. As we stated earlier, that is not the case. As for the second ground, the Court of Appeal construed the word "agreement" in s. 65 of the SCA to include the IM and accordingly the disclaimer is void as it contravenes the said provision.

This Court

[33] The Court of Appeal relied on the case of *Antaios Compania Naviera SA v. Salen Rederierna AB* [1985] AC 191 in extending the meaning of the word "agreement" to include the IM but as rightly pointed out by learned counsel for KAF, in that case the House of Lords was concerned with charter party which had an arbitration clause and in particular with the construction of cl. 5 of the charter party. Therefore, strictly, the principle of construction as expounded by Lord Diplock in that case is relevant to the construction of commercial contract and is not applicable to the interpretation of statute.

[34] Section 65 of the SCA provides as follows:

> 65. Agreements to exclude or restrict liability void.
>
> An agreement is void in so far as it purports to exclude or restrict the liability of a person for contravention of section 55, 57 or 58 or for loss or damage under section 153.

We agree with learned counsel for KAF that the word "agreement" in s. 65 of the SCA must be given its ordinary meaning, which would mean some kind of contract between two or more parties. The IM on the face of it is not a contractual document. It had been issued by KAF on behalf of Pesaka to provide information to potential investors. The IM was not part of the issue documents which requires the approval of the SC. For those reasons, we hold that the IM is not an agreement falling within s. 65 of the SCA, therefore, KAF is free to include the important notice in the IM to exclude any liability arising from any claim that may arise from the IM.

[35] The important notice in the present case reads:

> This Information Memorandum Is Not Intended By KAF To Provide The Sole Basis Of Any Credit Or Other Evaluation, And Should Not Be Considered As A Recommendation By KAF To Participate In The Financing Facilities, Each Participant Is Urged

A To Make Its Own Assessment Of The Relevance And Adequacy Of The Information Contained In This Information Memorandum And To Make Such Independent Investigation As It Deems Necessary For The Purpose Of Such Determination. Neither KAF Nor Any Of Its Directors, Officers, Employees, Representatives Or Professional Advisers (Collectively, The "Parties") Shall Be Liable For Any Consequences As A Result Of The Reliance On Any Information Or Data In This Information Memorandum.

All Information And Projections Contained In This Information Memorandum Have Been Supplied By PASB As A Mere Guide Only And Do Not Purport To Contain All The Information That An Interested Party May Require. KAF Has Neither Independently Verified The Contents Nor Verified That All Information Material For An Evaluation Of The Financing Facilities Or About PASB Has Been Included. No Representation Or Warranty, Express Or Implied, Is Made By KAF With Respect To The Authenticity, Origin, Validity, Accuracy Or Completeness Of Such Information And Data As Contained In This Information Memorandum.

By Receiving This Information Memorandum The Recipient Acknowledges That It Will Be Solely Responsible For Making Its Own Investigations, Including The Costs And Expenses Incurred, And Forming Its Own Views As To The Condition And Prospects Of PASB And The Accuracy And Completeness Of The Statements Contained In This Information Memorandum. Further, KAF And PASB, And Their Officers Or Employees Do Not Represent Or Warrant That Any Information Contained Herein Will Remain Unchanged From The Date Of This Information Memorandum.

This Information Memorandum Includes Certain Statements, Estimates And Projections Provided By PASB With Respect To Its Anticipated Future Performance. Such Statements, Concerning Anticipated Results And Subject To Significant Business, Economic And Competitive Uncertainties And Contingencies, Many Of Which Are Or May Be Beyond The Control Of PASB. Accordingly, There Can Be No Assurance That Such Statements, Estimates And Projections Will Be Realised. The Forecast And Actual Results May Vary, And Those Variations May Be Material. No Representations Are Or Will Be Made By KAF Or PASB As To The Accuracy Or Completeness Of Such Statements, Estimates And Projections Or That Any Forecast Will Be Achieved.

The Contents Of This Information Memorandum Are Strictly Private And Confidential And Must Not Be Reproduced Or Circulated In Whole Or In Part Or Used For Any Purpose Other Than That For Which It Is Intended.

[36] The IM is widely used in other jurisdictions and it is generally accepted that the IM is merely to provide the potential investors with the necessary overview of the product before deciding whether to participate in bonds issue or otherwise. It is also common practice for a lead arranger to insert the notice of disclaimer.

[37] In the case of *IFE Fund SA v. Goldman Sachs International* [2007] EWCA Civ 811, it was held that a notice of disclaimer by an arranger absolves the arranger from the obligation to verify the accuracy of the facts contained in the information memorandum. It was held that the disclaimer was sufficient to negate the duty of care. The material facts in that case may be summarised as follows:

(i) Goldman Sachs International ('GSI') was the underwriter of credit facilities made available to Autodis.

(ii) Additionally, GSI was also the arranger for the syndication of an intermediate tier of credit provided to Autodis for its purchase of shares in Finelist, a UK listed company.

(iii) GSI created a syndication information memorandum ('SIM'), subject to certain standard wording, which was distributed on or about 30 March 2000 to possible participants, including IFE.

(iv) IFE decided to invest in the security and subsequently brought an action against GSI, alleging misrepresentation on the basis that GSI had failed to reveal further information regarding Finelist, which GSI had obtained from Arthur Anderson prior to 30 May 2000.

(v) Before the trial, IFE amended its pleading and included an additional claim for breach of duty of care.

[38] In its defence, GSI also relied on the terms of the "important notice", under cover of which the SIM was provided to IFE and all possible participants. That notice contains standard terms under which arrangers and underwriters in the world of syndicated finance provide SIMs.

[39] The claim by IFE was dismissed by the High Court. The Court of Appeal affirmed the decision of the High Court. Waller LJ in dismissing the appeal by IFE made the following observation:

> 28. … The foundation for liability for negligent misstatements demonstrates that where the terms on which someone is prepared to give advice or make a statement negatives any assumption of responsibility, no duty of care will be owed. Although there might be cases where the law would impose a duty by virtue of a particular state of facts despite an attempt not "to assume responsibility", the relationship between GSI either as arranger or as vendor would not be one of them. I entirely agree with the judge on this aspect. Second, since IFE and GSI were parties to the contract under which GSI sold bonds to IFE, if there was a misrepresentation it would be one to which the Misrepresentation Act 1967 would apply. If that Act does not, for any reason, provide a remedy, there could as I see it be no room for IFE being able to succeed on some other case of negligent misstatement.

[40] It would appear that important notice is a common practice not only in this country but also in more established capital markets. Therefore, important notice cannot just be brushed aside. It has to be given effect. After all, it cannot be denied that the bondholders in the present case are sophisticated investors and experienced financial institutions. They have vast experience in bonds and are expected to act on independent and professional advice from their own sources in respect of the contractual obligations in the light of the disclaimer as contained in the important notice.

[41] *IFE Fund SA* has been followed in a number of other cases. (See *JP Morgan Chase Bank & Others v. Springwell Navigation Corporation* [2008] EWHC 1186 (Comm); *Springwell Navigation Corporation (a body corporate) v. JP Morgan Chase Bank (a body corporate) (formerly known as the Chase Manhattan Bank) & Others* [2010] EWCA Civ 1221; *Titan Steel Wheels Limited v. The Royal Bank of Scotland PLC* [2010] EWHC 211 (Comm); *Raiffeisen Zentralbank Osterreich AG v. Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm); *Standard Chartered Bank v. Ceylon Petroleum Corporation* [2011] EWHC 1785 (Comm); *Andrew Brown and Others v. InnovatorOne Plc and Others* [2012] EWHC 1321 (Comm); and *Go Dante Yap v. Bank Austria Creditanstalt AG* [2010] SGHC 220.

[42] In *Raiffeisen*, the effect of important notice was considered by the court. At para. 65, the learned judge stated: A

The Information Memorandum

[65] At the beginning of the Information Memorandum ("IM") there was what was headed an "Important Notice" which stated amongst other things: B

> … This Information Memorandum (the 'Memorandum') has been prepared from Information supplied by the Company (EEL being defined as the Company). C
>
> The contents of this Memorandum have not been independently verified. No representation, warranty or undertaking (express or implied) is made, and no responsibility is accepted as to the adequacy, accuracy, completeness or reasonableness of this Memorandum or any further information, notice or other document at any time supplied in connection with the Facility. D
>
> This Memorandum is being provided for information purposes only and is not intended to provide the basis of any credit decision or other evaluation and should not be considered as a recommendation that any recipient of this Memorandum should participate in the Facility. Each potential participant should determine its interest in participating in the Facility based upon investigations and analysis as it deems necessary for such purpose. E F
>
> No undertaking is given to assess or keep under review the business, financial condition, prospects, creditworthiness, status or affairs of the Company, the Borrower or any other person now or at any time during the life of the Facility or (except as specifically provided in the Facility Agreement) to provide any recipient or participant in the Facility with any information relating to the Company, the Borrower or otherwise. G
>
> …
>
> This Memorandum is being made available to potential participants on the strict understanding that it is confidential. Recipients shall not be entitled to use any of the information contained in this Memorandum other than for the purpose of deciding whether or not to participate in the Facility. Recipients are reminded that this Memorandum is subject to the confidentiality undertaking signed by them. H I

A It was held in *Raiffeisen* that as the IM is only a summary, it cannot therefore be assumed that the IM contained everything that anyone might think relevant (even on credit issue).

[43] Similarly in *Titan Steel Wheels Limited*, one of the issues was B whether Royal Bank of Scotland ('RBS') was entitled to rely on contractual terms pertaining to its exclusion of liability or not. In that case, the High Court held that there was no such duty of care, even if RBS had subsequently given advice to Titan.

C **[44]** Therefore, it can be drawn from the authorities cited above, it is open to the lead arranger to include the important notice as a disclaimer in the IM. It is not contrary to law or business practice to do so. This is so because the IM contains information belonging to the issuer and not that of lead arranger. In the present case, the IM is Pesaka's document.

D

[45] Since we have held that the important notice is not rendered null and void by s. 65 of the SCA, hence it must be given full effect and force.

E **[46]** On close scrutiny of the judgment of the High Court and the Court of Appeal, with respect, we are of the view that both fell into serious error when they held that on the facts, there existed a duty of care owed by KAF to the bondholders despite the presence of the important notice in the IM. The reasons given F by the High Court read:

> I am not going into the background of what I understand of the reasons leading to Pesaka looking for the bonds. I find on the law that KAF as a lead arranger owes a duty of care to the bondholders Plaintiffs because its responsibility fundamentally was G to structure the bonds and to meet the object of its client, the issuer who was looking for cheaper financing because the Islamic bonds were understood to offer that advantage and so that it could meet existing obligation under the existing contracts with Bomba and MINDEF and that the bondholders would be paid them monies when the bonds matured.

H

While the Court of Appeal at para. 20, held:

> Fraudulent misappropriation of trust property was the immediate cause of the loss of the revenue. But it was dereliction of duty and/or negligence that allowed that to happen. The stable door I was invitingly not shut, those who had the duty to shut that door

> would have to restore the total loss. That such is the extend of that liability was reaffirmed in *Target Holdings Ltd v. Redferns (a firm) and Anor* [1996] AC 421 …

[47] Both courts made no reference to the contractual documents as contained in the issue documents. The Court of Appeal referred to *Target Holdings Ltd v. Redferns (a firm) and Another* [1996] AC 421 in support of its finding. This is a case concerning trust, where the degree of duty of care is higher than the present case. What is more glaring, both the High Court and the Court of Appeal in finding that there existed a duty of care by KAF, failed to consider the impact of the important notice or disclaimer. The High Court made no reference at all to the important notice. Whereas, the Court of Appeal held that the IM is an "agreement" within s. 65 of the SCA and for that reason the important notice was held to be void. This went against the principles in *IFE Fund SA* and *Raiffeisen* cited above.

[48] It is also worth noting that both the High Court and the Court of Appeal, without considering the special facts and circumstances of the case, simply ruled that there existed a duty of care on the principles of "foreseeability", "proximity", "neighbourhood" and "fairness". In applying those general phrases, it is important to bear in mind the warning given by Lord Roskill in *Caparo Industries plc v. Dickman* [1990] 2 AC 605 where he said:

> But … such phrases are not precise definitions. At best they are but labels or phrases descriptive of the very different factual situations which can exist in particular cases and which must be carefully examined in each case before it can be pragmatically determined whether a duty of care exists and, if so, what is the scope and extent of that duty.

[49] Another important consideration in this connection is whether or not the bondholders are persons with sufficient experience or sophistication. This is borne out in *JP Morgan Chase Bank*.

[50] In the present case, it is common ground that the bondholders are sophisticated investors with vast experience in the capital market. They are no ordinary investors. In *JP Morgan Chase Bank*, Gloster J held that a trader employed by an investment bank, who made recommendations and gave advice to financially sophisticated investors did not assume responsibility to the investor as to bring into play the full range of obligations of an

investment adviser or an asset manager. She concluded by saying that the bond salesman in the financial world are no different to any salesman in ordinary life. The duty of care owed by them is lower than that of investment advisors or an asset manager.

[51] The important notice in the present case clearly states:

> ... by receiving this Information Memorandum, the recipient acknowledges that it will be solely responsible for making its own investigations, including the costs and expenses incurred, and forming its own views as to the condition and prospects of (Pesaka) and the accuracy and completeness of the statements contained in this Information Memorandum.

This undoubtedly shifted the burden of verifying the content of the IM on the potential investors rather than KAF.

[52] For the reasons stated above, we are of the opinion that KAF as lead arranger is entitled to exclude liability arising from the IM through the important notice. It follows therefore that KAF could not be held liable for any information found in the IM. Accordingly, we set aside the findings made by the High Court and the Court of Appeal that KAF is liable for damages suffered by the bondholders consequent upon their reliance on the IM.

Condition Precedent 11

[53] Under the scheme of the bonds issue, Pesaka was required to open four Syariah compliant designated accounts at recognised financial institutions. The four accounts were:

(i) disbursement account ('the DA');

(ii) finance service reserve account ('the FSRA');

(iii) revenue account ('the RA'); and

(iv) operating account ('the OA').

The DA, the FSRA and the RA were intended to be used for the purpose of receiving the bonds proceeds and also to receive the proceeds from the existing contracts which were to form the corpus of the funds to repay the bondholders.

[54] The OA was intended to receive the balance funds available upon full redemption of the bonds which will be used to finance the working capital of Pesaka.

[55] A trustee would be appointed and be the signatory to all the designated accounts except the OA. MTB was appointed to be the trustee to the bonds issue. The OA was intended to be operated and managed solely by the issuer. The appointment of MTB as trustee to these designated accounts was to safeguard the interest of the bondholders and to provide integrity to the repayment scheme. This is commonly referred to as "ring fencing" which was described as being the fundamental basis upon which the bonds exercise was premised.

[56] The "ring fencing" works on the basis that the receipt of the existing contract would be paid into the RA and the FSRA to which the trustee would be the authorised signatory.

[57] Under the scheme, KAF's obligation in relation to the designated accounts is set out in Schedule A to the SFA which contains the conditions precedent to the bonds issue. One of the conditions precedent is CP11, which reads:

> 11. Confirmation by the Issuer to the Lead Arranger that it has opened the Designated Accounts and mandates (in form and content acceptable to the Lead Arranger) in respect of the Designated Accounts.

[58] CP11 must be read together with cl. 3.1 of the SFA, which reads:

> 3.1 Condition Precedent
>
> The obligation of the Issuer to issue the ABBA Bonds and the agreement of the Primary Subscriber to accept and receive the ABBA Bonds under this Agreement shall be expressly subject to this condition that the Lead Arranger has received the documents and/or evidence listed in Schedule A in each case in form and content satisfactory to the Lead Arranger and Primary Subscriber.

[59] It is not in dispute that there was no Syariah compliant designated accounts opened by Pesaka. Instead, upon Pesaka's request, the DDWG agreed to use the existing conventional accounts belonging to Pesaka as the designated accounts and to convert them by making MTB as the sole signatory. However, these designated accounts were not fully converted because MTB was not made the sole signatory to these accounts. In other

words, Pesaka was still the signatory to these accounts, having complete control over the accounts. In short, the accounts were not ring fenced when the bonds were issued.

[60] The issue before the court is whether KAF had complied with CP11 before the issuance of the bonds.

[61] It was contended on behalf of bondholders and MTB that KAF had acted in breach of CP11 by issuing the bonds on 1 April 2004 without ensuring that ring fencing was in place. It was their contention that under CP11, KAF had first to be satisfied that the designated accounts had been "ring fenced" prior to the issuance of the bonds.

[62] In reply, it was argued on behalf of KAF that KAF had fully complied with CP11 prior to the issuance of the bonds on the basis that Pesaka had by four letters dated 15 March 2004 confirmed that Pesaka had opened designated accounts to be managed and operated by MTB. Furthermore, the transactional solicitor had through its letters to KAF dated 25 March 2004 and 29 March 2004 confirmed that all the conditions precedent had been met.

High Court

[63] The learned judge disagreed that KAF's responsibility ended by receiving the confirmation alone. She held that it is "the responsibility of KAF to see that the condition precedent was fulfilled in real term and not in **executrix** stage alone." She expressed the view that KAF's duty was to ensure that the ring fencing feature of the designated accounts must exist in reality and these features are to endure till the maturity of the bonds. She concluded that the ring fencing was in fact not in place and therefore KAF was in breach of its duty under CP11.

Court Of Appeal

[64] In affirming the findings of the High Court, the Court of Appeal held that before KAF could issue the bonds, KAF had to be satisfied that CP11 had been complied with. In order to do so, KAF as lead arranger, facility agent and issue agent, had to independently verify that they were all in place. Confirmation by Pesaka was no proof that the required designated accounts with the mandates had actually been opened. In its judgment, it held

that "KAF had to be absolutely sure that the required designated accounts with MTB in sole control were in place before the issuance of bonds. The stable door must be first closed. The accounts into which revenue would be deposited must be in operation and in the sole control of MTB before bonds could be issued. Only such accounts could be designated accounts. But even so, those accounts must be Syariah compliant".

This Court

[65] Syariah compliant was not an issue before us. As it would appear from submissions of parties, what is critical is the absence of ring fencing in respect of the designated accounts which was the proximate cause of the loss. Having said that, therefore, the issue before us is whether the High Court and the Court of Appeal were right in their decision in holding that KAF had acted in breach of CP11 in issuing the bonds.

[66] We think it is relevant to consider the circumstances which led to KAF being satisfied that CP11 had been complied with. For this, we have to consider the various correspondences between Pesaka, KAF and the transactional solicitor. More importantly, the execution of the trust deed on 19 March 2004 in which MTB was appointed as the trustee.

[67] The powers and duties of MTB as trustee may be gathered from the following clauses of the trust deed. Clause 7.3 of the trust deed provides:

> 7.3 Entitlement:
>
> The Issuer agrees and covenants that the Trustee is entitled to take such action and to exercise all rights and remedies and discretion pursuant to the terms of this Deed and the other Issue Documents together with such powers as are reasonably incidental thereto.

And cl. 8 of the trust deed provides:

> 8. DESIGNATED ACCOUNTS
>
> 8.1 Designated Accounts:
>
> The Issuer shall open (where applicable) and maintain the following Islamic based income bearing accounts with a Commercial Bank acceptable to the Trustee:

A (a) Disbursement Account;

(b) Finance Service Reserve Account;

(c) Revenue Account; and

B (d) Operating Account.

Other than the Operating Account, all other Designated Accounts shall be operated solely by the Trustee. The Operating Account shall be operated solely by the Issuer.

C **[68]** It would appear that it is the duty of Pesaka to open the designated accounts and the designated accounts shall be operated solely by MTB as the trustee.

[69] Clause 12.3 of the trust deed provides for the appointment of MTB as the attorney of Pesaka. It reads:

D

12.3 Power of Attorney

The Issuer hereby irrevocably APPOINTS the Trustee or such other person or persons as the Trustee may designate as its attorney or attorneys and in the name of the Issuer in

E the name of the attorney or attorneys and on its behalf to do all such acts and execute in its name or otherwise all such documents and instruments as may be deemed necessary or expedient by the Trustee to protect or otherwise perfect the interest of the Trustee and/or the

F ABBA Bondholders under this Deed or which may be required for the full exercise of all or any of the powers and rights conferred on the Trustee under this Deed …

[70] Pursuant to cl. 12.3 of the trust deed, a power of attorney was executed on 19 March 2004 by Pesaka in favour of MTB.

G

[71] Clause 2 of the power of attorney grants upon the trustee such broad powers and rights to do any act or take any action on behalf of Pesaka.

H The said cl. 2 reads as follows:

2. APPOINTMENT

The Issuer hereby by way of security appoints the Trustee or any authorized officer of the Trustee or any Insolvency

I Official, each with full power of substitution and each with full power to act alone, to be its attorney and in its name and on its behalf to execute and as its act and deed or

otherwise to do all such assurances, acts or things which the Issuer ought to do under the covenants and obligations contained in the Security Documents, and generally in its name and on its behalf to exercise all or any of the powers vested in the Trustee, or any authorized officer of the Trustee or any Insolvency Official and (without prejudice to the generality of the foregoing):

(a) to execute, seal and deliver and otherwise perfect any deed, assignment, transfer, assurance, agreement, instrument or act which may in the opinion of such attorney be required or deemed proper, necessary or desirable in or for any of the purposes of the Security Documents;

(b) to file any claim, to take any action or institute any proceedings which the Trustee may deem to be necessary or advisable and to execute any documents and do anything necessary or desirable under any of the Security Documents and with full power to delegate any of the powers hereby conferred upon it.

[72] On 24 March 2004, the transactional solicitor deposited the trust deed and the power of attorney with the Registry of the Kuala Lumpur High Court.

[73] On 25 March 2004, the transactional solicitor forwarded a letter to KAF confirming that other than conditions precedent numbered 7 and 9, all conditions precedent as set out in Schedule A of the SFA had been fulfilled by Pesaka. This was followed by a letter dated 29 March 2004 from the transactional solicitor to KAF confirming that Pesaka had fulfilled conditions precedent 7 and 9 of Schedule A to the SFA.

[74] Under CP11, KAF is only required to obtain the confirmation and the mandates from Pesaka that the designated accounts had been opened. The letters from Pesaka dated 15 March 2004 relating to the designated accounts clearly stated that Pesaka had opened the designated accounts to be managed and operated by MTB. Judging from Pesaka's letters, it is incorrect to say that the accounts are yet to be opened or at the executrix stage as stated by the learned judge.

[75] In view of the above, we think it is justified for KAF to be satisfied that the designated accounts had been opened and the MTB had been made the sole signatory to the designated

A accounts. In other words, the designated accounts had been ring fenced. KAF had no knowledge that the designated accounts had not been opened what more ring fenced.

Is It KAF's Duty To Independently Verify That The
B **Designated Accounts Were In Fact Ring Fenced?**

[76] The Court of Appeal in its judgment stated that it was KAF's duty, as lead arranger, facility agent and issue agent, to independently verify that the designated accounts had been
C opened with MTB in sole control prior to the issuance of the bonds. The Court of Appeal further held that the confirmation by Pesaka was no proof that the required designated accounts with the necessary mandates had actually been opened.

[77] With respect, we think that the Court of Appeal had
D placed a much higher burden on KAF than what is required under the issue documents. There is no such contractual duty in the issue documents for KAF to independently verify that MTB had been made the sole signatory to the designated accounts. Under the SFA, KAF's duty as the lead arranger is merely to ensure that
E Pesaka had opened the designated accounts and that the mandates in form and content are acceptable to KAF.

[78] Further, we are of the opinion that the Court of Appeal had misinterpreted CP11 and did not give sufficient weight to the
F fact that the transactional solicitor had certified the fulfilment of CP11 in their written opinion to KAF.

[79] It should be pointed out that MTB did commence a separate action against the transactional solicitor in the High Court. However, MTB failed in its action. MTB then appealed to
G the Court of Appeal but later withdrew. In the circumstances, we hold that it is not unreasonable for KAF to act on the advice of the transactional solicitor. Hence, KAF was not relying on the confirmation by Pesaka alone. More importantly, the transactional
H solicitor was appointed by Pesaka's board of directors' Resolution dated 15 January 2004.

[80] Therefore, it can reasonably be concluded that when the bonds were issued on 1 April 2004, KAF was fully satisfied that all the conditions precedent in Schedule A of the SFA, including
I CP11, had been complied with.

[81] For the above reasons, we find that KAF had not acted in breach of CP11 when KAF issued the bonds on 1 April 2004.

Cause Of Loss

[82] The next issue to be considered is the cause of loss. From the evidence, the cause of loss is directly attributable to Pesaka, who had misappropriated the fund. The facts revealed that instead of using the monies to repay the bondholders, Pesaka had utilised the monies for its own purposes in breach of the terms and conditions as contained in the issue documents.

[83] The Court of Appeal held that the most proximate cause of the loss was the issuance of the bonds by KAF on 1 April 2004 without the ring fencing in place. The Court of Appeal so held on the ground that had KAF not issued those bonds on 1 April 2004, there would not have been any loss even if the ring fencing was not in place.

[84] The Court of Appeal was of the opinion that it was the duty of KAF to put MTB on board as trustee of the designated accounts prior to the issuance of the bonds. With respect, we are of the view that the Court of Appeal erred in coming to its finding because it is not supported by the issue documents. As a matter of fact, KAF is not a party to the trust deed. It is strictly between the issuer and MTB. As we have said earlier in this judgment, MTB had wide powers and rights under the trust deed and the power of attorney to take the necessary action to ring fence the account prior to the issuance of the bonds. It is a fact found by the courts below that MTB was duly notified of the proposed date of issuance of the bonds by KAF. There is no reason for MTB not to take immediate action to ring fence the designated accounts prior to the issuance or immediately after the bonds were issued. In the present case MTB chose to do nothing.

[85] Alternatively, MTB could have exercised its powers and rights under the power of attorney to stop the withdrawal from the designated accounts by Pesaka after the bonds were issued.

[86] The Court of Appeal in its judgment correctly noted that MTB was notified of the bonds issue which was originally on 26 March 2004 (then rescheduled to 1 April 2004) but MTB took no assertive step to control those conventional accounts

A before the issuance of the bonds. The Court of Appeal further stated that MTB could have informed KAF that the designated accounts were yet to be ring fenced but MTB did not do so. For this reason, the Court of Appeal held that MTB was equally accountable for the loss.

B

[87] Premised on the above, it is our view that the most proximate cause of the loss was the failure on the part of MTB to ring fence the designated accounts or alternatively to stop Pesaka from operating the designated accounts. MTB could have
C done that by using its powers and rights as vested upon it by the trust deed and the power of attorney. In our view, MTB is wholly to blame for the loss and not KAF.

Conclusion

D **[88]** In the result, the appeal by KAF is allowed with costs, both here and in the courts below and the orders of the High Court and the Court of Appeal are set aside.

Civil Appeal No: 02(f)-30-04-2012(W) – Appeal No. (iv)
E **(MTB's Appeal)**

[89] This court had also granted leave to appeal to MTB on the following questions of law:

QUANTUM

F

(i) Is a trustee who has been adjudged to be negligent liable to compensate a bondholder in full for the face value period of the bond, or only to the extent of what the bondholder would have received had the trustee not been negligent?

G (ii) In assessing the measure of damages a trustee is adjudged to be liable for by reason of the trustee's negligence, whether account has to be taken of what the beneficiary would have received had the breach not been committed, or is the beneficiary entitled to be indemnified in full?

H PRE JUDGMENT INTEREST

(i) Whether the power of the court to award pre-judgment interest can be exercised in regard of an express provision in the Trust Deed?

I

(ii) Whether in an action brought on a breach of obligation on an Islamic financing transaction whether the interest or compensation can be awarded by a court?

(iii) Whether compensation for loss on a pre-judgment basis can be qualified in the absence of clear evidence on the date to be sanctioned by the Syariah Advisory Council?

PESAKA'S INDEMNITY

Can a party ("the first party") who is adjudged to be liable on the basis that they acted fraudulently and who received the full benefit of their illegal act be permitted to retain some measure of their ill-gotten gains on the basis that the party to indemnify ("the second party") was negligent and whose negligence facilitated the wrongdoing by the first party?

[90] In respect of MTB's appeal the main issues that call for determination may be summarised as follows:

(i) The liability of MTB in relation to its roles in the bond issue.

(ii) The quantum recoverable by the bondholders against MTB.

(iii) The bondholders' entitlement to pre-judgment interest.

(iv) The liability of Pesaka and the extent of indemnity recoverable by MTB.

Liability

[91] As held earlier in this judgment MTB is wholly to blame for the loss suffered by the bondholders. To reiterate, the most proximate cause of the loss was the failure on the part of MTB to ring fence the designated accounts or alternatively to stop Pesaka from operating the designated accounts. MTB could have done that by using its powers and rights as vested upon them by the trust deed and the power of attorney. In our judgment, MTB is wholly to blame for the loss and not KAF. As a result, the appeal by MTB against the order of Court of Appeal in apportioning liability between MTB and KAF at 50:50 has to be dismissed with costs. Hence, MTB is 100% liable to the bondholders.

Quantum Recoverable By The Bondholders Against MTB

[92] Having found that MTB is wholly liable we must now ascertain whether MTB is liable for the full amount of RM149,315,000 which the issuer (Pesaka) would have to pay to

A the bondholders. The High Court had found that MTB and KAF were liable for the full sum of RM149,315,000. The decision was upheld by the Court of Appeal but the final order of the Court of Appeal was for the sum of RM149,300,000. However, on perusing the records and the Court of Appeal's judgment, we B cannot find any reason why the Court of Appeal had ordered this sum of RM149,300,000 instead.

[93] The reasons given by the Court of Appeal in upholding the decision of the High Court are as follows:

C

> [30] The actual loss occasioned by the absence of "ring fencing" was RM107m, which was the total revenue that was deposited into Pesaka's conventional accounts at the CIMB Cosway Branch. It was argued that any assessment of MTB's liability should be based on that RM107m. Common D law provided that bondholders would be indemnified for their total loss, which was the total face value of the bonds. Written law was not any different. Section 57 (deleted by Act 1305) of the SC Act 1993 provided that 'a person who acquires, subscribes for or purchases securities and suffers loss or damage as a result of any statement: or information E contained in a *prospectus* (the definition of which included the IM) that is false or misleading, or any statement or information contained in a prospectus from which there is a material omission, may recover that amount of loss or damage from' 'the issuer … a principal advisor … '. As said, F there were false and/or misleading statements in the IM. The IM stated the contact sum was RM150,613,200, but failed to disclose that the revenue that would be received would be substantially less than the contract sum, as the contracts had already been partly paid at the time of issuance of the IM. The IM also imparted that a foreign exchange loss claim for G RM31,529,338 had been approved. The note at the bottom of 2562AR which read 'Bomba *vide* (3118AR) has agreed to compensate (Pesaka) on losses arising out of foreign exchange differences, on its contracts with (Pesaka) (ie, contracts number (ii) and (iii) in the table above)' was H entirely economical with the true. The truth was that the Fire and Rescue Department merely acknowledged a foreign exchange loss claim for an unspecified amount (see 3118AR). Those statements on the revenue at 2562AR could not have been true, as the total revenue actually deposited after the issuance of bonds, which was the acid test on the truth of I the statements in 2562AR, was only RM107m and not RM180m.

> That clearly evinced that the statements at 2562AR were false and misleading. Had 'ring fencing' been in place, MTB would only have had RM107m to redeem the bonds, and the shortfall would have to be covered by Pesaka, KAF and MTB. Clearly therefore, the fact that only RM107m was lost would not assuage the liability of KAF or of MTB.

[94] Before us, learned counsel for MTB submitted that any liability attaching on MTB must be limited only to the amount that went into the RA from the existing contracts. And the amount that came into the RA did not exceed RM107 million. Learned counsel for the bondholders conversely submitted that MTB has to compensate the bondholders "in full for the face value of the bond" as it represented the latter's true loss. As an authority for this proposition, learned counsel referred us to the case of *Bartlett v. Barclays Bank Trust Co Ltd (No 2)* [1980] 2 All ER 92 wherein Justice Brightman had summarised the relevant principles on the measure of damages payable by a trustee to a beneficiary/estate for breaches of trust as follows:

(i) the obligation of a defaulting trustee is to effect restitution to the trust estate;

(ii) until restitution has been made, the default continues because it has not been made good;

(iii) the obligation of a trustee who is held liable for breach of trust is fundamentally different from a contractual or tortious wrongdoer;

(iv) the trustee's obligation is to restore to the trust estate the assets of which he (the trustee) has deprived it; and

(v) in the case of a wilful default by a trustee, that is, a passive breach of trust, *viz* an omission by a trustee to do something which as a prudent trustee he ought to have done, the court is entitled to order an account, that is, a roving commission.

Learned counsel submitted that the Court of Appeal in our instant case had applied similar principles which were relied upon by the House of Lords in *Target Holdings Ltd v. Redfrens* [1995] 3 All ER 785 and rightfully held that MTB "who had the duty to shut the door" would have to restore the total loss suffered by the bondholders.

[95] We have deliberated on this issue, and with respect we are unable to agree with the bondholders' contention on this point. On the contrary we are inclined to agree with learned counsel for MTB. On the evidence, we find that there is no serious dispute as to the total sum of monies that was received and dissipated by Pesaka from the RA which did not exceed RM107 million. This was even acknowledged by the Court of Appeal which clearly stated that "the actual loss occasioned by the absence of 'ring fencing' was RM107 million". Thus, we are of the view that judgment should not and cannot be entered for the sum of RM149,315,000 against MTB in favour of the bondholders, which sum represents the redemption value of the bonds. First, as rightfully pointed out by learned counsel for MTB the sum of RM149,315,000 would include a sum of RM31,529,338 which was stated to be the value of a foreign exchange loss claim, a sum which was never approved and never meant to be received by Pesaka for which MTB can never be held liable for, as it had nothing to do with the evaluation of the foreign exchange claim. Secondly, to hold MTB liable for the full amount of Pesaka's indebtedness would amount to treating MTB as if it was either the primary debtor or guarantor. It is pertinent to note that in actual fact MTB was neither the primary debtor nor a guarantor to the bonds issue. Instead MTB was the trustee who failed to ring fence the sum of RM107 million that came into the RA. The amount that came to the RA does not exceed RM107 million. Under the circumstances, we are of the view that MTB should only be liable for RM107 million and not the full amount of RM149,315,000 as ordered by the High Court.

[96] Thus, our answers to the two questions posed on quantum would be that MTB is not liable to compensate the bondholders in full for the face value of the bond. Accordingly, this part of MTB's appeal is allowed with costs. We make an order that MTB is liable only to RM107 million and not the full amount of RM149,315,000.

Pre-judgment Interest

[97] The High Court had rejected the bondholders' claim for pre-judgment interest. The rejection was based on cl. 39 of the trust deed which reads as follows:

NO PAYMENT OF INTEREST

For the avoidance of doubt and notwithstanding any other provision to the contrary herein contained, it is hereby agreed and declared that nothing in this Deed shall oblige the Issuer, the Trustee or any ABBA Bondholder to pay interest (by whatever name called) on any amount due or payable to other parties to this Deed or to receive any interest on any amount due or payable to the Issuer, the Trustee or any ABBA Bondholder or to do anything that is contrary to the teachings of Islam.

[98] The High Court in rejecting the bondholders' claim for pre-judgment interest gave the following reasons:

I have carefully considered the language in clause 39 and I find that it is not so much a matter of Syariah principles for the fact of this case but that the parties have simply agreed not to impose interest. And although it was argued by the Plaintiffs that their right of action did not arise from the Trust Deed but founded under Section 11 of Civil Law Act as well as Order 42 Rule 12 of the Rules of High Court, it cannot be denied that the fundamental arrangement between the parties emanate from the issue documents of which the Trust Deed is part of. However, the Syariah Advisory Council of Bank Negara Malaysia at its fourth meeting which was held on 14.2.1998 had nevertheless resolved that the High Court may impose penalty charges at the rate of 8% per annum on the judgment sums. This rate however is only to be allowed for actual loss.

Accordingly, I shall order interest at the rate of 8% not from the date of 1.8.2005 as proposed by the Plaintiffs because this is only allowed on the judgment sum and the sum only becomes the judgment sum as of to date. So I shall order the rate of 8% to run from today till the date of realization. It meets the ruling or resolution of the Syariah Advisory Council of Bank Negara.

[99] The Court of Appeal decided otherwise. The Court of Appeal granted the bondholders penalty charges at the rate of 3% on the judgment sum from 30 September 2005 to the date of the judgment. The Court of Appeal gave the following reasons:

[39] The learned judge refused pre-judgment interests to the bondholders, against which the bondholders cross-appealed. Pre-judgment interests might not be appropriate in Islamic finance business. But compensation, could it not have been awarded? Both cl 9.4 of the SF agreement, (2.702AR) and

A cl 4.4 of the trust deed (2591AR) identically provided 'In the event of overdue payment of any amounts due under the ABBA Bonds Issuance Facility, the issuer shall pay to the Primary Subscriber and or ABBA Bondholders compensation, on such overdue amounts at the rate and in the manner
B prescribed by the Shariah Advisory Council of the Securities Commission or such other relevant regulatory authority from time to time'. Only the promised payments of RM2,565,000 and RM5,950,000 (see 2666AR) towards secondary bonds were paid on time. But when default was declared on 30 September 2005, all promised payments towards primary or
C other secondary bonds, which then totaled RM149,300,000, fell immediately due. The SF agreement and trust deed provided that compensation on the overdue sum of RM149,300,000 would be payable to the bondholders 'at the rate and in the manner as prescribed by the Shariah Advisory Council of the Securities Commission or such other relevant regulatory
D authority from time to time'. There was no evidence of 'the rate and in the manner as prescribed by the Shariah Advisory Council of the Securities Council'. However, s. 56(1)(a) of the Central Bank of Malaysia Act 2009 provided that 'where the proceedings relating to Islamic
E financial business before any court or arbitrator any question arises concerning a Shariah matter, the court or the arbitrator, as the case maybe shall take into consideration any published rulings of the Shariah Advisory Council or refer such question to the Shariah Advisory Council for its
F ruling'. As its 50th meeting on 26 May 2005, the Shariah Advisory resolved 'that the court may impose late payment penalty charges on judgment debts as decided by the court (compensation) mechanisms'. The Council also resolved that the court may impose penalty charges for the actual loss *(ta'widh)*, which the Council agreed to adopt the 'annual
G average for overnight weighted rate' of Islamic money market of the preceding rate as a reference point. The bondholders who were denied the use of their money for the period 30 September 2005 to the date of judgment (not awarded by the court below – see 72AR) had suffered an actual loss
H which should have been compensated. For those reasons, we unanimously allow the cross-appeal by the bondholders and order KAF and MTB to pay to the bondholders the penalty charges at the rate of 3% on the judgment sum from 30 September 2005 to the date of judgment, and the costs of the latter appeal.

I

[100] Learned counsel for MTB argued that the Court of Appeal erred in its findings. It was submitted that the parties to the trust deed, and here it would include the plaintiffs as bondholders, had agreed that no interest would be payable. It was further submitted that the seeking of interest on the principal amount from the date of default that is 30 September 2005 until judgment and thereafter is a pure and simple interest or *riba* which the Syariah does not permit.

[101] We are inclined to agree with learned counsel for MTB on this point. We are of the view that the Court of Appeal had erred in allowing pre-judgment interest, which the High Court had correctly refused, on the premise that the parties had agreed that no interest will be payable. It is our view that in deciding the question of interest, the court must consider the express agreement of the bondholders in the trust deed. In this case, the trust deed as specified under cl. 39 clearly provides that no interest shall be payable. The trust deed is a contract and "the court has a duty to defend, protect and uphold the sanctity of the contract entered between the parties". (See *Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor And Other Appeals* [2009] 6 CLJ 22; [2009] 6 MLJ 839.) It is unfortunate that the Court of Appeal appears to have overlooked cl. 39 of the trust deed but instead erroneously chose to rely on cl. 4.4 of the trust deed which reads:

> 4.4 Compensation:
>
> In the event of overdue payments of any amounts due under the ABBA Bonds, the Issuer shall pay to the ABBA Bondholders compensation on such overdue amounts at the rate and manner prescribed by the Shariah Advisory Council of the Securities Commission or such other relevant regulatory authority from time to time.

[102] First, we wish to point out that cl. 4.4 of the trust deed provides for the issuer to pay pre-judgment compensation. As we all know in this case, the issuer is Pesaka and not MTB. Thus, the fact that the issuer had agreed to pay "compensation on such overdue amounts" cannot be applied to MTB in light of cl. 39. Secondly, there was no evidence adduced of the applicable rate as prescribed by the Syariah Advisory Council of the SC. Thus, we are of the view that the order of the Court of Appeal on this issue must be set aside. We allow MTB's appeal on this part of

A the judgment with costs. The order of the High Court in rejecting the bondholders' claim for pre-judgment interest is reinstated. And our answers to the three questions on pre-judgment interest are in the negative.

B **MTB's Claim For Indemnity From Pesaka**

[103] The High Court had dismissed MTB's claim for an indemnity against Pesaka. The High Court judge ruled as follows:

> In my judgment, the manner in which Mayban Trustees managed
C the accounts when they became aware of withdrawals to me is more consistent with daily routine banking practices rather than managing these accounts as a trustee of the bond issue and where the accounts in question are these securitized monies. Alarm bells went off at the various stages but were either not heard or
D ignored by Mayban Trustees. As I had said earlier, Mayban Trustees have not displayed the standard of diligence and knowledge not only of a professional specialist trustee in the bond market but one who is paid. I agree with the submissions of learned counsel for Pesaka that a paid trustee is expected to exercise a higher standard of diligence and knowledge than an
E unpaid trustee. I agree with the authorities that have been cited, *Bolam* and *Gillespie*. I agree that Mayban Trustees has not shown that degree of skill, prudence care and diligence consistent with the position held at the material time.
>
> And another factor that has weighed in my mind is the fact that
F BDO Binder, chartered accountants reported that the bond proceeds and the contract proceeds had been duly accounted for and that these monies were actually in fact used for the ordinary cause of business of Pesaka, its companies and its businesses and lands ultimately acquired were for and on behalf of Pesaka.
>
G Another factor to be taken into account is the fact that Pesaka had informed and had procured KAF's consent as well as the DDWG on the use of the existing accounts as designated accounts. It had prepared the necessary resolutions for the change of mandates, authorizations and signatories to these accounts. The
H proceeds of the bonds and the monies were released into the accounts upon confirmation by the third party that the CPs had being fulfilled. These Defendants cannot now to me be blamed for having relied on the experts and the professionals whom they have engaged and paid for their opinion, advice and directions.

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Finally, the consent judgments which have been entered into by these Defendants with the Plaintiff represent in my mind, the accountability of these Defendants for their acts despite the role of the other Defendants.

In these circumstances, the claim for indemnity against these Defendants must fail. The counter-claim is therefore dismissed with costs.

[104] The Court of Appeal was of a different view on this point. The Court of Appeal allowed MTB's appeal on the issue of indemnity but only awarded a limited indemnity. It gave the following reasons:

[48] Negligence of KAF and MTB was held by the learned judge to have disentitled them to any indemnity from Pesaka, on account of the respective riders in cl. 13.1 of the SF agreement (in the case of KAF) and cl. 14.1 of the trust deed (in the case of MTB). But there was a total failure by the learned judge to enquire if those riders applied in the first.

[49] In the first place, could an exemption clause avail to the party guilty of a wilful breach which goes to the root of the contract? In *Karsales (Harrow) Ltd v. Wallis* [1956] 1 WLR 936, it was held by Lord Denning that no exemption clause however widely drafted, could avail the party guilty of a breach which goes to the root of the contract:

> Notwithstanding earlier cases which might suggest the contrary, it is now settled that exempting clauses of this kind, no matter how widely they are expressed, only avail the party when he is carrying but his contract in its essential respects. He is not allowed to use them as a cover for misconduct of indifference or to enable him to turn a blind eye to his obligations. They do not avail him when he is guilty of a breach which goes to the root of the contract.

[105] Basically, the Court of Appeal was of the view that there was a total failure on the part of the High Court to enquire into the exemption appearing at cl. 14.1 of the trust deed which reads:

14.1 Indemnity:

> The Trustee and every other attorney, agent or other person appointed by the Trustee under the provisions of this Deed shall be entitled to be indemnified by the Issuer in respect of all liabilities, costs, charges and expenses incurred by it or him in relation to this Deed and the other Issue

> Documents to which it is a party or to the preparation and execution or purported execution thereof or to the carrying out of the trusts of this Deed or the exercise of any trusts, powers or discretions vested in it or him pursuant to this Deed and the other Issue Documents to which it is a party and against all actions, proceedings, costs, claims and demands in respect of any matter or thing done or omitted in anyway relating to this Deed in priority to any payments to the ABBA Bondholders and the Trustee may retain and pay out of any moneys in its hands arising from this Deed all sums necessary to effect such indemnity and also the remuneration of the Trustee as hereinbefore provided, save and except for its gross negligence, wilful default, wilful breach or fraudulent actions.

[106] In interpreting the above indemnity clause, the Court of Appeal referred to the case of *Karsales (Harrow) Ltd v. Wallis* [1956] 1 WLR 936 to the effect that no exemption clause however widely drafted, could avail the party guilty of a breach which goes to the root of the contract.

[107] Premised on the above, learned counsel for MTB submitted that the Court of Appeal had held correctly that at the end of the day it is a matter of construction of the clause in question. This according to learned counsel is evident from a line of cases in Malaysia. This aspect of the submissions is better highlighted by quoting the exact words employed by learned counsel in the written submission which state:

> The question is in all cases whether the clause, on its true construction, extends to cover the obligations or liability which it sought to exclude or restrict (Chitty, para 14-024). The law is that 'no exemption clause can protect a person from liability for his own fraud (Chitty meant fraud within the context of section 17 of our Contracts Act 1950) or require the other party to assume what he knows to be false.
>
> The Court of Appeal held that the issue must be resolved by the proper construction of the said exclusion clauses; see *Hotel Anika Sdn Bhd v. Majlis Daerah Kluang Utara* [2007] 1 MLJ 248), *Anderson v. Fitzgerald* (1853) 4 HLC 484; (1853) 10 ER 551; and *Guardian Assurance Co Ltd v. Condogianis* (1919) 26 CLR 231. In *Hong Realty (Pte) Ltd v. Chua Keng Mong* [1994] 3 SLR 819, 825, Karthigesu JA said:

> It is trite law that exemption clauses must be construed strictly and this mean that their application must be restricted to the particular circumstances the parties had in mind at the time they entered into the contract.

[108] Learned counsel for MTB advanced his arguments to the effect that cl. 14.1 of the trust deed provided that MTB would be indemnified "save and except for its gross negligence, wilful default, wilful breach or fraudulent actions". Those were the particular circumstances that the parties had in mind at the time when they entered into the trust deed. As such, learned counsel submitted that the exemption clause must be strictly construed, meaning that it must be restricted to those particular circumstances of gross negligence, wilful default, wilful breach or fraudulent actions by MTB.

[109] MTB's stance on this point is that the exemption clauses discussed in the preceding paragraphs could not avail to Pesaka as a defence. Clause 14.1 of the trust deed, on its true construction, could not reasonably have been intended to apply even when fraud by Pesaka had intervened to alter the circumstances in which those exemption clauses would ordinarily apply. Learned counsel forcefully argued that any other construction would mean that Pesaka could break every covenant with impunity.

[110] Learned counsel for Pesaka took a diametrically opposing view on this point in that MTB's reliance on the indemnity clause was misconceived as they were liable for having acted in breach of duties owed to the bondholders. Pesaka's stance on this point is that the indemnity provisions did not apply. For the forgoing reason it was submitted that the Court of Appeal was clearly wrong when it concluded that the indemnity provisions applied and that Pesaka was disqualified from relying on the exclusion clauses and MTB was entitled to be indemnified.

[111] Having taken into account all that has been said on both sides pertaining to the issue at hand, we are of the view that the Court of Appeal was correct in reversing the High Court decision on the issue of indemnity. As such we are inclined to agree with learned counsel for MTB on this point that cl. 14.1 of the trust deed clearly provides that MTB would be indemnified "save and except for its gross negligence, willful default, willful breach or

A fraudulent actions". It is clear in this case the High Court did not make a finding that MTB was guilty of "gross negligence, wilful default, wilful breach or fraudulent actions". As such the High Court had erred in denying MTB's claim for indemnity against Pesaka.

B

[112] The next issue is whether MTB should be indemnified in full by Pesaka. As stated earlier, the Court of Appeal having held that Pesaka should not benefit from its own fraud went on to make a finding that since MTB was guilty of gross negligence C Pesaka was only ordered to indemnify MTB 2/3 of RM149,300,000 together with penalty charges at the rate of 3% on the said sum from 30 September 2005 to the date of judgment at the rate of 4% at the date of judgment till the date of satisfaction. The reasoning behind this, according to the Court of Appeal was that D a full indemnity would mean that MTB was blameless.

[113] It was submitted before us that the Court of Appeal did not appreciate the effect of their decision in only granting a limited indemnity in that the real fraudsters ie, Pesaka will stand to gain at least 1/3 of their ill-gotten gains. We agree it would not be just E and equitable for Pesaka who had received the ill-gotten gains to be put in a position where it can retain those gains or any part of it. The House of Lords had the occasion to consider the issue of contribution in the context of the situation where one party still retained a portion of the ill-gotten gains and whether they ought F to contribute to the extent of a full contribution in the case of *Dubai Aluminum Company v. Salam & Ors* [2003] 1 All ER 97.

[114] In that case, Dubai Aluminum, had suffered loss to the tune of USD50 million and the parties who received those monies G were Mr Salaam and Mr Al Tajir. Dubai Aluminum had also sued a firm of solicitors, Amhurst, who acted in the fraudulent transactions except that Amhurst were not recipients of the monies. Amhurst settled the claim and then brought contribution proceedings against Mr Salaam and Mr Al Tajir. Lord Nicholls of H Birkenhead dealt with the issue as follows:

> 50 The other major factor which weighed with the judge when deciding to direct that the Amhurst firm should be entitled to an indemnity was that Mr. Salaam and Mr. Al Tajir had still not disgorged their full receipts from the fraud. The I judge considered (at 475) it would not be just and equitable to require one party to contribute in a way which would leave another party in possession of his spoils.

51 Mr. Salaam and Mr. Al Tajir submitted that this approach is impermissible. Under s. 2(1) of the 1978 Act the court is required to assess the amount of contribution recoverable from a person which is just and equitable 'having regard to the extent of that person's responsibility for the damage'. 'Responsibility' includes both blameworthiness and causative potency. However elastically interpreted, 'responsibility' does not embrace receipts.

52 I cannot accept this submission. It is based on a misconception of the essential nature of contribution proceedings. The object of contribution proceedings under the 1978 Act is to ensure that each party responsible for the damage makes an appropriate contribution to the cost of compensating the plaintiff, regardless of where that cost has fallen in the first instance. The burden of liability is being re-distributed. But, of necessity, the extent to which it is just and equitable to re-distribute this financial burden cannot be decided without seeing where the burden already lies. The court needs to have regard to the known or likely financial consequences of orders already made and to the likely financial consequences of any contribution order the court may make. For example, if one of three defendants equally responsible is insolvent, the court will have regard to this fact when directing contribution between the two solvent defendants. The court will do so, even though insolvency has nothing to do with responsibility. An instance of this everyday situation can be found in *Fisher v. C H T Ltd (No 2)* [1166] 1 All ER at 90-91, 2 QB 475 at 481 per Lord Denning MR.

53 In the present case a just and equitable distribution of the financial burden requires the court to take into account the net contributions each party made to the cost of compensating Dubai Aluminum. Regard should be had to the amounts payable by each party under the compromises and to the amounts of Dubai Aluminum's money each still has in hand. As Mr. Sumption submitted, a contribution order will not properly reflect the parties' relative responsibilities if, for instance, two parties are equally responsible and are ordered to contribute equally, but the proceeds have all ended up in the hands of one of them so that he is left with a large undisgorged balance whereas the other is out of pocket.

54 Rix J considered this was obvious. So did Ferris J, in *K v. P (J, third party)* [1993] 1 All ER 521 at 529, [1993] Ch 140 at 149. I agree with them.

…

> 59 This suggests that a just and equitable distribution of the burden of liability calls for a substantial measure of equality between the three of them. In this regard an unusual, and notable, feature of this case is the extent to which some parties to the fraud, but not others, remain in possession of substantial amounts of misappropriated money even after the plaintiff's claims have been met. Taken together Mr. Salaam and Mr. Al Tajir are still net recipients to the extent of over $20m. If equality of burden is the goal, the Amhurst firm ought not to be left out of pocket in respect of its $10m settlement payment. The firm should not be out of pocket so long as Mr. Salaam and Mr. Al Tajir retain a surplus in hand. Unlike Mr. Salaam and Mr. Al Tajir, neither the Amhurst firm nor Mr Amhurst received any money from the fraud.

[115] Similarly in the present case it is obviously not just and equitable to allow Pesaka to keep the ill-gotten gains or any part of it. This is especially so when the bondholders have not taken any step to enforce the consent judgment entered between Pesaka and the bondholders and instead focus their attention to MTB on the basis that MTB is in the position to satisfy the bondholders' claim. Thus, by allowing indemnity in full, Pesaka will be called to meet its obligation in full.

[116] We would therefore answer the question on Pesaka's indemnity in the negative. In the result, we allow MTB's cross-appeal with costs and order full indemnity against Pesaka.

Civil Appeal No: 02(f)-28-04-2012(W) - Appeal No. (ii) (Murnina's Appeal)

[117] We now deal with the appeal by Murnina against MTB for the order of indemnity obtained by MTB against her in the Court of Appeal.

[118] The background facts need to be restated although some had been mentioned earlier in our judgment.

[119] MTB had filed for a notice of contribution dated 3 June 2009 and further re-re-amended defence and counterclaim on 15 September 2009 *inter alia* against Pesaka, Rafie, Murnina and the Amdac Group claiming for, among others a declaration as well as judgment to the effect that MTB is entitled to be indemnified in full by them for any judgment that may be entered in favour of the bondholders or any one of them against MTB.

[120] MTB's claim for indemnity against Pesaka, Rafie, Murnina and the Amdac Group is on the basis that they are constructive trustees over the monies in the RA and which they had dominion over by virtue of being the directors or chief executive officer and signatories to the bank accounts.

[121] MTB also claimed that a constructive trust is imposed on them by reason of their knowledge that the monies in the RA were trust monies and that they knew that the monies were being misapplied or were reckless as to their application.

High Court

[122] On 7 July 2008, a consent judgment was recorded between the bondholders and the defendants (Pesaka, Rafie, Murnina and the Amdac Group) whereby it was agreed that:

(i) judgment be entered against Pesaka in the sum of RM149,315,000 together with interest at the rate of 8% per annum from 1 October 2005 to date of satisfaction;

(ii) Rafie and the Amdac Group agreed to pay to the bondholders general damages to be assessed together with interests thereon at the aforesaid and period; and

(iii) the bondholders withdraw their action against Murnina.

[123] After a full trial, judgment was given in favour of the bondholders against the remaining defendants whereby:

(i) The bondholders' claim against MTB and KAF was allowed on the apportionment of 60:40 respectively. Judgment in the sum of RM149,315,000 was accordingly entered.

(ii) The High Court however dismissed MTB's claim for indemnity against Murnina (and against Pesaka, Rafie and the Amdac Group) absolving her obligation to pay in view of MTB's negligence in not showing "a degree of skill, prudence, care and diligence" as a paid trustee. According to the Court of Appeal, the trial judge found as follows:

A ... MTB was negligent ... that clauses 28.2 and (14.1) of the Trust Deed disallowed an indemnity claim where there was gross negligence on the part of MTB (64AR) ... that the bond proceeds and said revenue were in fact used for the ordinary course of business of Pesaka, its companies and its businesses and lands ultimately acquired were for and on behalf of Pesaka ... that Pesaka had informed and procured KAF's consent for the use of the existing accounts as designated accounts, that Pesaka prepared the necessary resolutions for the change of mandate, authorisations and signatories to those accounts, that the proceeds of the bonds and monies were released into the accounts upon confirmation by the third party that the CPs had been fulfilled, that these defendants cannot now to me be blamed for having relied on the experts and the professionals whom they have engaged and paid for their opinion, advice and directions ... that the consent judgment which have been entered into by these Defendants with the plaintiffs represent in my mind, the accountability of these defendants for their acts despite the role of the other defendants.

(iii) Nevertheless, with regard to the role and liability of Murnina, the High Court held as follows:

These are my findings. I in fact first of all agree that this is an appropriate case for the lifting of the veil of incorporation as the evidence indicates that all the activities of Pesaka as well as the 6 - 12 Defendants were directed for the benefit of Dato' Rafie who together with her wife own (90%) of Pesaka. Datin Murnina may say that the shares were held by her on trust for husband and that he does not seem to have considered her as joint owner but merely as holding the properties on his behalf. I agree with Mayban Trustees' proposition that the impression given of them being in control, these 2 Defendants being in control of Pesaka and its group of companies is consistent with the fact that Dato' Rafie himself had given evidence that he considered Pesaka his personal property and he exercised actual control over them including the monies and the accounts though they were carried out by other personnel in his companies. I'm not going to set out, I agree that on the findings revolved around the reasoning in *Wallersteiner v. Moir*, *Gilford Motor*'s case to find that the directing mind and controlling minds behind Pesaka and the Amdac Group of companies is the Defendants. In my view, Datin Murnina remains liable even if she chose not to know or if

she allowed herself to be used by Dato' Rafie regardless of her personal reasons as to me she has chosen to enter into the realm of the corporate world and engage with the public especially in matters concerning raising public funds through this bond issue.

It's not an uncommon feature today that many now choose to work from home without the benefit of office space, without attending meetings and without even email particularly in this 21st century. It would be disastrous if directors such as Datin Murnina would be absolved from accountability for the reasons that she has proffered. Here monies moved in and out of the accounts and she signed for such movements and was the recipient of these monies insofar as these investment and shares were in her name. Therefore I find that she knowingly received proceeds of the trust money and for these reasons she has rightly been brought in.

Court Of Appeal

[124] An appeal was filed by MTB against Rafie, Murnina and the Amdac Group against the High Court's refusal to grant MTB's claim for an indemnity or contribution from the directors of Pesaka and the Amdac Group.

[125] In respect of the issue of lifting the corporate veil, the Court of Appeal discussed the position and the extent of Murnina's involvement in the operation, management and business of Pesaka and the Amdac Group and came to this opinion:

[66] There was no appeal by Pesaka, Rafie, Murnina, or the Amdac Group to challenge the lifting the corporate veil or to contest those findings of fact (see above) that led the learned judge to lift the corporate veil. Mr Wong Kian Keong for Murnina nonetheless submitted that there was no case for the lifting of the corporate veil. But on the basis of high authority, it would seem that no credence should be given to that submission.

…

[69] Be that as it may, we are nonetheless of the unanimous view, that is, after all consideration of the facts and circumstances, that the corporate veil should be lifted. On that, we are at one with the learned judge. First, it was all so evident that Rafie and Murnina absolutely ruled the roost.

That was evident from the pleadings alone. Pesaka, Rafie and the Amdac Group pleaded (i) that all major decisions of Pesaka were taken by Rafie (183AR), (ii) that the only directors of the Amdac Group of Companies was Rafie and Murnina and Murnina practically owned the entire equity of the Amdac Group of Companies (save for the eight Defendant - Amdac Capital) (183AR read together with 152AR). Pesaka, Rafie and the Amdac Group pleaded that 'the shares of the Amdac companies although in the names of Rafie and Murnina, were at all material times, held upon trust for Pesaka and the Amdac companies were treated as part of the Pesaka Group of Companies' (183AR). And Murnina pleaded that all her shares in Pesaka were held upon trust for Rafie (207AR) and that all her shares in the Amdac Group were held upon trust for Pesaka (207AR read together with 152AR). Given that state of the pleadings, the original defendants admitted that Rafie owned both Pesaka and the Amdac Group through Pesaka, and that Murnina who was a bare trustee for Rafie or Pesaka owned nothing in her own right.

[70] The evidence was no different. Rafie testified that whatever belonged to him belonged to Pesaka (1730AR), that he and Murnina owned nearly 90% of Pesaka (1730AR) and that he regarded Pesaka as his personal property (1730AR) and/or as his family company (1731AR). Murnina testified that all her shares in the Amdac Group were held upon trust for Pesaka (1382AR) and/or Rafie (1407AR), that her Bukit Jelutong lands were held upon trust for Pesaka (1407AR), and that her 87% of the issued capital of Pesaka was held upon trust for Rafie (1398AR). The trust deeds dated 9 June 1997 (8133AR) and 11 June 2003 (8134AR) also confirmed that Murnina held all her shares in Pesaka upon trust for Rafie.

[71] It could not be any clearer. The directing minds of Pesaka and the Amdac Group were Rafie and Murnina who had absolute control of those companies at all material times. Rafie and Murnina were the principals behind Pesaka and the Amdac Group. Rafie, Murnina and the Amdac Group were indistinguishable as separate economic units. All notional separateness could be disregarded (*Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533). And with their absolute control of Pesaka and the Amdac Group, Rafie and Murnina had fraudulently transferred the revenue to Murnina and the Amdac Group who had no right whatsoever

to that revenue or to retain or use the same for whatever reason or purpose, in breach of every covenant that they, through their alter ego, had entered into with KAF and MTB. Murnina, who had signed the security documents and the instructions to the CIMB Cosway Branch to transfer the revenue to herself and to the Amdac Group, and so was right up to her neck in complicity in the loss of the revenue, could not play humble housewife to feign ignorance. The indisputable truth was that Rafie and Murnina, with their dominion through Pesaka over the revenue, had fraudulently misappropriated and converted the revenue that belonged to the bondholders, in violation of the security documents. That was fraud, plain and simple, in every sense of the word. The veil of corporation must be ignored in the face of this unashamed fraud on KAF, MTB, and the bondholders (see *Re Darby ex parte Brougham* [1911] 1 KB 95). Rafie and Murnina and the Amdac Group should not be allowed to claim limited liability through the corporate shield. The court should pull aside the corporate veil and treat Pesaka and the Amdac as being their creatures, for whose doings they (Rafie and Murnina) should be responsible (see *Wallersteiner v. Moir; Moir v. Wallersteiner & Ors* [1974] 3 All ER 217). There was only justification to pierce the corporate veil, to ascertain the actual ownership of assets (*Aspatra Sdn Bhd & Ors v. Bank Bumiputra Malaysia Bhd & Anor* [1988] 2 MLJ 97, to enable creditors to reach the assets of Rafie, Murnina and the Amdac Group. If not, then Rafie and Murnina and the Amdac Group would make off with the revenue. Justice positively demanded that Rafie, Murnina, and the Amdac Group be ordered to indemnify MTB (see *Jones and Another v. Lipman and Another* [1962] 1 All ER 442 ... see also *Gilford Motor Co v. Horne* [1933] CH 935).

This Court

[126] Before us, Murnina is now appealing the Court of Appeal's decision in ruling that the corporate veil of Pesaka be lifted in allowing MTB's indemnity claim against her together with Rafie and the Amdac Group.

[127] Learned counsel for MTB submitted that, at trial, Rafie had admitted that the funds of the issuer were utilised to invest in the Amdac Group in various investments both locally and abroad. The common pattern was that the assets would ultimately be in the names of either Rafie or Murnina. The documentary evidence

clearly demonstrated that Murnina's knowledge of the bonds issue was far more extensive than what she sought to portray, despite her counsel's plea that she merely played the role of homemaker and dutiful housewife. Murnina allowed herself to be used by Rafie in carrying out the design to move monies out of the trust account as well as to be recipient of those monies on those assets which are in her name. She executed various resolutions in relation to the bonds issue including all resolutions pertaining to the opening of the designated accounts. She conceded that she made it a point to read the documents she signed. In short, she had the knowledge that she was used by Rafie to move out the monies from the trust accounts. The Court of Appeal and the High Court were therefore not wrong in lifting the corporate veil and in finding her liable. We agree with MTB's position that the various entities, Pesaka included, were a mere facade to perpetrate the acts. The corporate veil cannot, in our view, be a defence for Murnina from the claim for indemnity by MTB.

[128] We are also in agreement with MTB's stand that Murnina was guilty of having been in "knowingly receipt" of the revenue from the background facts as adverted to earlier. The trial court in fact made such a finding and this we affirm. Murnina had in our view acted dishonestly when she misapplied the proceeds of the trust monies. This simply means that she had not acted as an honest person would in the circumstances (see *Royal Brunei Airlines v. Tan* [1995] 3 All ER 97 at p. 105 which describes such act as a "conscious impropriety"). Lord Nicholls in that case said, "Honest people do not knowingly take others' property or participate in a transaction he knows involves a misapplication of trust assets or in such a case deliberately close his eyes or ears, or not ask questions, lest he learn something he would rather not know". Murnina thus cannot escape liability by playing blind and pleading ignorance. She had participated in committing the breaches of duty by Pesaka and Rafie and must be held liable.

[129] In the circumstances, this court must intervene by imputing a constructive trust upon Murnina (as well as Rafie) for her role in misapplying the trust monies. Constructive trust is "a trust which is imposed by equity in order to satisfy the demands of justice and good conscience, without reference to any express or presumed intention of the parties" (per Arifin Zakaria, CJ in *Hassan Kadir & Ors v. Mohamed Moidu Mohamed & Anor* [2011]

5 CLJ 136; [2011] 4 AMR 677). Equity therefore demands that Murnina (and Rafie) must not be allowed to keep those monies and in the process unjustly enrich herself (see *Fernrite Sdn Bhd v. Perbadanan Nasional Bhd* [2011] 9 CLJ 1).

[130] As regards Murnina's counsel's submission that MTB has no legal standing to pursue this action since the bondholders had entered a consent judgment with Murnina (and Rafie and the Amdac Group) and withdrawn the suit against her, we hold that there is no merit in this submission in view of our earlier findings.

[131] With Pesaka having admitted full responsibility to the bondholders *via* the consent judgment, it would be a travesty of justice that it be allowed to keep a portion of the ill-gotten gains and accordingly we order that Murnina too (and Rafie who together with Murnina owned 90% of Pesaka) must fully indemnify MTB for the loss. We therefore dismiss her appeal with costs. The order on indemnity by the Court of Appeal is to that extent set aside.

Civil Appeal No: 02(f)-27-04-2012(W) - Appeal No. (i) (CIMB's Appeal)

[132] CIMB is appealing against the order of the Court of Appeal to indemnify MTB to the extent of 1/3 of the total liability that MTB would have to bear, that is after deduction of the sum to be indemnified by Pesaka, Rafie, Murnina and the Amdac Group. For purposes of this appeal the following two questions will be answered:

(i) Having regard to the long established mandate rule for corporate customers under the law and practice of banker/customer, whether the Court of Appeal acted correctly in holding that CIMB was liable as a constructive trustee to a 3rd party *viz*. Mayban Trustees for monies held in an account operated at its Cosway branch at all material times by the customer of the said account, *viz*, Pesaka through its duly authorized signatories?

(ii) Not having found CIMB liable under either the "knowing receipt" or "knowing assistance" category, whether the Court of Appeal was nevertheless right in law in holding CIMB liable as a constructive trustee?

[133] Even though the antecedents of this appeal have been adequately provided for under KAF's appeal, when the need arises, additional details will be supplied in order to have better comprehension of the matter under discussion.

[134] Pursuant to the IM document, the opening of the designated accounts were required to be undertaken. Despite the want of ring-fencing, RM8,405,059.90 was deposited into the FSRA held at CIMB (formerly BCB), Terminal 3, Subang Branch. This was an existing conventional account in the name of Pesaka. A further sum of RM45,500,000 was deposited into the pre-existing escrow account in CIMB at the Cosway branch. Likewise this was also a conventional account in the name of Pesaka and under its control. MTB in its counter-claim alleged that this pre-existing escrow account, an account meant to receive payments from government contracts, was converted into the RA. The aggregate sum, collected from the bondholders and deposited under the two CIMB accounts amounted to RM53,905,059.90 (FSRA and escrow deposits).

[135] As there was no evidence adduced to show that there was anything untoward as regards the act of depositing the monies into those two accounts, such transaction must have taken place in the course of a normal banking practice. On the other hand the same cannot be said of the disposals of the monies from those two accounts. The admission by Pesaka, amongst others, that practically all the monies had been withdrawn from those two accounts, part of which were utilised for overseas investments or advanced to its related companies, and left the bondholders high and dry.

[136] In this case, MTB had filed a counter-claim pursuant to its duties under the trust deed against CIMB, pleading negligence and breach of duty as a constructive trustee, in light of the accounts held by Pesaka being maintained by CIMB. As reflected in paras. 62, 63 and 64 of the counter-claim MTB alleged that CIMB owed a duty of care to it. The High Court held that not only was there no duty owed to MTB but a banker-customer relationship existed between CIMB and the original signatories, namely Rafie and Murnina. The trial judge found that CIMB had not acted dishonestly and thereupon dismissed MTB's counterclaim. The Court of Appeal however took a different view

and held that CIMB did owe a duty as a constructive trustee to MTB and accordingly entered judgment against CIMB; hence this appeal. Thus, the question is did CIMB commit any breach of constructive trust for those acts of disposals from the CIMB accounts?

[137] In *Paragon Finance v. Thimbleby* [1999] 1 All ER 400 the court had summed it up succinctly when it held, amongst others:

> A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another.

(See also *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381)

[138] In *Datuk M Kayveas v. See Hong Chen & Sons Sdn Bhd & Ors* [2013] 5 CLJ 949 this court opined:

> ... it may be construed that a constructive trust arises by operation of law irrespective of the intention of the parties, in circumstances where the trustee acquires property for the benefit of the beneficiary, and making it unconscionable for him to assert his own beneficial interest in the property and deny the beneficial interest of another. Being bereft of any beneficial interest, and with equity fastened upon his conscience, he cannot transfer any interest to himself let alone a third party. If he does, then a constructive trust comes into existence.

[139] The logical sequential question to be resolved is, did CIMB owe a duty to anyone regarding the two accounts except to Pesaka? It was indisputable that those accounts were under the control of Pesaka, and being conventional accounts, the signatories were still Rafie and Murnina.

[140] Factually CIMB was in a peculiar position in that it was in a 'conflict of interest' position. Not only was it a bondholder, and thus beneficially entitled to the monies in the accounts, but at the same time running a banking business. Releasing the monies would cause CIMB to suffer equally as any bondholder whilst any refusal to act on the instruction of Pesaka as a customer would entail a breach of the banker-customer relationship between them. Yet as clearly seen, despite the two accounts being under the

A management of CIMB, never for a moment did it take advantage of its position and recover its losses. Instead the transfers to the other accounts as instructed by Pesaka were approved. So, where is the evidence to indicate even a trace of dishonesty?

B **[141]** The High Court when rejecting the counter-claim, justified its decision by concluding that there was failure by MTB to establish dishonesty on the part of CIMB, an essential ingredient when intending to establish a breach of constructive trust. The Court of Appeal in reversing the High Court held that CIMB
C owed a duty of care as a constructive trustee to MTB.

[142] A perusal of the submission of MTB pointed to its heavy reliance on the 'knowing assistance' proposition regarding the liability of CIMB, expounded amongst others, by *Selangor United Estates Ltd v. Craddock (No 3)* [1968] 2 All ER 1073, *Karak Rubber*
D *Co Ltd v. Burden* [1972] 1 All ER 1210 and *Rowlandson v. National Westminster Bank Ltd* [1978] 3 All ER 370. In those cases dishonesty was not a relevant ingredient to found liability against a constructive trustee under the 'knowing assistance' proposition; this approach was a major shift as propounded by *Barnes v. Addy*
E [1874] LR 9 Ch. App 244 (pp. 157-169), which demanded that, "agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees".

F **[143]** A rethinking was detected in *Carl-Zeiss-Stiftung v. Herbert Smith & Co (a firm) (No. 2)* [1969] 2 All ER 367 (CA) when it opined that an element of dishonesty or of consciously acting improperly was required to be established before a trustee could be said to have breached a trust (see also *Belmont Finance*
G *Corporation Ltd v. Williams Furniture Ltd* [1979] 1 All ER 118; *Re Montagu's Settlement Trusts Duke of Manchester v. National Westminster Bank Ltd* [1992] 4 All ER 308; *Lipkin Gorman v. Karpnale Ltd* [1992] 4 All ER 331).

H **[144]** Then came the case of *Royal Brunei Airlines* which especially clarified the principles relating to dishonest assistance. In this case, Royal Brunei contracted an agency agreement with Borneo Leisure Travel Sdn Bhd ('BLT'), wherein it was to sell tickets for the Royal Brunei. The proceeds were then deposited
I into a current account which was also the common account to defray some of BLT's expenses eg, salary and overdrafts. BLT

was to hand over the proceeds of the tickets to Royal Brunei within 30 days. The respondent (Tan) was the managing director and the principal shareholder of BLT. Later BLT went into insolvency and Royal Brunei took action against Tan for knowingly assisting in breaching a trust.

The Privy Council when discussing whether the breach of trust must be a dishonest and fraudulent breach of trust committed by the trustee, at the end of the day found Tan, on an objective test, liable. The Privy Council when discussing the fault based liability opined:

> Given then, that in some circumstances a third party may be liable directly to a beneficiary, but given also that the liability is not so strict that there would be liability even when the third party was wholly unaware of the existence of the trust, the next step is to seek to identify the touchstone of liability. By common accord dishonesty fulfils this role.

[145] The above principle was extended by *Twinsectra Ltd v. Yardley* [2002] 2 All ER 377 (HL), when it introduced the two-fold tests of an objective and subjective test. In this case, Leach who was a solicitor, acted for Yardley in a purchase of a piece of property. Financing was needed and Barclays Bank agreed to finance the purchase. Unfortunately delays happened and an alternative source had to be found. Twinsectra agreed to finance but subject to Leach giving an undertaking guaranteeing payment. Leach refused but was agreed upon by another solicitor ie, Sims. Later Barclays' loan came through thus dispensing with the need of Twinsectra's loan. However Yardley and Sims proceeded with Twinsectra's loan, with Sims now assuming the principal liability over the loan, as Sims owed Yardley monies. This agreement between them was not known to Leach and Twinsectra except for a proposed draft of the undertaking seen by the former. Sims handed over the monies to Leach who then paid it out on Yardley's instructions. When Yardley defaulted and Sims went bankrupt Twinsectra sued Leach for dishonest assistance of the breach of trust occasioned by Sims. The trial Judge found Leach not dishonest. The Court of Appeal disagreed and overturned that decision. The House of Lords agreed with the trial Judge and allowed Leach's appeal.

[146] In a gist, a new test was introduced by *Twinsectra*, in that the concept of subjective dishonesty became a requirement in a breach of trust situation. Lord Hoffman at p. 382 in this case opined:

> I do not think that it is fairly open to your Lordships to take this view of the law without departing from the principles laid down by the Privy Council in *Royal Brunei Airlines Sdn Bhd v. Tan* [1995] 2 AC 378. For the reasons given by my noble and learned friend, Lord Hutton, I consider that those principles require more than knowledge of the facts which make the conduct wrongful. They require a dishonest state of mind, that is to say, consciousness that one is transgressing ordinary standards of honest behaviour. I also agree with Lord Hutton that the judge correctly applied this test and that the Court of Appeal was not entitled, on the basis of the written transcript, to make a finding of dishonesty which the judge who saw and heard Mr Leach did not.

[147] Lord Hutton at p. 384 had added:

> Thirdly, there is a standard which combines an objective test and a subjective test, and which requires that before there can be a finding of dishonesty it must be established that the defendant's conduct was dishonest by the ordinary standards of reasonable and honest people and that he himself realised that by those standards his conduct was dishonest. I will term this "the combined test".

[148] Having scrutinised the evidence, we are satisfied that what was adduced before the court was merely evidence pointing to CIMB complying with the instructions given by the banker-customer relationship. In light of the peculiar position of CIMB, and with no cogent evidence having been adduced to say otherwise, it is our view that CIMB could not be construed as being dishonest in the ordinary standards of reasonable and honest people, with itself knowing, based on the subjective dishonest test, that what it did was dishonest when transferring the monies to other accounts. This finding and conclusion therefore would be in line with the combined tests of an objective and subjective test as propounded by *Twinsectra*.

[149] As opposed to CIMB's position MTB's stand is as follows. It argued that as all the pre-conditions of the designated accounts had not been complied with it could not move in and administer the accounts. Whether this position is acceptable or otherwise

requires a scrutiny of the facts and background of this case. And this we have done when discussing KAF's appeal. We found MTB liable for failing to ring fence the designated accounts. No further discussion therefore is needed here on the finding of MTB's liability except to say that with the authority it held MTB could have taken up many peremptory actions. Instead it did practically nothing. To use the words of the learned judge, MTB instead of being proactive, had behaved "like a mannequin", when its appointment as trustees went as far back as July 2003. MTB had been unprofessional and indifferent when it failed to take action despite being aware of the inaction of Pesaka.

[150] From the totality of the evidence we therefore hold that CIMB was not liable for the monies disposed on the instruction of Pesaka from the designated account and instead hold MTB totally liable.

[151] Thus, our answer to the two questions are in the negative. The appeal is allowed with costs and the order of the Court of Appeal set aside. The counter-claim by MTB against CIMB is dismissed with costs.

Civil Appeal No: 02(f)-33-04-2012(W) – Appeal No. (v) (Pesaka, Rafie And The Amdac Group's Appeal)

[152] This brings us to the appeal filed by Pesaka, Rafie and the Amdac Group.

[153] MTB had filed counterclaim against Pesaka, Rafie, Murnina and the Amdac Group claiming for a declaration as well as judgment to the effect that MTB is entitled to be indemnified in full by them for any judgment which may be entered against MTB in favour of the bondholders or any one of them.

[154] MTB's claim for indemnity against Pesaka, Rafie, Murnina and the Amdac Group is on the basis that they are constructive trustees over the monies in the RA. MTB claimed that a constructive trust was imposed because they had knowledge that the monies in the RA were trust monies and that they knew that the monies were being misapplied or that they were reckless as to their application.

[155] The High Court dismissed MTB's indemnity claim against Pesaka, Rafie, Murnina and the Amdac Group.

[156] The Court of Appeal allowed MTB's appeal and made the following orders:

(a) KAF and MTB should jointly bear 1/3 of the total loss of RM149,300,000 together with all penalty charges;

(b) Pesaka to pay KAF and MTB the sum of 2/3 of RM149,300,000 together with penalty charges at the nominal rate of 3% on 2/3 of RM149,300,000 from 30 September 2005 to the date of judgment, and penalty charges at the rate of 4% on 2/3 of RM149,300,000 from the date of judgment to the date of satisfaction;

(c) Pesaka to pay KAF and MTB the costs of their appeals;

(d) Rafie, Murnina and the Amdac Group to pay MTB, the sum of 2/3 of RM149,300,000 together with penalty charges at the nominal rate of 3% on half of 2/3 of RM149,300,000 from 30 September 2005 to the date of judgment, and penalty charges at the rate of 4% on half of 2/3 of RM149,300,000 from the date of judgment to date of satisfaction; and

(e) Rafie, Murnina and the Amdac Group to pay the costs of MTB's appeal against them.

[157] We have dealt with the appeal by Murnina. For the same reasons in Murnina's appeal, we would also dismiss the appeal by Rafie and the Amdac Group with costs and therefore we hold that they are fully liable to MTB.

[158] In respect of liability of Pesaka for MTB's claim for indemnity, learned counsel for Pesaka contended that the Court of Appeal clearly erred in holding that the indemnity provision under cl. 14.1 of the trust deed applied and that Pesaka could not rely on the exclusion in cl. 14.1 which according to learned counsel was clear, unambiguous and unequivocal in its meaning. It was submitted that an indemnity clause in business contracts did not have to satisfy the test of reasonableness as required for indemnity provisions in a consumer contract. It was further contended that while the High Court had applied the indemnity provision as written and agreed to by the parties, the Court of

Appeal in effect re-wrote the provision. It was also submitted that there was no basis for a finding of fraud by the Court of Appeal, and as such it erred in concluding that Pesaka was disqualified from relying on the exclusion clause. For reasons which we will set out shortly we are unable to agree with the aforesaid submissions.

[159] In considering the liability of Pesaka to MTB, the learned trial judge found that this was an appropriate case for lifting the corporate veil. She found that Rafie was the directing mind behind Pesaka and the Amdac Group. However she dismissed MTB's claim for reasons as set out in the relevant passages in her judgment. The main reason appears to be her finding that MTB "has not shown that degree of skill, prudence, care and diligence consistent with the position held at the material time", which disentitled it to any indemnity under cl. 14.1.

[160] The Court of Appeal found that there was a total failure on the part of the learned trial judge to enquire if the exemptions in cl.14.1 applied. Summarising the more recent development of the jurisprudence on the application of an exemption clause from leading authorities the Court of Appeal said:

> [49] In the first place, could an exemption clause avail to the party guilty of a wilful breach which goes to the root of the contract? In *Karsales (Harrow) Ltd v. Wallis* [1956] 1 WLR 936, it was held by Lord Denning that no exemption clause however widely drafted, could avail the party guilty of a breach which goes to the root of the contract:
>
> > Notwithstanding earlier cases which might suggest the contrary, it is now settled that exempting clauses of this kind, no matter how widely they are expressed, only avail the party when he is carrying his contract in its essential respects. He is not allowed to use them as a cover for misconduct of indifference or to enable him to turn a blind eye to his obligations. They do not avail him when he is guilty of a breach which goes to the root of the contract.
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> [50] But such a doctrine of fundamental breach as a rule of law was disapproved by the House of Lords in *Suisse Atlantique Societe d'Armement Maritime SA v. NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, who held, *albeit obiter*, that whether an exclusion clause was applicable when there was a fundamental breach was one of the true construction of the contract. However, the doctrine of fundamental breach

A continued to be used until it was again disapproved by the House of Lords in *Photo Production Ltd v. Securicor Transport Ltd* [1980] AC 827 (see *Contract Law in Malaysia* by Cheong Mei Fong, at p. 203), who held that whether an exclusion clause was applicable when there was a fundamental breach was one of the true construction of the contract. On that, Their Lordships wire uncompromisingly clear:

> Much has been written about the *Suisse Atlantique* case. Each speech has been subjected to various degrees of analysis and criticism, much of it constructive. Speaking for myself I am conscious of imperfection of terminology, though sometimes in good company. But I do not think that I should be conducing to the clarity of the law by adding to what was already too ample a discussion a further analysis which in turn would have to be interpreted. I have no second thoughts as to *the main proposition that the question whether, and to what extent, an exclusion clause is to be applied to a fundamental breach, or a breach of a fundamental term, or indeed to any breach of contract, is a matter of construction of the contract.* Many difficult questions arise and will continue to arise in the infinitely varied situations in which contracts come to be breached - by repudiatory breaches, accepted or not, by anticipatory breaches, by breaches of conditions or of various term negligent, or deliberate action or otherwise. But there are ample resources in the normal rules of contract law for dealing with these without the superimposition of a judicially invented rule of law: Per Lord Wilberforce.
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> My Lords, an exclusion clause is one which excludes or modifies general secondary or anticipatory secondary, that would otherwise arise under the contract by implication of law. Parties are free to agree to whatever exclusion or modification of all types of obligations as they please within the limits that the agreement must retain the legal characteristics of a contract; and must not offend against the equitable rule against penalties; that is to say, it must not impose upon the breaker of a primary obligation a general secondary obligation to pay to the other party a sum of money that is manifestly intended to be in excess of the amount which would fully compensate the other party for the loss sustained by him in consequence of the breach of the primary obligation. Since the presumption is that the parties by entering into the contract intended to accept the implied obligations exclusion clauses are to be construed

> strictly and the degree of strictness appropriate to be applied to their construction may properly depend upon the extent to which they involve departure from the implied obligations. Since the obligations implied by law in a commercial contract are those which, by judicial consensus over the years or by Parliament in passing a statute, have been regarded as obligations which a reasonable businessman would realise that he was accepting when he entered into a contract of a particular kind, *the court's view of the reasonableness of any departure from the implied obligations which would be involved in construing the express words of an exclusion clause in one sense that they are capable of bearing rather than another, is a relevant consideration in deciding what meaning the words were intended by the parties to bear. But this does not entitle the court to reject the exclusion clause, however unreasonable the court itself may think it is, if the words are clear and fairly susceptible of one meaning only*: per Lord Diplock.
>
> …
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> *The law is that 'no exemption clause can protect a person from liability for his own fraud (Chitty meant the fraud within the context of section 17 of our Contracts Act 1950) or require the other party to assume what he knows to be false.* But it is uncertain whether, there is any rule of law, based on public policy, which would prevent the exclusion by a principal of liability for fraud on the part of his agent acting as such. It is, however, clear that any such exclusion would have to be expressed in clear and unmistakable terms on the face of the contract so as to leave the other party in no doubt that fraud was covered' (Chitty, para 14-136). (emphasis added)

[161] The Court of Appeal opined (and in our view rightly) that the upholding or otherwise of the exemption clause agreed to by the parties depended upon the proper construction of that clause which must be construed strictly stating that:

> [53] … what was agreed must be resolved by the proper construction of the said exclusion clauses (for the general principles of construction of contract, see *Hotel Anika Sdn Bhd v. Majlis Daerah Kluang Utara* [2007] 1 MLJ 248) which must be construed strictly *contra proferentem* (*Anderson v. Fitzgerald* (1853) 4 HLC 484; (1853) 10 ER 551; *Guardian Assurance Co Ltd v. Condogianis* (1919) 26 CLR 231).

A [54] In *Hong Realty (Pte) Ltd v. Chua Keng Mona* [1994] 3 SLR 819, 825, [1994] Karthigesu JA said:

> It is trite law that exemption clauses must be construed strictly and this mean that their application must be restricted to the particular circumstances the parties had in mind at the time they entered into the contract. On any view of the matter the respondent and the appellants could not have intended that the exemption clauses in the contract of bailment would apply when some act had intervened to alter the circumstances in … which the exemption clauses would ordinarily apply.

[162] Turning to the exemption clause under cl. 14.1 (as well as cl. 13.1 of the SFA in their application to KAF) the Court of Appeal found that the exemption clause did not apply for the following reasons:

> [55] Clause 13.1 of the SF agreement provided that KAF would be indemnified 'save that the Issuer shall not be liable to the Facility Agent for any expenses, loss, damage, or liability referred to herein arising from the gross negligence or wilful misconduct or fraud or wilful default by the Facility Agent'. Clause 14.1 of the trust deed provided that MTB would be indemnified 'save and except for its gross negligence, wilful default, wilful breach or fraudulent actions'. Although differently worded, but yet both exemption clauses excluded indemnity where loss was occasioned by gross negligence, wilful misconduct or fraud or wilful default by KAF or MTB. Those were the particular circumstances that the parties had in mind at the time when they entered into the SF agreement or trust deed. Both exemption clauses must be strictly construed to mean that their application must be restricted to those particular circumstances of gross negligence, wilful misconduct or fraud or wilful default by KAF and or MTB. But both exemption clauses did not provide for the circumstance of fraud by Pesaka (fraud by Pesaka was by its wilful act that deprived, by inequitable means, the revenue that belonged to the bondholders; see *Kerr on the Law of Fraud and Mistake* (7th Ed), at p 1). So, could KAF or MTB have intended that the exemption clauses would apply even when some act had intervened to alter the circumstances in which those exemptions clauses would ordinarily apply? Could KAF or MTB have intended that the exemption would apply even when there was fraud by Pesaka? But it should not seem that KAF or MTB could have intended so, as contacting 'parties … assume the

honesty and good faith of the other; absent such an assumption they will not deal' (*HIH Casualty and General Insurance Ltd & Ors v. Chase Manhattan Bank & Ors* [2003] 2 Lloyd's Rep 61, 68 per Lord Bingham). Since honesty was assumed, it could not have been contemplated by KAF or MTB that the exemption clauses applied even when there was fraud by Pesaka. KAF and or MTB could not have intended that the exemption clauses would apply even when fraud by Pesaka had intervened to alter the circumstances in which those exemption clauses would ordinarily apply. If that had been intended, then it should have been expressed in clear and unmistakable terms on the face of the SF agreement and trust deed so as to leave KAF or MTB in no doubt that fraud by Pesaka was covered. Clause 13.1 of the SF Agreement and *cl. 14.1 of the trust deed, on its true construction, could not reasonably have been intended to apply even when fraud by Pesaka had intervened to alter the circumstances in which those exemption clauses would ordinarily apply. Any other construction would mean that Pesaka could break every covenant with impunity. And that absurd result could never be right.* Suffice it to say that those exemption clauses could not avail to Pesaka as a defence. (emphasis added)

[163] We find no reason to disagree with the aforesaid conclusion of the Court of Appeal. Indeed, in *Suisse Atlantique* Lord Reid said:

As a matter of construction it may appear that the terms of the exclusion clause are not wide enough to cover the kind of breach which has been committed. Such clauses must be construed strictly and if ambiguous the narrower meaning will be taken. Or *it may appear that the terms of the clause are so wide that they cannot be applied literally: that may be because this would lead to an absurdity or because it would defeat the main object of the contract or perhaps for other reasons*. (emphasis added)

[164] On the finding of fraud against Pesaka, we are of the view that on the evidence, the Court of Appeal was right in concluding that Pesaka fraudulently misappropriated and converted the monies which belonged to the bondholders in breach of the security documents. Summing up the material events relating to the fraudulent misappropriation of the bond proceeds by Pesaka the Court of Appeal said:

[18] 'Ring fencing' was not even there after the bonds had been issued and after the bonds proceeds had been fully disbursed. In the meantime, revenue flowed into Pesaka's conventional account at the CIMB Cosway branch. Pesaka had a number of conventional accounts, but the revenue was

A only deposited into the revenue/proceeds account at the CIMB Cosway branch. That revenue belonged to bondholders. Still 'ring fencing' was not in place, not even after all revenue had been deposited into Pesaka's aforesaid account. That revenue in that aforesaid conventional account was not controlled by MTB. As a matter of sad fact, MTB B had no control whatsoever of all revenue deposited into the aforesaid conventional account after the issuance of the bonds. When revenue was deposited into the aforesaid conventional account, Pesaka controlled it. The signatory or signatories to all conventional accounts were yet the C nominee/s of Pesaka. In that state, it should have dawned upon KAF and or MTB that the security of the bondholders had been totally breached. Pesaka could withdraw the revenue at will, notwithstanding that the revenue had been assigned and was no longer its property. And sad to say, so it proved to be that Pesaka could indeed withdraw all D revenue. Between July 2004 and September 2005, Pesaka fraudulently withdrew all revenue that had been deposited into its conventional account at the ClMB Cosway branch. On Pesaka's instructions, all revenue in that conventional account was transferred to other accounts. Pesaka had made off with E the revenue, despite Pesaka's prior notices to the CIMB Cosway and Subang branches that Pesaka had assigned and charged all rights and title in and to all said conventional accounts to MTB (see 3727 and 3729AR). Not surprisingly, there was nothing left in the till for the redemption of bonds. Bond holders were left high and dry, and quite without F payment.

[165] In the circumstances we agree with the Court of Appeal that Pesaka cannot rely on the exemption clause under cl. 14.1 as a defence. In *HIH v. Chase* Lord Bingham said:

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> For, as Lord Justice Rix observed more than once in his judgment (paras. 160, 169), fraud is a thing apart. This is not a mere slogan. It reflects an old legal rule that fraud unravels all: *fraus omnia corrumpit*. It also reflects the practical basis of commercial intercourse. Once fraud is proved, "it *vitiates* H judgments, contracts and all transactions whatsoever": *Lazarus Estates Ltd v. Beasley*, [1956] 1 Q.B. 702 at p. 712, per Lord Justice Denning. Parties entering into a commercial contract will no doubt recognize and accept the risk of errors and omissions in the preceding negotiations, even negligent errors and omissions. I But each party will assume the honesty and good faith of the other; absent such an assumption they would not deal.

As such, Pesaka cannot benefit from its own fraud.

[166] We also agree with the Court of Appeal that notwithstanding MTB's breach of duty or negligence, it is no excuse for Pesaka by its fraudulent misappropriation, to deprive the bondholders of the monies. Pesaka must indemnify MTB. On the extent of the indemnity, for reasons which we have set out earlier in this judgment, we order full indemnity against Pesaka. Hence, the Court of Appeal's order on the indemnity by Pesaka is varied to that extent.

[167] In the result the appeal by Pesaka, Rafie and the Amdac Group are dismissed with costs.