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Judgment Express

UNIVERSAL HEALTH CARE (R&D) SDN BHD

v.

RAMLI MD SALEH & ORS

Federal Court, Putrajaya
Hashim Hamzah CJM, Mohd Nazlan Mohd Ghazali, Collin Lawrence Sequerah FCJJ
[Civil Appeal No: 02(f)-50-11-2024(W)]
29 July 2026

***Company Law:** Fraudulent trading — Personal liability of directors and holding company — Appeal against dismissal of creditor's claim against debtor company's former directors and holding company for personal liability under s 304 Companies Act 1965 and conspiracy to defraud arising from write-off and waiver of intercompany advances following a Sukuk Al-Ijarah asset sale — Whether the property had already been sold under the Sukuk Al-Ijarah structure such that proceeds of its subsequent sale did not constitute advances owed to the debtor company — Whether such advances recorded in audited financial statements were legal and enforceable debts — Whether the writing off and waiver of the debts was fraudulent — Whether fraudulent trading and conspiracy to defraud had been proved*

The appellant, formerly known as SSI Health Care Sdn Bhd, was a tenant under a tenancy agreement dated 16 June 2000 with Pandan Indah Medical Management Sdn Bhd ("PIMM"), which became a wholly owned subsidiary of the 4th respondent, Talam Transform Berhad, for the operation of a hospital on the property, Wisma Talam, of which PIMM was the registered lessee. Following PIMM's termination of the tenancy agreement, the appellant sued PIMM, and on 16 November 2009 the parties entered into a consent judgment under which PIMM agreed to pay the appellant security and earnest deposits and general damages to be assessed for breach of the tenancy agreement. Separately, following approval by the Securities Commission on 4 January 2005 of a RM150 million Sukuk Al-Ijarah financing programme, PIMM sold Wisma Talam to Ample Zone Berhad, a special purpose vehicle, under an asset purchase agreement dated 10 January 2005, and leased it back under an Ijarah Rental Agreement dated 28 January 2005. With the approval of the Sukuk holders on 8 November 2006 and PIMM's directors by circular resolution, PIMM sold Wisma Talam to Hospital Pantai Indah Sdn Bhd on 19 April 2007 for RM63.5 million, the proceeds being applied towards partial redemption of the Sukuk. PIMM's audited financial statements for the relevant financial years recorded advances owed to it by the 4th respondent and other related companies arising from the utilisation of those proceeds. On 24 January 2010, two months after the consent judgment, the advances owed by the 4th respondent to PIMM were written off as bad debts in PIMM's accounts and recorded as waived in the 4th respondent's accounts, and PIMM was subsequently wound up on 29

May 2014. Damages under the consent judgment were assessed on 27 April 2015 at RM23,824,939.51, with a sum of RM49,233,505.15 said to remain due and unpaid as at 12 October 2015. By writ in the High Court, the appellant sued the 1st, 2nd and 3rd respondents, former directors of PIMM, and the 4th respondent, PIMM's holding company, seeking to hold them personally liable for the sums due under the consent judgment on the grounds of fraudulent trading under s 304 of the Companies Act 1965 ("CA") and the tort of conspiracy to defraud, contending that the writing off and waiver of the debts owed to PIMM had been carried out with intent to defraud the appellant as PIMM's creditor. The 1st, 2nd and 3rd respondents did not enter appearance. The High Court dismissed the appellant's claim, and this decision was affirmed by the Court of Appeal. The appellant obtained leave to appeal to the Federal Court under s 96 of the Courts of Judicature Act 1964 on 10 questions of law, the appeal proceeding only as between the appellant and the 4th respondent, the issues before the court were (i) whether Wisma Talam had already been sold by PIMM to Ample Zone Berhad under the Sukuk Al-Ijarah structure such that the proceeds of its subsequent sale to Hospital Pantai Indah Sdn Bhd could not constitute advances owed to PIMM by the 4th respondent; (ii) whether the entries recording such advances in PIMM's audited financial statements constituted legal and enforceable debts owing to PIMM, including whether s 34 of the Evidence Act 1950 permitted a party to disavow its own or its subsidiary's audited accounts; (iii) whether there had in fact been any writing off or waiver of debts owed by the 4th respondent to PIMM; (iv) whether the dismissal of the appellant's claim by the courts below was founded on a case different from the 4th respondent's pleaded defence and (v) whether the appellant had proved, on a balance of probabilities, that the 4th respondent was liable for fraudulent trading under s 304 of the CA and/or the tort of conspiracy to defraud.

Held (dismissing the appellant's appeal):

(1) Wisma Talam had already been the subject of a true sale by PIMM to Ample Zone Berhad under the asset purchase agreement, such that beneficial ownership passed to Ample Zone Berhad and ultimately to the Sukuk holders through Malaysian Trustees Berhad, as the Sukuk Trustee, with PIMM remaining only a bare trustee of the property. The concurrent findings of the High Court and the Court of Appeal on this point had not been made in error, and it followed that there could not have been any proceeds from the subsequent sale to Hospital Pantai Indah that constituted advances from PIMM in favour of the 4th respondent or other related companies. (paras 114, 227, 228, 229 & 230)

(2) The entries recording advances from PIMM to the 4th respondent in PIMM's audited financial statements did not constitute legal and enforceable debts owing to PIMM. Section 34 of the Evidence Act 1950 operated only as an evidential rule under which such accounting entries were merely relevant but not sufficient by themselves to prove legal liability, and since Wisma Talam and its sale proceeds had never been the property of PIMM, there was manifestly no legally enforceable debt owed to PIMM. (paras 307, 308 & 336)

(3) The writing off and waiver of the intercompany advances on 24 January 2010 was not fraudulent. The internal settlement plan had been in contemplation since PIMM's financial year 2008 and bore no valid nexus to the consent judgment recorded later in November 2009, and the 4th respondent's letters of financial support were genuine and had been accepted by PIMM's auditors. The waiver, write-off, assignment and letters of financial support were legitimate group restructuring initiatives, not instruments of fraud. (paras 371, 372, 373, 374, 387 & 407)

(4) The decisions of the High Court and the Court of Appeal dismissing the appellant's claim did not depart from the 4th respondent's pleaded defence, since the courts below had merely dismissed the appellant's claim on its own pleaded case and had not granted relief on any unpleaded basis. (paras 393-395)

(5) The appellant had failed to establish that the 4th respondent was liable for fraudulent trading under s 304 of the CA or for the tort of conspiracy to defraud. No real debt existed capable of being fraudulently written off. The essential element of dishonesty was absent, and the appellant's pleadings on conspiracy were defective for want of particulars of any agreement. The appellant had failed to prove its case on a balance of probabilities. (paras 396, 407, 408, 409, 410, 411 & 431)

Case(s) referred to:

Blackburn Building Society v. Cunliffe, Brooks & Co [1882] 22 Ch. D. 61 (folld)

Dataran Rentas Sdn Bhd v. BMC Construction Sdn Bhd [2009] 1 MLRA 163 (refd)

Dato' Prem Krishna Sahgal v. Muniandy Nadasan & Ors [2017] 6 MLRA 1 (folld)

Datuk Ishak Ismail v. Kenanga Investment Bank Berhad & Ors [2012] 1 MLRH 446 (refd)

Formis Resources & Ors v. Risk Management And Safety System Pty Ltd & Ors And Other Appeals [2017] 4 MLRA 28 (folld)

Gula Perak Berhad v. Datuk Lim Sue Beng & Other Appeals [2019] 1 MLRA 345 (refd)

Lai Fee & Anor v. Wong Yu Vee & Ors [2023] 3 MLRA 495 (folld)

Lam Eng Rubber Factory (M) v. Lim Beng Yew & Ors [1994] 2 MLRH 564 (folld)

LMW Electronics Pte Ltd v. Ang Chuang Juay & Ors [2009] 5 MLRH 39 (distd)

Low Chin Meng v. CIMB Islamic Bank Berhad [2014] 7 MLRA 758 (distd)

Maple Amalgamated Sdn Bhd & Anor v. Bank Pertanian Malaysia Berhad [2021] 5 MLRA 337 (distd)

Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd [1989] 2 MLRH 705 (folld)

Re Augustus Barnett & Son Ltd [1986] BCLC 170 (distd)

Renault SA v. Inokom Corporation Sdn Bhd & Anor And Other Applications [2008] 3 MLRA 504 (refd)

Sinar Mudah Sdn Bhd & Anor v. Ramasamy Muthusamy & Anor [2020] 1 MLRA 577 (affd)

Sony Electronics (M) Sdn Bhd v. Direct Interest Sdn Bhd [2006] 2 MLRA 583 (folld)

Soo Boon Siong v. Saw Fatt Seong & Ors [2007] 2 MLRA 784 (folld)

Tan Heng Chew & Ors v. Tan Kim Hor & Ors [2006] 1 MLRA 786 (refd)

Tay Keong Kok & Ors v. Eastmont Sdn Bhd & Another Appeal [2025] 1 MLRA 85 (refd)

Teoh Kiang Hong v. Theow Say Kow @ Teoh Kiang Seng Henry & Other Appeals [2025] 2 MLRA 504 (folld)

TKM (Singapore) Pte Ltd v. Export Credit Insurance Corporation Of Singapore Ltd [1992] SGHC 240 (folld)

Yong Tshu Khin & Anor v. Dahan Cipta Sdn Bhd & Anor And Other Appeals [2021] 1 MLRA 1 (folld)

Legislation referred to:

Central Bank of Malaysia Act 2009, s 56

Companies Act 1965, ss 67(1), 169, 304

Companies Act 2016, ss 213(2), (3), 245, 249(1), 251, 540

Courts of Judicature Act 1964, s 96(a)

Evidence Act 1950, ss 34, 92

National Land Code, s 214A

Securities Commission Act 1993, s 32

Other(s) referred to:

Thomson Reuters and Roy Goode, *Principles of Corporate Insolvency* (2018), p 162

Counsel:

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For the respondents: Chandrasekar (Chew Yiting with him); M/s Chandrasekar & Associates

[For the Court of Appeal judgment, please refer to *Universal Health Care (R&D) Sdn Bhd v. Ramli Md Saleh & Ors* [2025] 5 MLRA 876]

JUDGMENT

Mohd Nazlan Mohd Ghazali FCJ:

Introduction

[1] This appeal concerns a claim of fraudulent trading pursuant to s 304 of the former Companies Act 1965 ("the CA 1965") and conspiracy to defraud. The claim was brought by a creditor in respect of an alleged write-off of debts owed to the debtor company, which effectively depleted assets that otherwise could have satisfied the creditor's claim. Central to the appeal are critical questions in respect of the veracity and reliability of accounting entries in financial statements, and the structural framework and legal effect of an asset sale in a Sukuk *Al-Ijarah* transaction.

[2] This appeal is against the decision of the Court of Appeal, which had earlier dismissed an appeal by the Appellant against the dismissal of its writ action as the plaintiff, against the Respondents at the High Court. This appeal, as it was at the Court of Appeal, is only between the Appellant and the 4th Respondent (the 4th Defendant at the High Court). The other three respondents did not enter an appearance, and never participated in the earlier proceedings. There was also no appeal against the dismissal of a counterclaim filed by the 4th Respondent.

[3] In the final analysis, we unanimously found no errors in the judgment of the Court of Appeal which had affirmed that of the High Court. This judgment of the Court contains the full reasons for our decision.

Key Background Facts

The Suit And The Litigants

[4] The Appellant plaintiff is a creditor of Pandan Indah Medical Management Sdn Bhd ("PIMM"). PIMM was at the material time a wholly owned subsidiary of Talam Transform Berhad ("Talam"), a company listed on Bursa Malaysia, being the 4th Respondent herein. PIMM had become a wholly owned subsidiary since 29 July 2005, and PIMM remained so until 31 October 2012 when the 4th Respondent disposed of its entire shareholding in PIMM to Plenitude Silver Sdn Bhd for RM2.00.

[5] The 1st, 2nd and 3rd Respondents were former directors of PIMM.

[6] The main suit filed by the Appellant against the Respondents was to recover the sums due under a Consent Judgment dated 16 November 2009 entered into between PIMM and the Appellant. The suit sought to make the 1st to 3rd Respondents, being directors of PIMM, as well as the 4th Respondent the parent of PIMM, all personally liable for the debt of PIMM which arose from the Consent Judgment, pursuant to s 304 of the CA 1965 and under the tort of conspiracy to defraud, primarily for their involvement in the manner in which the business of PIMM had been carried out, *vis-à-vis* the alleged write-off or waiver of debts owed to PIMM.

The Chronology of Key Events & the Sukuk *Al-Ijarah*

[7] The origin of the dispute — between the Appellant and PIMM — may be traced to the termination of a Tenancy Agreement dated 16 June 2000 between the two. The Appellant, as tenant, was to operate a budget hospital on the property owned by PIMM in District Ulu Langat, the State of Selangor, to be called Talam Medical Centre, or Wisma Talam (the property and the building to be collectively referred to as Wisma Talam in this judgment). As a result of a disagreement on alleged breaches by the Appellant, including on non-payment of rentals, PIMM decided to terminate the Tenancy Agreement.

[8] On its part, the Appellant filed a suit on 17 June 2002 against PIMM at the Shah Alam High Court ("the PIMM Suit"). PIMM, too, counterclaimed for loss of rental. In compliance with the relevant listing requirements of the stock exchange on disclosures, on 26 November 2001, the 4th Respondent announced to Bursa Malaysia that the Tenancy Agreement to which its subsidiary PIMM was a party had been terminated.

[9] A key milestone occurred on 4 January 2005 when the Securities Commission ("the SC") approved the 4th Respondent's proposal to raise funds via the issuance of Sukuk *Al-Ijarah* of RM150,000,000.00. The relevant transactions were succinctly recorded among others, in PIMM's audited financial statements for the financial year ("FY") ended 31 January 2005. We summarise them as follows.

[10] First, in January 2005, four subsidiaries of Talam/the 4th Respondent — namely Abra Development Sdn Bhd, Inti Johan Sdn Bhd, Intelbest Sdn Bhd and PIMM (collectively "the Sellers"), entered into a series of agreements to establish a Sukuk *Al-Ijarah* transaction.

[11] Among others, in one Assets Purchase Agreement dated 10 January 2005 ("the APA") with Ample Zone Berhad ("Ample Zone"), Ample Zone agreed to purchase various assets from the respective Sellers. Ample Zone was a special purpose vehicle (SPV) established for the purpose of the Sukuk programme. In respect of PIMM, Wisma Talam was the asset sold to Ample Zone. PIMM was the registered lessee of Wisma Talam, whose registered owner and lessor then was Maxisegar Sdn Bhd ("Maxisegar"). Both were subsidiaries of the 4th Respondent. The purchase consideration under the APA was RM236,000,000.00, with RM135,311,100.00 as upfront cash whilst a deferred payment of RM100,688,900.00 was to be paid to the Sellers after the full redemption of the Sukuk.

[12] Secondly, in order to pay for these purchases, Ample Zone entered into an *Ijarah* Rental Agreement ("the IRA") with each of the Sellers dated 28 January 2005, whereby the Sellers leased the relevant assets back from Ample Zone for a fixed lease term, and in consideration of periodic rental payments made to Ample Zone. Ample Zone, as the SPV, was the issuer of the Sukuk certificates to investors. Ample Zone's shares were held and registered in the share trust deed of Asia Pacific International Trust Berhad, as the share trustee of Ample Zone. Its directors were from the transaction administrator, Cross World Consultant Sdn Bhd.

[13] As the issuer of the Sukuk, Ample Zone is governed by a strict set of transaction documents, primarily the Trust Deed dated 10 January 2005 (and later the Supplemental Trust Deed dated 12 September 2007) which Ample

Zone executed with Malaysian Trustees Berhad as the Sukuk Trustee acting for the benefit of the Sukuk holders/investors, which dictated exactly how the issuer ought to operate.

[14] As is common in a typical Sukuk programme, albeit depending on the exact structure, the entity intending to raise funds or the Sellers herein — would sell a pool of assets (including here, Wisma Talam, by PIMM) to the SPV (Ample Zone). The idea behind this, often described as a "true sale" (more on this later), is to legally separate them from the Sellers' balance sheet. Ample Zone, as the issuer/SPV subsequently, under a Deed of Conveyance dated 28 January 2005, assigned and conveyed the trust assets (which included Wisma Talam) and all its rights under the APA and the IRA to the Sukuk Trustee. On even date, under a Declaration of Trust, PIMM, as one of the Sellers, also declared being the registered lessee of Wisma Talam only as bare trustee to the order of and for the Sukuk Trustee.

[15] Thirdly, the rental payments from the Sellers received by Ample Zone pursuant to the IRA would then be issued and distributed as *Ijarah* certificates to the capital market investors representing proportionate but undivided ownership of the said assets. These investors became holders of the Sukuk. The Sukuk raised RM150,000,000.00 in total for a tenure of seven years.

[16] Fourthly, upon maturity of the IRA, Ample Zone, as the SPV issuer, was entitled to exercise the purchase undertaking given by the Sellers to Ample Zone to require the Sellers to purchase the relevant assets back from Ample Zone for an exercise price pursuant to the purchase undertaking. The proceeds from the sale of the assets were to be utilised to meet the final payment due from Ample Zone to the investors under the Sukuk.

[17] More on these features of the Sukuk *Al-Ijarah* will be discussed further in the analysis that will follow in later parts of this judgment.

The 4th Respondent's Financial Problems & The Sale Of Wisma Talam

[18] Whilst the Sukuk *Al-Ijarah* was subsisting, by the end of the financial year ended 31 January 2006 (FY 2006), however, Talam/the 4th Respondent and the Talam Group of Companies became commercially insolvent — their current liabilities exceeded their current assets. Apart from in respect of the Sukuk programme, they failed to meet certain loan and interest repayments and had breached all their borrowing facility agreements with various financial institutions.

[19] In fact, in its audited financial statements for FY 2006, the 4th Respondent's auditors expressed substantial doubt if the 4th Respondent and the Group would be able to continue as a going concern. This then, on 1 September 2006, resulted in the 4th Respondent being classified as an affected issuer under Bursa Malaysia's para 2.1(d) of the Enhanced Practice Note 17. As an affected issuer, the 4th Respondent was compelled to propose a regularisation plan to resolve its financial condition.

[20] Towards the end of 2006, however, Ample Zone started to encounter difficulty in meeting the repayment as required under the Sukuk programme. This was then resolved with the holders of the Sukuk approving at an Extraordinary General Meeting of the Sukuk holders held on 8 November 2006 to pre-sell all the assets which had previously been sold under the aforesaid APA by the Sellers to Ample Zone, and to pass a resolution approving the sale of the assets.

[21] This was thus followed by the approval of the directors of PIMM for the pre-sale of Wisma Talam by way of a directors' circular resolution dated 19 April 2007. On even date, crucially, PIMM, Maxisegar and Hospital Pantai Indah Sdn Bhd ("Hospital Pantai Indah") entered into a sale and purchase agreement (SPA) where Wisma Talam was disposed of to Hospital Pantai Indah for a purchase consideration of RM63,500,000.00. Wisma Talam, it will be recalled, was the asset sold by PIMM as one of the Sellers to Ample Zone pursuant to the APA.

[22] Thereafter, pursuant to various agreements signed by relevant parties on 8 January 2008, PIMM's involvement in the Sukuk programme ended. The day after, the 4th Respondent announced that the sale of Wisma Talam had been completed. The proceeds of the sale were used towards the partial redemption of the Sukuk and the paring down of the Talam Group's debts. The partial redemption was for about RM58,000,000.00 plus the face value of the primary Sukuk. This resulted in the Sukuk repayments for the entire Talam Group being significantly reduced by more than RM45,000,000.00.

[23] Now, during the same period, in various FYs, PIMM's audited financial statements recorded that loans were given by PIMM to the 4th Respondent (its holding company) and other related companies representing advances and payments made by PIMM on their behalf. These debts as reflected in the accounts arose from the utilisation of the proceeds of sale pursuant to the APA, among others from PIMM's sale of Wisma Talam to Ample Zone to redeem PIMM's borrowings from HSBC Bank Malaysia Berhad ("HSBC Bank"), which was for the benefit of the 4th Respondent and the Group.

[24] The amount further rose substantially in FY 2008 after the said disposal of Wisma Talam by PIMM to Hospital Pantai Indah on 19 April 2007. The point of note is that these loans were described in the audited financial statements of PIMM as:

> "... advances which are unsecured, interest-free and have no fixed terms of repayment".

[25] During the currency of the 4th Respondent's status as a PN17 listed issuer and as it continued to be commercially insolvent in the period between 1

September 2006 and 10 June 2010, no allowance had been made for doubtful debts in respect of these loans.

[26] This was attributed to the fact that the directors of PIMM were confident — as clearly stated in the audited financial statements of PIMM for FY 2007, FY 2008 and FY 2009 — that the regularisation plan devised by the 4th Respondent to address its PN17 status would be approved by the relevant authorities and that when implemented, the plan would enable the 4th Respondent to settle the amount owing to PIMM.

[27] Another point of importance was the fact that PIMM had ceased its operations sometime during FY 2009.

[28] Throughout these periods — FY2007 to FY2009 — when the accounts of PIMM recorded advances made to the 4th Respondent, and even thereafter, long after the involvement of PIMM in the Sukuk programme had ceased in January 2008, there had been no issues by any party either denying or confirming the existence of these debts, until after the institution of the instant suit by the Appellant.

[29] A significant development occurred on 16 November 2009, where in respect of the aforementioned PIMM Suit filed by the Appellant against PIMM, the parties agreed to enter into a Consent Judgment whereby PIMM agreed to pay the Appellant, among others, the security and earnest deposits of RM821,145.00, and for general damages to be assessed for the breach of the Tenancy Agreement.

[30] On 29 May 2014, PIMM was ordered to be wound up by the Court and the Director General of Insolvency Malaysia was appointed as its liquidator.

[31] Almost five years after the Consent Judgment and about five months after PIMM was wound up, on 13 October 2014, the Appellant applied for an assessment of damages pursuant to the Consent Judgment. Damages were on 27 April 2015 assessed at RM23,824,939.51 together with interest at the rate of 8% per annum from the date of the writ of summons until the date of full settlement. The Appellant claimed that as at 12 October 2015, PIMM owed the Appellant the sum of RM49,233,505.15 under the Consent Judgment. This sum remained unpaid.

[32] On 24 January 2010, despite, as stated earlier, the previous expressions of confidence by PIMM's directors in its audited financial statements that the debts owed to PIMM would be repaid by the 4th Respondent upon completion of the 4th Respondent's regularisation plan, the debts were written off as bad debts in PIMM's financial statements. In contradistinction, though, in the 4th Respondent's accounts, the debts were stated to have been waived by PIMM.

[33] On the other hand, the amounts which PIMM owed the 4th Respondent and the other related companies were not written off or waived. They remained outstanding in PIMM's balance sheet.

[34] We should emphasise that it is precisely the writing off of the debts owed by the 4th Respondent and its other subsidiaries or related companies in the group to PIMM which formed the crux of the Appellant's allegation of fraudulent trading and conspiracy to defraud against the 4th Respondent. The assignment, write-off and waiver exercise occurred on 24 January 2010. This was merely two months after PIMM entered into the Consent Judgment with the Appellant on 16 November 2009.

[35] It is the Appellant's case that, there being such a debt owing to PIMM, the 4th Respondent and PIMM ought not to have assigned or waived such a debt bearing in mind that the Appellant was a creditor that was moving an assessment of damages against PIMM in pursuance of the said Consent Judgment.

[36] The assignment and waiver exercise left PIMM insolvent as it was argued by the Appellant to have removed an asset worth RM52,500,000.00 from the books of PIMM. The overriding issue for determination is whether this exercise was fraudulent or resulted from a conspiracy to defraud.

[37] As such, the Appellant's instant claim, filed on 16 October 2015 against the 1st, 2nd and 3rd Respondents as directors of PIMM at the material time and the 4th Respondent (Talam, the holding company and sole shareholder of PIMM), was to make them liable for the sums due under the Consent Judgment entered between the Appellant and PIMM by invoking s 304 of the CA 1965 (now found in s 540 of the Companies Act 2016) and under the tort of conspiracy to defraud.

[38] The primary case of the Appellant is simply that it was fraudulent for PIMM, who knew it was indebted to the Appellant by virtue of the Consent Judgment, to have written off the debts due from the 4th Respondent and related companies. These debts were a substantial part of PIMM's assets, and the only means PIMM had to satisfy the judgment sum. The 4th Respondent ought therefore to be liable for PIMM's debts owed to the Appellant under s 304 of the CA 1965 as the business of PIMM — which included particularly the waiver, write-off and assignment of debts — was carried out with intent to defraud the Appellant as a creditor of PIMM or for a fraudulent purpose, by avoiding payment to a creditor.

[39] Additionally, it was also contended that the Respondents (or any two or more of them together) wrongfully, by unlawful means and with the intent to injure, conspired and combined together to defraud PIMM's creditors — in particular, the Appellant.

[40] The 4th Respondent, as sole shareholder of PIMM at the material time, was, according to the Appellant, PIMM's shadow director responsible for this decision and hence should be equally, and especially, liable. For it had the power to and did exercise overarching control over all the affairs of PIMM, including its financial affairs, and that the directors of PIMM during this period were merely acting on the instructions and directions of the 4th Respondent.

[41] After 23 days of trial, the High Court dismissed the Appellant's claim. This decision was unanimously affirmed by the Court of Appeal after a two-day appeal hearing.

Leave To Appeal — 10 Questions Of Law

[42] Despite the concurrent findings of the High Court and the Court of Appeal, the Appellant succeeded in obtaining leave from this Court under s 96 of the Courts of Judicature Act 1964 to appeal against the decisions of the Courts below, in respect of 10 questions of law.

[43] These questions principally revolve around issues relating to reliance on accounting entries, the impact of a property sale in *Sukuk Al-Ijarah* and the writing off and waiver of debts.

[44] The 10 questions are as follows.

> **Question 1**
>
> Whether Section 34 of the Evidence Act 1950 can be invoked by a party to proceedings to disavow its and/or its subsidiary's audited accounts?
>
> **Question 2**
>
> Whether the cases of *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1989] 2 MLRH 705, *Lam Eng Rubber Factory (M) v. Lim Beng Yew & Ors* [1994] 2 MLRH 564, *TKM (Singapore) Pte Ltd v. Export Credit Insurance Corporation of Singapore Ltd* [1992] SGHC 240 and the like which held that loss or damage or a debt must be proved by primary evidence can be invoked by a party to proceedings to disavow its and/or its subsidiary's audited accounts?
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> **Question 3**
>
> Whether a party to proceedings is bound by accounting entries in its and/or its subsidiary's audited accounts? If not, in what cases are parties to proceedings not bound by its and/or its subsidiary's audited accounts?
>
> **Question 4**
>
> Whether there exists in law the concept of a "default accounting entry" in that an accounting entry showing a debt owed by Party A to Party B in Party A's accounts can be disavowed by Party A?

Question 5

Whether the reasoning and approach by the Federal Court in *Maple Amalgamated Sdn Bhd & Anor v. Bank Pertanian Malaysia Berhad* [2021] 5 MLRA 337 towards a "*Bai Bithaman Ajil*" Islamic financing facility equally applies to an Islamic "*Sukuk Al-Ijarah*" financing facility?

Question 6

Whether a "seller" who has "sold" an asset to a financier pursuant to a "*Sukuk Al-Ijarah*" Islamic financing facility can nevertheless:

(a) redeem that asset prior to maturity of that facility; and

(b) own any excess of the purchase price less the redemption sum?

Question 7

Whether a "seller" who has "sold" an asset to a financier pursuant to a "*Sukuk Al-Ijarah*" Islamic financing facility and has therefore parted with beneficial interest in that asset can nevertheless sell that asset to a third party during the period of the facility?

Question 8

Whether in law there is a difference between the "writing off" of a debt and a "waiver" of a debt?

Question 9

Whether, as a matter of law, a debtor can:

(i) assign a debt it owes to a creditor to a third party? And

(ii) waive a debt it owes to a creditor?

Question 10

Whether the Court of Appeal decision of *Sinar Mudah Sdn Bhd & Anor v. Ramasamy Muthusamy & Anor* [2020] 1 MLRA 577 that it is not open to a Court to make out a case for a party which is different to what is pleaded is the correct statement of the law in Malaysia?

Analysis & Findings Of This Court

[45] These 10 questions may be broadly grouped into four key themes. The 1st, Questions 1 to 4 concern accounting entries. Questions 5 to 7 attempt to address the concept and mechanics of *Sukuk Al-Ijarah* whilst Questions 8 and 9 are about the write-off and waiver of debts. Question 10 is about the pleadings.

[46] These in turn largely correspond to what we see as the key issues in this appeal, which are as follows. The 1st is whether Wisma Talam had already been sold by PIMM to Ample Zone, and if so, whether there could not therefore be any proceeds from the subsequent sale of Wisma Talam to Hospital Pantai Indah which could have counted as advances from PIMM in favour of the 4th Respondent. This is relevant to Questions 5 to 7 on the Sukuk and its mechanics.

[47] The 2nd is whether entries on advances from PIMM to the 4th Respondent and other related companies as recorded in the relevant audited financial statements constituted legal and enforceable debts owing to PIMM. This is of consequence to Questions 1 to 4.

[48] The 3rd is whether there was any writing off or waiver of the debts owing to PIMM from the 4th Respondent. This involves Questions 8 and 9.

[49] The 4th issue, as is implicit in Question 10, is in respect of the pleaded defence of the 4th Respondent.

[50] The final issue is a consideration as to whether, depending on the analysis of the aforementioned issues, the case of fraudulent trading and conspiracy to defraud had been proven by the Appellant against the Respondents.

[51] These issues will be examined in turn.

The First Key Issue — Whether Wisma Talam Had Already Been Sold By PIMM To Ample Zone, And If So, Whether There Could Not Therefore Be Any Proceeds From The Subsequent Sale Of Wisma Talam To Hospital Pantai Indah Which Could Have Counted As Advances From PIMM In Favour Of The 4th Respondent.

The Sukuk *Al-Ijarah*, The Ownership Of Wisma Talam & Its Sale Proceeds

[52] The Sukuk *Al-Ijarah* is generally understood as an Islamic finance facility, not unlike the traditional sale and leaseback arrangement. The Information Memorandum on its offering (see below) by the 4th Respondent too described the Sukuk transaction as a "financing structure" and defined the key Sukuk documentation such as the APA, IRA and the Subscription Agreement, among many others, collectively as "Financing Documents".

[53] However, the Sukuk importantly excludes the interest element in its structure by linking profitability to tangible assets and underlying commercial risk. The facility agent would instead distribute lease rentals as profits (like coupons in conventional bonds) on a semi-annual basis and the principal at maturity of the Sukuk, to the Sukuk holders. And as with conventional banking, at the point of maturity or redemption, the original owner, depending on the structure — whether asset backed or asset based (see below), gets their property back unencumbered, and the investors (effectively the lenders) receive their final lump-sum principal.

[54] As stated earlier, the Appellant argued that despite the concurrent findings of the Court of Appeal and the High Court, the proceeds of sale belonged to PIMM as suggested by PIMM's and the 4th Respondent's own financial statements, but that under the Sukuk programme they had to be used to redeem Talam Group's debts.

[55] In contradistinction, the argument of the 4th Respondent was that there were no advances from PIMM in terms of any sales proceeds of Wisma Talam from Hospital Pantai Indah — that there was thus no debt — because this property had already been sold earlier by PIMM pursuant to the APA to Ample Zone.

[56] The Court of Appeal, in its findings which affirmed those of the High Court held that the sale of Wisma Talam (to Hospital Pantai Indah) was beyond the 4th Respondent's control because the beneficial interest in the property had been conveyed to the Sukuk Trustee who held it on trust for the Sukuk holders as the ultimate beneficial owners of Wisma Talam (pursuant to the APA entered into with Ample Zone earlier).

[57] It also found that as the sale proceeds from that sale were applied for the redemption of the Sukuk, the 4th Respondent did not therefore receive any advances from PIMM.

[58] The relevant key passages from the grounds of judgment of the Court of Appeal read as follows:

> "[55] We find that the evidence before the learned HCJ shows otherwise. The evidence revealed that AZB had conveyed the beneficial interest in the Assets to the Sukuk Trustee, who held it in trust for the Sukuk holders. Therefore, the ultimate beneficial owners of the Assets, including the Property, were the Sukuk holders. The Sukuk holders' EGM was held on 8 November 2006 and two important matters that emanate from the EGM on 8 November 2006 are as follows:
>
> i. Firstly, pursuant to Extraordinary Resolution 1, the Sukuk holders resolved that the Assets (i.e., all 4 properties under the Sukuk) be pre-sold; and
>
> ii. Secondly, the sale proceeds from the assets will waterfall accordingly and be distributed proportionately/pro-rated in accordance with the pro-rated Classes A, B and C ("partial redemption of the Sukuk").
>
> [56] The above EGM minutes clearly show that neither PIMM nor the 4th Respondent was involved in the decision on the pre-sale of the Assets and ultimately had no say whatsoever on the decision to pre sell nor the application of the sale proceeds. In short, only the Sukuk holders had the right to sell the Property under the Sukuk. Neither PIMM nor the 4th Respondent had the right to do so, and the Property could not have been sold without the Sukuk holders' approval. SP1 in his evidence also confirmed and agreed that the Sukuk holders unanimously approved the sale of the Assets.

> [57] The learned HCJ heard the entire evidence and mechanics on the sale of the Property commencing from the EGM, Securities Commission ("SC") approval and actual utilisation of the sale proceeds and found no fraud in it. Based on the evidence before the learned HCJ, it is our considered view that the 4th Respondent did not orchestrate the sale and neither was the disposal of the Property carried out with intent to defraud the Appellant or PIMM's creditors.
>
> [58] In the circumstances, we find that the learned HCJ was right in rejecting the Appellant's aforesaid allegations and found for a fact that the sale was controlled by, *inter alia*, Malaysian Trustees Berhad as the Property was under the Sukuk.
>
> [59] The 4th Respondent and its related companies did not receive money as advances from PIMM because the sale proceeds were applied by the Facility Agent for the redemption of the Sukuk as approved by the Securities Commission and the Sukuk Trustee. Under the Supplemental Trust Deed dated 12 September 2007 between AZB and the Sukuk Trustee, the application of the sale proceeds was determined solely by the Facility Agent and not PIMM. The accounting entries are made to reflect the default descriptions in PIMM's financial statements to merely record the application of the sale proceeds by the Facility Agent pursuant to the terms of the Sukuk. PIMM was not in any position to make any advance of the sale proceeds.
>
> [60] As there was no surplus from the disposal of the Property after the redemption payments to Sukuk holders, there were no proceeds available to PIMM, and for PIMM to advance to the 4th Respondent and/or its subsidiaries. This evidence clearly showed that the proceeds from the disposal of the property in 2007 did not belong to PIMM. The learned HCJ was right in rejecting the Appellant's allegation on the ownership and control over the property, including the proceeds of sale and advance from PIMM to the 4th Respondent".

[59] The Appellant argued that the proceeds of the sale of Wisma Talam (where PIMM was the vendor) that went to partially redeem the Sukuk belonged to PIMM, and the portion of proceeds which reduced the 4th Respondent's and other related companies' indebtedness constituted advances from PIMM to those entities.

[60] Crucially, a key reason for this stance was the various entries made to the financial statements of PIMM and of the 4th Respondent which exhibited the existence of the said advances, despite the sale to Ample Zone under the APA. In fact, Wisma Talam was also described in PIMM's accounts as having been pledged or charged for the Sukuk arrangement. The property continued to be included as an investment property in its financial statements as PIMM's non-current asset, until its sale to Hospital Pantai Indah under the SPA.

[61] The 4th Respondent, however, consistently made the important point that underlying source documents governed the relevant legal rights such that regard must be had to these documents in order to ascertain the applicable legal obligations, including in Sukuk cases. This firmly echoes the findings of the

Courts below that accounting recognition is an economic matter that cannot be relied on to create legal obligations without the underlying legal documentary evidence.

[62] We certainly do not disagree with this observation. This is where we should first turn to.

The Agreed Terms & Conditions In The Sukuk Legal Documentation

[63] The starting point must be to ascertain what had legally been transferred by PIMM in respect of Wisma Talam to Ample Zone under the APA.

[64] Focus may usefully be made on the salient characteristics of the terms and conditions of the Sukuk *Al-Ijarah* as detailed out in the Information Memorandum dated 20 January 2005 prepared by Malaysian International Merchant Bankers Berhad ("MIMB"), the lead arranger for the issuance and offering of the Sukuk by Ample Zone.

[65] An information memorandum is a disclosure document used for offerings of securities that are exempt from the standard prospectus requirements under the Capital Markets and Services Act 2007, which carries similar liabilities (to a prospectus) for the issuer company and its directors, as well as advisers for defective disclosures.

[66] The information contained therein is essentially taken from the source documents being the relevant agreements, undertakings and deeds or declarations which collectively make up the Sukuk documentation, the key amongst which included the aforementioned APA, the IRA, the Purchase and Sale Undertakings and the Trust Deed.

[67] The following, which are stated in sections in the Information Memorandum — on the terms and conditions of the Sukuk are especially pertinent-

a) in s 2.1 on purpose of the Sukuk — Ample Zone is to raise funds primarily to part finance the purchase of the assets from the Sellers (including Wisma Talam from PIMM), whereby the funds to be received by the latter will be utilised mainly to repay bank borrowings to facilitate the redemption of the said assets then charged as security to financial institutions. This included Wisma Talam which was then charged in favour of HSBC Bank, but of significance is that out of RM135,311,100.00 received by the Sellers as upfront cash payment under the APA, only about RM9,000,000.00 was to be used to redeem Wisma Talam *vis-à-vis* the loan from HSBC Bank to PIMM.

b) in s 1.3 on source of payment for the Sukuk is the periodic rental payments made to Ample Zone by the Sellers pursuant to the IRA and importantly, from the disposal of the said assets pursuant to a Purchase Undertaking given by the Sellers or a Sale Undertaking granted by Ample Zone respectively, exercisable upon what are defined as an Event of Default, a Trigger Event or on the maturity date of the IRA. Failure by the Sellers to purchase entitles the Sukuk Trustee under an Option Agreement to require the 4th Respondent to make the purchase instead.

c) in s 2.2 on the salient characteristics of the Sukuk, specifically in its para 1, it is explicitly mentioned that first, beneficial interest in the assets shall vest in Ample Zone. Secondly, there will be no registration of the transfer of the legal ownership of the assets with the land registries. We note that these crucially are found in cl 2 of the APA.

Thirdly, the Sellers will declare themselves bare trustees of the assets, for the benefit of Ample Zone, pursuant to the Declaration of Trust and but continue only to be registered as the proprietor of the assets or as registered lessee (like in the case of PIMM in relation to Wisma Talam). The Declarations of Trust (dated 28 January 2005) also provide for the Sellers to deposit the original titles to the assets with Ample Zone and require the Sellers to deal with the assets as may be directed by the beneficiaries (via Ample Zone or the Sukuk Trustee).

d) in para 2 of s 2.1, in conjunction with the IRA, the Sellers as service agents will also enter into Service Agency Agreements with Ample Zone to provide the latter with major maintenance and undertake the responsibility of effecting and maintaining insurances for the respective assets.

e) in paragraph 3 of s 2.2, Ample Zone will under a Deed of Conveyance transfer all its beneficial interest in the assets to the Sukuk Trustee who under a Trust Deed declares itself as trustee for the trust asset for the benefit of the Sukuk holders (investors).

f) in paragraph 4 of the same s 2.2, Ample Zone will issue the Sukuk to the Sukuk holders who will have proportionate but undivided ownership of the assets.

g) in paragraphs 2 and 4 under Transaction Overview — Ongoing, the Sellers have the duty to pay rental payments to Ample Zone on periodic basis (via collection accounts opened by Ample Zone), and the Facility Agent (MIMB) will distribute to the Sukuk holders the rentals (profits) on semi-annual basis and the principal on maturity or the relevant Sukuk.

[68] In the section on Transaction Overview — Upon Maturity, the following statements in the Information Memorandum are significant.

a) In para 1, Ample Zone shall be entitled to exercise the Purchase Undertaking given by the Sellers to require the Sellers to purchase the assets back from Ample Zone. The exercise of the Purchase Undertaking will extinguish the correlating Sale Undertaking on the same asset;

b) as per para 2, the proceeds from the said sale of the assets is to meet the final payment due from Ample Zone to the investors/ Sukuk holders and any balance from such proceeds shall be used to pay the balance of deferred purchase consideration. Failure of the Sellers to purchase shall entitle the Security Trustee under the Option Agreement to require the 4th Respondent to undertake the purchase on the terms therein;

c) under paragraph 3, upon full redemption of the Sukuk and satisfaction of all indebtedness, the trust over the trust assets in favour of the Sukuk Trustee for and on behalf of the investors/ Sukuk holders shall be dissolved;

d) under paragraph 4, the Sukuk Trustee shall reconvey their rights over the trust assets to Ample Zone (originally conveyed to the trustee pursuant to the Deed of Conveyance). Ample Zone will in turn dissolve the trust over the assets under the declaration of trust and reconvey the interest in the assets to the Sellers.

[69] It is imperative to note that the terms and conditions of the Sukuk are set out in the Trust Deed dated 10 January 2005 between Ample Zone and the Sukuk Trustee, specifically in its Schedule 5. We stress that the Trust Deed is the legal document which constituted the Sukuk *Al-Ijarah*.

[70] As a starting point, however, we must highlight cl 2.2 of the APA which states as follows:

> 2.2 Sale of Assets to be by way of True Sale
>
> The Sellers and the Purchaser intend the transactions hereunder to be true sales by way of disposition of all of the Sellers' rights, titles and interests in and to the Assets by the Sellers to the Purchaser for all purposes, providing the Purchaser with the full risks and benefits of ownership of the Assets (such that the Assets would not be the property of the Sellers in the event of the Sellers' liquidation or insolvency).

[71] This intention of the parties on a true sale of the asset as stated in the aforesaid cl 2.2 of the APA seems, it could be argued, to envisage an absolute sale, transfer and conveyance of the asset, which should no longer form part of the seller's estate.

[72] We are nevertheless reminded of the terms and conditions of the Sukuk transaction documents which included the fundamental aspects of sale and leaseback in the APA and the IRA respectively. The APA is unmistakable in specifying in its cl 2.1.2 that the sale of Wisma Talam by PIMM to Ample Zone involved only the beneficial interest in the asset such that following the sale, as per its cl 2.1.3, PIMM remained the property's registered lessee and continued holding the same purely as a bare trustee for Ample Zone.

[73] Other than what is expressly stated in this cl 2.2 of the APA on true sale, it is undoubtedly plain that the terms and conditions of the Sukuk transaction, as stated above, fundamentally involved the sale of only the beneficial ownership in the asset — Wisma Talam included — to Ample Zone (and ultimately owned by the Sukuk holders via the Sukuk Trustee).

[74] Crucially, in the aforementioned Trust Deed dated 10 January 2005 between Ample Zone and the Sukuk Trustee it was agreed that the Sukuk Trustee shall hold the benefit of the Trust Deed and the Trust Assets and any income derived therefrom on trust for the Sukuk holders. The Trust Deed defined Trust Assets as including Wisma Talam and all of Ample Zone's "rights, title, benefit, interest, present and future into and under", among others the APA, the IRA, the Declaration of Trust, and the Purchase and Sale Undertakings "and all proceeds of the foregoing."

[75] This, in our view, is plainly a wide formulation of Trust Assets which includes not only Wisma Talam but also all rights and benefits derived therefrom, including its sale proceeds. Clause 5.1 of the APA on the acquisition of the assets (Wisma Talam included) stated that upon payment, the beneficial interest in the property passed to and vested in Ample Zone.

[76] It must also be reiterated that fundamentally, under the Sukuk structure, pursuant to the Declaration of Trust dated 28 January 2005, PIMM remained the registered lessee of Wisma Talam only as the bare trustee for and on behalf of the Sukuk Trustee. Clause 2 of the Declaration of Trust — made by PIMM in favour of the Sukuk Trustee makes this position abundantly clear, as follows:

> "2. Declaration of Trust
>
> The Seller hereby declares and undertakes that
>
> > (a) As from the date hereof it is the registered lessee of the Asset only as bare trustee for and on behalf and to the order of the Sukuk Trustee."

[77] No less manifest is the following declaration by PIMM in cl 3 of the Declaration of Trust:

> 3. Instructions of the Purchaser
>
> "The Seller covenants and undertakes with the Purchaser and the Sukuk Trustee that the Seller will, whenever requested by the Sukuk Trustee or the Purchaser (with the concurrence of the Sukuk Trustee) convey and transfer the Asset to such person(s) as the Sukuk Trustee or the Purchaser (with the concurrence of the Sukuk Trustee) shall in its absolute discretion direct and

will do all acts and execute all documents as may be necessary to perfect such conveyance and transfer."

[78] Clearly PIMM, as bare trustee, undertook to follow any instruction of Ample Zone or the Sukuk Trustee in respect of Wisma Talam, including to transfer and convey the same to any third party as directed. Further, on the subscription of the Sukuk (issued by Ample Zone) by the Sukuk holders, Ample Zone conveyed the Trust Assets (as such including Wisma Talam and all interests and benefits derived therefrom) pursuant to the Deed of Conveyance unto the Sukuk Trustee to hold as trustee for the Sukuk holders. The Sukuk represented undivided beneficial interest in the Trust Assets.

[79] This legal nature of the ownership interest in Wisma Talam under the APA was also stated in the Sukuk trust certificates issued to and held by the Sukuk holders. The said certificates (of various types) clearly expressed that they represented an undivided beneficial interest in and to the Trust Assets (as defined above).

[80] It is also specifically mentioned therein that the Sukuk was created and issued pursuant to Ample Zone's memorandum and articles of association and its Board of directors' resolution, and constituted by the aforesaid Trust Deed, the benefit to which the Sukuk holders were entitled.

[81] Clause 19.9.4 of the Trust Deed also makes it clear that the proceeds of sale of any assets under the APA (such as Wisma Talam) upon the exercise of the Purchase and Sale Undertakings (or the Option Agreement) shall be used to pay the indebtedness of Ample Zone arising from the Sukuk. Further, pursuant to cl 19.9.5 on completion of the sale, the Declaration of Trust over the assets shall be dissolved, and all interest in the assets shall be re-conveyed to the Sellers (such as PIMM) and "thereafter neither the Sukuk Trustee, the Sukuk holders nor the issuer will have any further rights or interests in and to such relevant Assets."

[82] In terms of the recourse of the Sukuk holders upon the occurrence of an Event of Default or a Trigger Event, the Information Memorandum, again restating what are contained in the relevant deeds, agreements and other Sukuk documentation, mentioned the primary entitlement of the Sukuk holders to instruct Ample Zone to exercise the Purchase Undertaking requiring the Sellers to purchase the assets, failing which the Option Agreement could be invoked to require the 4th Respondent to do the same.

[83] Other remedies include the Sukuk holders having the right upon the approval by three-fourths of the Sukuk holders at an extraordinary general meeting to direct the Sukuk Trustee to declare the outstanding Sukuk to be immediately due and payable, terminate the lease of the assets under the IRA and to enforce their security over the designated accounts in respect of the proceeds of the lease and the Sukuk.

Wisma Talam Was Later Pre-Sold Before Maturity

[84] As it turned out, however, Wisma Talam, one of the Trust Assets which was subject to the APA, was later pre-sold, before the maturity of the IRA. There was no issue of any Event of Default or Trigger Events having occurred. Neither was there any necessity for the exercise of the Purchase or Sale Undertakings.

[85] As such, it is to be noted that the manner and timing of the sale of Wisma Talam to Hospital Pantai Indah was not provided for in the original terms and conditions of the Sukuk *Al-Ijarah*. It was not envisaged in the Trust Deed dated 10 January 2005. As stated, the sale was not undertaken due to any Event of Default, Trigger Event or maturity of the IRA. The Purchase and Sale Undertakings did not have to be exercised at all. The sale therefore amounted to a variation of the terms and conditions of the Sukuk. This was nonetheless approved by the SC on 25 May 2007.

[86] The SC approval essentially allowed the issuer/Ample Zone to apply to the Sukuk Trustee to pre-sell the assets prior to full redemption of the Sukuk, subject to conditions such as that the purchase consideration of the relevant asset should not be less than the aggregate *Al-Ijarah* rentals under the IRA of the asset.

[87] Crucially, as for the proceeds of the pre-sale, it shall be paid, firstly other than to the usual statutory, tax and professional fees deductions, towards payment of any *Al-Ijarah* rentals accrued but unpaid, and the redemption of the all outstanding (principal) under the Sukuk, with Class A being prioritised before Class B and Class C Sukuk, and that thereafter, any balance from the sale of the pre-sale of the final asset -

> "will be gifted back (by way of Hibah) to the original Seller of such asset by the Sukuk Trustee on behalf of the Sukuk holders of Class C Sukuk".

[88] All these were subsequently inserted into and reflected in the relevant Supplemental Trust Deed dated 12 September 2007 between Ample Zone as the issuer and the Sukuk Trustee, where the parties agreed, among others, to allow the pre-sale of Wisma Talam. Relevant terms were also incorporated in the SPA, and consequentially, other applicable documents as well. An example was the supplemental agreement dated 12 September 2007 to the Sale Undertaking Deed whereby the undertaking given to the Sellers — such as PIMM — would automatically lapse on completion of the pre-sale of the property.

[89] In its letter to PIMM dated 19 April 2007, in pursuance of the pre-sale arrangement, the Sukuk Trustee expressed its consent to the pre-sale of Wisma Talam by PIMM to Hospital Pantai Indah for RM63,500,000.00, following the EGM approval of the Sukuk holders (and which later was also approved by the SC, as mentioned earlier).

[90] In the said letter, the Sukuk Trustee had also undertaken that upon its receipt of 90% of the total sale proceeds, the Sukuk Trustee would disclaim and discharge all of its and the Sukuk holders' interest in Wisma Talam and execute and release its withdrawal of caveat against the property to the purchaser's financier's solicitors.

[91] Accordingly, the legal position that could be concluded from the agreed terms and conditions of the Sukuk *Al-Ijarah* here is that the APA resulted in the sale and transfer of the entire beneficial interest in the assets to Ample Zone, and by virtue of the Declaration of Trust and the Deed of Conveyance, immediately thereafter (on issuance of the Sukuk) to the Sukuk Trustee, holding on behalf of the Sukuk holders/investors. PIMM, as registered lessee, became a bare trustee only *vis-à-vis* Wisma Talam for the benefit of the Sukuk holders.

[92] Later, when the sale by PIMM to Hospital Pantai Indah pursuant to the SPA was completed and all monies were received by the Sukuk Trustee (on behalf of the Sukuk holders) for the purposes of the partial redemption of the Sukuk, the trust in respect of Wisma Talam ended, such that the bare trusteeship was then dissolved.

[93] In our view therefore, the Sukuk *Al-Ijarah* transaction documents, in addition to the agreed terms and conditions governing the pre-sale of Wisma Talam, strongly support the position on the nature of the sale proceeds taken by the 4th Respondent, as affirmed by the Courts below.

[94] First, as discussed earlier and given its crucial importance, we repeat here that the key Sukuk transaction documents such as the APA, the IRA, the Trust Deed and the Declaration of Trust are clear in stating that the sale of Wisma Talam by PIMM to Ample Zone was the sale of the entire beneficial interest in Wisma Talam. PIMM became a mere bare trustee only.

[95] If PIMM's interest was only as a bare trustee for the Sukuk holders *vis-à-vis* the property, it must follow that PIMM would have no interest in the proceeds of the sale of that same property. This is also consistent with the wide definition of Trust Assets which, as discussed above, extends to not only Wisma Talam but also any such rights or benefits arising from the APA, the Trust Deed and the Declaration of Trust "and all proceeds of the foregoing." PIMM was a mere bare trustee to the Trust Assets.

[96] Secondly, the very terms of the SPA of Wisma Talam to Hospital Pantai Indah, too, make this position unassailable. We need only highlight two key provisions. One is found in recital 6 of the SPA which stated that PIMM had sold the beneficial interest in the property whereby the interest was then held by the Sukuk Trustee on trust for the benefit of the Sukuk holders. It stated the following:

> "6. Pursuant to a structured Islamic Finance Transaction, Islamic trust certificates in the form of Sukuk *Al-Ijarah*...were issued by Ample Zone Berhad ("Sukuk *Al-Ijarah* Financing"), and the Vendor had pursuant to

the said transaction sold the beneficial interest in the Property and the said interest is currently held by MTB for the benefit of the beneficiaries who are the holders of the said Sukuk *Al-Ijarah* trust certificates ("Sukuk Holders") and had further declared holding the Property on trust for the Sukuk Holders, all of whom are represented by MTB. The sale of the beneficial interest in the Property by the Vendor is subject to the right of the Vendor to repurchase the Property."

[97] The other is cl 3.1 of the SPA on Conditions Precedent, specifically in cl 3.1.4 which in no uncertain terms stated that the SPA was subject to the written authorisation and consent of the Sukuk Trustee as trustee for the Sukuk holders. The clause reads as follows:

"3.1 Conditions Precedent

This Agreement and the sale of the Property is conditional upon:

...

3.1.4 the written authorization and consent of MTB as trustee and agent for the Sukuk Holders which written authorization and consent shall be addressed to the Vendor (in the agreed form annexed to Annexure B) to sell the Property in accordance with the terms and conditions of this Agreement..."

[98] It is legally indisputable therefore that insofar as the Sukuk Trustee held the beneficial interest in Wisma Talam on behalf of the Sukuk holders, any dealing with the said property required the express authorization and consent of the Sukuk Trustee. This was precisely the reason why its consent was sought and obtained by Ample Zone before the sale of Wisma Talam could be completed. It was also another condition precedent, found in cl 3.1.5 of the SPA, that the SC's prior approval be obtained to vary the Sukuk terms to permit the pre-sale of Wisma Talam prior to the expiry of the term of the trust certificates issued pursuant to the Sukuk *Al-Ijarah*. This was also obtained, as stated earlier.

[99] In fact, there were other conditions that must be fulfilled by PIMM in accordance with the SPA. One other was that PIMM must procure from the Sukuk Trustee, who must provide a statement to the solicitors of the purchaser or its financier, the requisite confirmation on the sum to fully redeem Wisma Talam (cl 7.1.1). This is not inconsistent with the status of PIMM as bare trustee of Wisma Talam, despite being the vendor for the sale, as PIMM was then still the registered lessee of the property.

[100] Moreover, relevant to the abovesaid condition precedent, PIMM's status as bare trustee is further demonstrated in that important letter from the Sukuk Trustee dated 19 April 2007 to PIMM, granting its consent, as referred to earlier. This had referenced the Trust Deed of 10 January 2005 between Ample Zone and the Sukuk Trustee in the establishment of the Sukuk *Al-Ijarah*, but on this occasion served to notify PIMM that following the approval of the Sukuk holders at an EGM of the pre-sale of Wisma Talam, the Sukuk Trustee thus gave its authorisation to PIMM to sell the same.

[101] Further, among other matters, PIMM was required to ensure that the relevant purchase price from the purchaser's financier was to be paid in the name of the Sukuk Trustee for the Sukuk holders into the collections account. And that, importantly, upon receipt of 90% of the same, as mentioned, the Sukuk Trustee would disclaim and discharge all of its and the Sukuk holders' rights in Wisma Talam.

[102] As such, the sale of Wisma Talam to Hospital Pantai Indah could only be properly described under the law as PIMM in its capacity as bare trustee having sold the property pursuant to the SPA upon the express consent of the Sukuk holders, and with the prior approval of the SC.

[103] We further emphasise that under the Declaration of Trust, as shown earlier, as bare trustee, PIMM had undertaken, whenever requested by the Sukuk Trustee or Ample Zone, to convey and transfer the property as the Sukuk Trustee or Ample Zone (with the concurrence of the Sukuk Trustee) shall in its absolute discretion direct and "will do all acts and execute all documents as may be necessary to perfect such conveyance and transfer".

[104] On top of that, the sale was legally possible also because whilst PIMM was never the registered proprietor of Wisma Talam, Maxisegar, PIMM's related company was then the registered proprietor who had been made a contracting party to the SPA.

The SC Guidelines On True Sale

[105] The issuance and offering of the Sukuk in this case was approved by the Securities Commission (then a requirement pursuant to s 32 of the Securities Commission Act 1993) in December 2004 whilst it is understood that the SC's Guidelines on the Offering of Asset-Backed Debt Securities ("the ABS Guidelines") had been in force since April 2001.

[106] The appeal records did not disclose whether the SC had approved the Sukuk under the ABS Guidelines. It is equally unclear whether the Sukuk *Al-Ijarah* had been approved under either the SC's Guidelines on the Offering of Islamic Securities or the Guidelines on the Offering of Private Debt Securities then in force.

[107] In the course of submissions, however, counsel for both parties made reference to the ABS Guidelines — in particular in respect of the concept of true sale, when arguing on the status of the sale of Wisma Talam under the APA to Ample Zone. The ABS Guidelines were even included in the enclosures to the appeal records.

[108] It is a specific requirement of these ABS Guidelines that the originators or the Sellers here must be a going concern at the date of transfer of any assets to a special purpose vehicle (SPV), and that importantly, such transfer of assets must comply with the "true sale" criteria.

[109] According to the ABS Guidelines, this means that the assets which are transferred to the SPV from the seller/originator must be put beyond the reach of the originator and its creditors even in bankruptcy. This means that the originator must effectively transfer all rights and obligations in the assets to the SPV and must not retain any residual beneficial interest in these assets. Since underlying assets will be separated from the book of the originator, there would not be recourse to the obligor.

[110] The ABS Guidelines stipulate in para 6.02 that for a true sale, the risk that a transfer of assets by a seller/originator to an SPV might be re-characterised as a financing transaction rather than a sale of assets should be minimised as far as possible. In this regard, the originator must effectively transfer all rights and obligations in the underlying assets to the SPV. The originator must also not be in a position to exercise effective control over the decisions of the SPV in relation to the securitisation transaction.

[111] Conversely, the SPV must have no recourse to the originator for losses arising from those assets, and that additionally the SPV itself must be "bankruptcy remote" in that it should not carry on any other business activity other than in relation to the securitisation transaction itself.

[112] Unlike in the ABS Guidelines, however, the SC's Guidelines on Islamic Capital Market Products and Services (latest revision on 30 March 2026) have no specific mention of the true sale criteria. Nevertheless, Sukuk issuance is now also governed under the SC's Guidelines on Unlisted Capital Market Products under the Lodge and Launch Framework (latest revision on 30 March 2026) (which essentially repeat the true sale requirements set out in para 6 in the ABS Guidelines), the pertinent parts of which are now found in para 2 of Part 4 of the latest Guidelines, and read as follows:

> PART 4 ASSET-BACKED SECURITIES
>
> True sale criteria
>
> 2.09 The underlying assets must have been isolated from an originator i.e. put beyond the reach of the originator and its creditors even in receivership or bankruptcy as far as possible.
>
> 2.10 The risk that a transfer of assets by an originator to an SPV might be re-characterised as a financing transaction rather than a sale of assets should be minimised as far as possible. In this regard, the originator must effectively transfer all rights and obligations in the underlying assets to the SPV.
>
> 2.11 An originator must not hold any equity stake, directly or indirectly, in an SPV. In addition, the originator must not be in a position to exercise effective control over the decisions of the SPV in relation to the securitisation transaction.

> 2.12 An SPV must have no recourse to an originator for losses arising from those assets save for any credit enhancement provided by the originator at the outset of the securitisation transaction.
>
> 2.13 Where an originator is also the servicer, the services must be provided on an arm's length basis, on market terms and conditions. In addition, there must be no obligation imposed on the originator to remit funds to the SPV unless and until they are received from the debtor of the originator in respect of the underlying assets.
>
> 2.14 Notwithstanding the provisions of paras 2.09 to 2.13 above, an originator may repurchase assets from an SPV in the following circumstances:
>
> (a) Where such assets have declined to a level that renders the asset securitisation transaction uneconomical to carry on, under which an originator may retain a first right of refusal to repurchase these assets at a fair value; or
>
> (b) Where the originator is under an obligation to do so under a securitisation transaction when it has breached any conditions, representation or warranty in respect of the securitisation transaction.

[113] Now, it is not in dispute, as seen earlier, that the important concepts such as true sale and bankruptcy remote as stipulated in the SC's ABS Guidelines could be said to be found in the APA itself, in cl 2.2, as just mentioned.

[114] In our view, despite the definition of true sale in the relevant SC Guidelines and the provision in cl 2.2 in the APA which evinced the intention of the parties for the sale of Wisma Talam to be in the nature of a true sale — which may be construed to encompass an absolute legal and registered ownership of the property (as per the National Land Code) as well, based on the entirety of the terms and conditions of the Sukuk and the relevant transaction documentation, and indeed, regardless of whichever SC Guidelines applied to the Sukuk *Al-Ijarah* then, we reiterate our view that the legal position on the sale of Wisma Talam was that it involved the sale of the entire beneficial ownership to Ample Zone (and ultimately to the Sukuk holders as held by the Sukuk Trustee), with PIMM, as the seller/originator remaining as bare trustee only.

True Sale — General

[115] We accept that whether a sale qualifies as a true sale is determined by the governing law and the substance of the transaction. Not only by the label employed in the documentation.

[116] It is worthy of emphasis that the concept of true sale is a cornerstone in finance, especially in securitisation transactions in the debt markets. Generally understood, a true sale may be said to refer to the absolute and irrevocable transfer of ownership of an asset (which in securitisation commonly means mortgage loans and accounts receivable) from a seller as the original owner to a purchaser. Here, in a Sukuk *Al-Ijarah* scheme, the Sellers sold the various assets (being properties generating cashflows in rentals) to an SPV (Ample Zone) which then issued securities to investors.

[117] A true sale also seeks to achieve bankruptcy remoteness, such that if the seller or owner of the assets goes bankrupt, its creditors cannot have recourse to the sold assets because they no longer belong to the seller. It isolates and "ring-fenced" the assets from the estate of the bankrupt owner.

[118] This also means that the purchaser relies entirely on the performance of the underlying asset rather than the corporate credit of the seller. The purchaser assumes all risks and benefits associated with the asset.

[119] Other considerations consistent with the existence of true sale include the purchaser having absolute power to resell or pledge the assets whilst at the same time absorbing asset defaults and market drops, and without any right to demand the seller buy back underperforming assets (beyond standard warranties). The seller must relinquish all effective control over the assets.

[120] Fundamentally, a true sale removes the assets from the seller's balance sheet. They are derecognised.

[121] It is important that there is a true sale in such financing structures to avoid the risk that a transaction structured as a sale is characterised instead as a secured loan — in that the asset in question is not sold but pledged as collateral, with the key consequence that it remains in the seller/owner's estate.

[122] In other words, whilst the sale under the APA in the Sukuk *Al-Ijarah* transaction may well have been accepted as a true sale from a regulatory standpoint and in the Shariah context, its effects on the debt position of parties involved must be examined like what we have done in this case based on the contractual provisions set out in the Sukuk transaction documentation and other applicable legal principles.

[123] Generally, therefore, a true sale refers to a sale of an asset which removes the asset from the estate of the seller and transfers the economic risks and benefits to the buyer. This in our view could also apply to a sale which only transfers the beneficial ownership of the asset with the legal title remaining with the seller, like presently.

[124] However, the question then becomes whether the investors in fact have asset ownership or merely a contractual claim against the seller. Crucially, whether the transaction like the present Sukuk *Al-Ijarah* was legally a true sale depends on the transaction documents and applicable insolvency, property and trust laws, as well as other regulatory guidelines and governing Shariah rulings. It is not in that sense necessary for us to examine whether there was a legal true sale in this case.

[125] The main question before us was whether there had been advances to the 4th Respondent and its related companies which were attributed to PIMM (and later alleged to be fraudulently extinguished), and whether PIMM remained a creditor during the subsistence of the Sukuk programme. In order to do this, and as mentioned earlier, we need to examine the agreement of the parties as contained in the relevant Sukuk transaction documents in the context of the governing law.

[126] We have determined earlier that the relevant Sukuk transaction documents, viewed in their entirety, should rightly be said to have transferred the entire beneficial ownership in Wisma Talam under the APA to Ample Zone and ultimately, pursuant to the relevant Declaration of Trust and Deed of Conveyance, to the Sukuk Trustee on behalf of the Sukuk holders. PIMM then held the title to the property as its registered lessee in the legal capacity as a bare trustee only.

[127] This is consistent with the concurrent findings of the Court of Appeal and the High Court, which had rejected the case of the Appellant. In other words, on this point, Wisma Talam was determined to have been ultimately beneficially owned by the Sukuk holders or investors, pursuant to the APA between PIMM and Ample Zone and the subsequent transfer by Ample Zone of all its interests in the property by way of the Deed of Conveyance to the Sukuk Trustee, who held the same on trust for the Sukuk holders.

[128] We highlight again that even if the true sale criteria set by the SC was assumed to have been satisfied in the instant Sukuk *Al-Ijarah* programme, and despite the presence of the aforementioned cl 2.2 in the APA, legally, the very terms and conditions of the Sukuk issuance very unmistakably describe the sale of the assets under the APA to Ample Zone to involve only the beneficial interest therein, with the registered ownership remaining with the Sellers, including PIMM, albeit as bare trustees (in s 2 in the Information Memorandum and cl 2 of the APA, as mentioned above).

[129] This, for regulatory or Shariah purposes might have been deemed to be compliant with the requirement that the seller had effectively transferred all rights and obligations in the underlying assets, as stipulated in the above-stated relevant SC Guidelines, even though falling short of an absolute sale, transfer and conveyance of the underlying asset under the law, as set out principally in the National Land Code, it being a landed property.

Caselaw Held Asset Transfers in Al Bai Bithaman Ajil Islamic Finance Mere Formalities

[130] It is noteworthy that our appellate courts have had the occasion to examine the nature of the transfer of assets in the context of Islamic finance transactions. We refer to two such decisions.

[131] In *Low Chin Meng v. CIMB Islamic Bank Berhad* [2014] 7 MLRA 758, the Court of Appeal had to consider whether a series of transactions entered by the parties (including the asset purchase agreements and asset sale agreements, over company shares) for the purposes of the Islamic financing facility *Al Bai Bithaman Ajil* (BBA) were illegal because the company was effectively "dealing in its own shares," which violated s 67(1) of the former Companies Act 1965.

[132] The Court of Appeal was not persuaded. It held that the asset sale and purchase agreements were necessary formalities of the Islamic financing structure and not a genuine attempt by the company to buy back its own shares. The execution of the sale and purchase of the property by the parties is a prerequisite in the concept of Islamic financing of the BBA. The sale and immediate resale of the property under the asset purchase and sale agreements form an essential step in this mode of Islamic financing before the company could avail itself of the financial facilities.

[133] The following passages from the judgment of the Court of Appeal are instructive:

> "[56] We must emphasise that the execution of the sale and purchase of the property by parties involved is a prerequisite in the concept of Islamic financing of "Al Bai Bithaman Ajil". The sale and immediate resale of the property which are carried out by executing asset purchase and sale agreements form an essential step in this mode of Islamic financing before the company could avail itself of the financial facilities provided by the respondent. Thus, it is wholly erroneous for the appellant to say that the BBA transactions were asset sale and purchase transactions simpliciter.
>
> ....
>
> [62] The principle that can be gleaned from the above case is that firstly, the execution of the property purchase agreement was sufficient, without more, to pass a beneficial title of the lands to the defendant to found the basis for the BBA transaction. Applying the said principle to the present suit, the four asset purchase agreements were sufficient to pass a beneficial title in the shares to the respondent. There was no necessity to do anything more for that purpose. In fact cl 2 of the APA clearly states:
>
>> Upon execution of this Agreement, all rights title and benefits to the Asset shall be deemed and passed to the Bank.
>
> Secondly, intention of the parties in entering into the four asset purchase agreements and the asset sale agreements as clearly evinced therein is critical in construing the same.
>
> ....
>
> [65] ....The transactions involving the purported sale and purchase of the shares are genuine commercial transactions which could be justified on purely commercial grounds. The acquisition of the shares by the company was a side-effect and not the point of the transactions. The point of the transactions after examining the commercial context of the transactions was in substance and in essence an exercise in the Islamic financing procedure in order to execute the second BBA facility for the purpose of granting the financing facility by the respondent to the company.

> [66] We are satisfied that in all the circumstances, reasons and evidence point to the inevitable conclusion that there was nothing that the company did in relation to the shares in this case had contravened s 67 of Act 125. The submission of learned counsel for the appellant based on s 67 is not supported by the terms of s 67 itself. The second BBA facility in our judgment is valid and enforceable. Based on the foregoing reasons, we cannot accede to the argument of learned counsel for the appellant that the transactions had contravened s 67 of Act 125."

[134] This decision affirms that standardized BBA transaction documents are robust and valid. It also favours the economic and commercial "substance over form" approach when examining the asset purchase and sale agreements integral to BBA financing.

[135] The Federal Court decision in *Maple Amalgamated Sdn Bhd & Anor v. Bank Pertanian Malaysia Berhad* [2021] 5 MLRA 337 also follows this approach. The case involved a challenge on the legality of Asset Sale and Asset Purchase Agreements ("the SPAs") entered into as part of a BBA financing facility on the ground that such SPAs infringed s 214A of the National Land Code ("the NLC"). This provision seeks to prevent the unchecked fragmentation of large agricultural estates. It therefore prohibits the transfer, conveyance, or disposal of "estate land" without prior approval from the Estate Land Board.

[136] The BBA facility commonly involves the bank purchasing a particular asset owned by the customer for the value of the financing to be provided. The bank will then sell the same asset back to the customer at a price greater than the value obtained by the customer, which is to be paid on a deferred and instalment basis. This transaction is encapsulated in an asset purchase and asset sale agreements, respectively.

[137] This Court ruled, following its earlier decision in *Gula Perak Berhad v. Datuk Lim Sue Beng & Other Appeals* [2019] 1 MLRA 345 (on the legislative intent of s 214A of the NLC) that the SPAs under the BBA do not constitute an actual "transfer, conveyance, or disposal" of an estate land. There was no actual memorandum of transfer or change in the registered proprietor such that the transaction does not fall within the prohibition of s 214A. There was no actual transfer of ownership, no such vesting of beneficial ownership ever took place and the respondent bank never in law or in equity became the owner because the arrangement was merely a means to finance an Islamic facility.

[138] Her Ladyship Tengku Maimun (Chief Justice) delivering the judgment of the Federal Court in *Maple Amalgamated* said this:

> "[72] The undisputed fact remains in this case that there has been no actual transfer of ownership of the land from the 1st appellant to the respondent. No memorandum of transfer was executed and the 1st appellant remained the registered proprietor of the land at all material times. Even if the BBA agreement purports to vest beneficial ownership in the respondent, it is clear that in fact no such vesting ever took place. The respondent never in law or in

> equity became the owner of the land as the arrangement was merely a means to finance an Islamic facility. Our courts have held that Islamic financing facilities transacted in this way, for example the BBA in this case, are valid and are recognised financial transactions (see *Dato' Hj Nik Mahmud Daud v. Bank Islam Malaysia Bhd* [1998] 1 MLRA 380).
>
> [73] Accordingly, we agree with the respondent that the BBA agreement is not caught by the terms of s 214A of the NLC."

[139] The Court favoured the approach which considers the commercial reality of such a transaction and the purpose of the law which the agreement was claimed to have violated. Having taken into account the object and purpose of the statutory provision in question, if there are two possible interpretations, the one that avoids the finding of illegality is to be preferred, for reasonable commercial people would organise their affairs on the basis that what they are engaging in is not prohibited under the law.

[140] Since in that case no actual transfer of the land had taken place and the purpose of s 214A of the NLC had not been breached, the Federal Court found that the SPAs were consequently not in breach of s 214A, and nor were they illegal. The SPAs were mere formalities which formed a necessary part of the Islamic financing facility and which otherwise had no real effect towards the ownership of the asset.

[141] This Court in *Maple Amalgamated* further noted as follows:

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

[142] In both these decisions — *Maple Amalgamated* and *Low Chin Meng* — the Courts examined the substance of these Islamic finance transactions such that in our view the relevant documentation ought therefore to be read in that context. Both cases concerned the BBA facility.

[143] It is a form of financing, albeit Shariah-compliant and in respect of which an integral and crucial element is the requirement for the sale of the relevant asset to the financier. Although it is clear that the BBA facility also mandates the purchase of the same asset back by the customer, whilst in Sukuk *Al-Ijarah* the asset would be leased back to the originator/seller, the key feature common to both types of facilities — BBA and Sukuk *Al-Ijarah* — is the prerequisite of a sale or transfer of the asset to the SPV/financier.

[144] However, we are of the view that the reasoning and approach by the Federal Court in *Maple Amalgamated* towards a BBA Islamic financing facility might not equally apply to an Islamic Sukuk *Al-Ijarah* transaction. The legal construction of any Islamic transaction should be made on a case-to-case basis and may have no universal application since the intention of the parties would have to be determined according to the specific structure of the facility and the terms and conditions set out in the individual transactional documents. More specifically, the structures in BBA and Sukuk *Al-Ijarah* are not the same. The differences are fundamental.

[145] We recognise that, not so dissimilar to the situation in *Maple Amalgamated*, here, PIMM somewhat still retained legal ownership of Wisma Talam (as its registered lessee; as was Maxisegar its registered proprietor) because, despite the sale to Ample Zone, title was not transferred, although PIMM held the title merely as a bare trustee. However, although there was no actual transfer of legal ownership, this arrangement was a feature expressly stated in the terms and conditions of the instant Sukuk *Al-Ijarah*. Further, the transfer of beneficial ownership of Wisma Talam was well documented in the relevant terms and conditions and other documents such as the APA, the Trust Deed, the Declaration of Trust and the Deed of Conveyance.

[146] In *Maple Amalgamated*, in contrast, it was held that no vesting of beneficial ownership ever took place and the respondent bank never in law or in equity became the owner because the arrangement was merely a means to finance an Islamic facility. *Maple Amalgamated,* however, was in respect of the standard BBA facility, as was also the case in *Low Chin Meng*, whereby the BBA facility structure does not typically require the involvement of a third-party trustee holding the beneficial ownership over any asset on trust.

[147] It is observed that even though both the BBA and the Sukuk *Al-Ijarah* involve sale contracts, the legal nature and consequences of those sales are essentially not the same. In BBA, the sale is the primary financing transaction that gives rise to a deferred debt obligation. In Sukuk *Al-Ijarah,* on the other hand, the sale is an enabling step to generate underlying asset ownership for the Sukuk holders. Fundamentally, the sale in Sukuk *Al-Ijarah* performs a different legal and commercial function within the overall programme structure.

[148] Unlike the sale in BBA financing, which this Court in *Maple Amalgamated* described as a formality ancillary to the financing arrangement, here, the sale in Sukuk *Al-Ijarah* performs a distinct legal function by effecting the sale and transfer of the leased asset to the issuer/SPV (and subsequently the Sukuk Trustee), thereby enabling the subsequent lease. The nature and legal effect of the sale in Sukuk *Al-Ijarah* are materially different from those in BBA financing.

[149] This Court in *Maple Amalgamated* found that the sale and purchase transactions in the BBA arrangement there were, in substance, a mechanism to facilitate financing, describing the sale as a "mere formality" and not the true commercial substance of the transaction. That, however, is not the position in Sukuk *Al-Ijarah*, where the sale transfers ownership (or beneficial ownership, depending on the structure) of the asset to the SPV or trustee so that the asset can thereafter be leased. The investors' returns arise from lease rentals, not from the sale price. In contrast, in the BBA facility, the sale between the bank and the customer is the financing contract itself. The deferred sale price creates the customer's debt.

[150] More pivotal, in our view, is that in the Sukuk *Al-Ijarah* structure, the sale would be much more integral because absent a valid transfer of the asset (whether an absolute true sale or only in respect of beneficial ownership, like presently), the SPV cannot lease the asset to the originator. The very sale (here, via the APA) establishes the ownership necessary for the lease contract (the IRA). The sale has the effect of transferring ownership (or beneficial ownership, depending on the structure) of the asset to the SPV or trustee so that the asset can subsequently be leased. The investors' returns arise from lease rentals, not from the sale price.

[151] As such, we do not think that the principles enunciated in *Maple Amalgamated* and *Low Chin Meng* which concerned BBA facility — quite apart from the vastly different factual circumstances — could be readily applied to other Islamic transactions or financing with different features and structures, such as in the Sukuk *Al-Ijarah* which in the instant case was governed by its own set of legal documentation.

Case Not About Validity of Islamic Finance Documentation

[152] It is important for us to stress that this case does not involve any question, let alone attack on the validity or legality of an Islamic finance transaction. There is no dispute on whether certain clauses in the Sukuk *Al-Ijarah* instrument were not Shariah-compliant that could have necessitated reference to the Shariah Advisory Council of the Bank Negara Malaysia under s 56 of the Central Bank of Malaysia Act 2009. Neither are there doubts expressed on the validity of the Sukuk programme or in relation to any of the various agreements, deeds and many other documentation which constitute the entire Sukuk programme. Nor does it concern any complaint that the Islamic instrument was entered into in breach of any law, like in *Maple Amalgamated* or in *Low Chin Meng*.

[153] However, here, some of the issues on the interpretation of the effects of certain features of the Sukuk *Al-Ijarah vis-à-vis* the accounting treatment and creditor-debtor relationship, among others, are more than merely tangential. We cannot emphasise enough that when dealing with Islamic finance transactions, the law cannot operate in a vacuum of rigid formalism, but must appreciate the intricate commercial realities of modern Islamic financial instruments in order not to imperil liquidity and stability of the country's financial and capital markets, as well as the growth of the wider economy.

[154] It is worth noting that according to the Securities Commission Capital Market Masterplan 2026-2030, the Islamic Capital Market in Malaysia expanded to RM2,700,000,000,000.00 by the end of 2025, and this accounted for about 64% of the country's total capital market size. Malaysia remains the global leader in Sukuk issuance, representing about 36 per cent of the global Sukuk market as at the end of 2024. The country ranked first in the Islamic Finance Development Indicator for the 13th consecutive year in 2025, ahead of Saudi Arabia, the United Arab Emirates and Indonesia. The Sukuk market is undoubtedly a very important pillar of Malaysia's debt capital markets.

[155] Courts must therefore bridge Islamic finance jurisprudence with contemporary commercial reality, and not just recognise but also comprehend the true economic and proprietary substance of such transactions.

[156] We are in agreement with the submission of the Appellant that Sukuk *Al-Ijarah* is an Islamic bond based on leasing. This is consistent with the literature on the subject as well as reflected in Sukuk documentation and general market practice in the Islamic Capital Market in respect of which we take judicial notice.

[157] The Sukuk transaction documentation clearly differs from a conventional bond as it seeks to prevent payment of interest obligations. Thus, Sukuk documentation is drafted and structured as a trade activity, instead of the usual direct lending. In the true and final analysis, a Sukuk transaction is arguably akin to a financing transaction. The originators/sellers of assets need financing, which is provided by Sukuk investors who subscribe to certificates issued by the SPV who purchased the assets from the originators/sellers and then leased them back to the originators/sellers.

[158] This trade activity is reflected by the originator selling the assets (in conventional lending, akin to pledging the asset for security) to the Sukuk holders (lender) who in turn pay a purchase price (loan sum) albeit via an SPV issuer. The Sukuk transaction documents declare that the beneficial interest in the asset is transferred to the Sukuk holders (after the transfer to the SPV) with corresponding obligations for the originator/seller/lessee to make periodic rental payments (like loan repayments) to the Sukuk holder, via the SPV.

[159] Significantly, there would also be a provision for redemption of the Sukuk upon maturity or default or the happening of a trigger event whereby the Sukuk holders (via Ample Zone, the SPV issuer) undertake to sell and the originators/sellers undertake to repurchase the assets. There is no transfer of title or legal ownership of the assets throughout.

[160] Whilst in this respect it could be said that the financial obligations that arise from an Islamic financing transaction such as the Sukuk *Al-Ijarah* replicate the economic effects of a conventional bond/financing, this would be more true in aspects such as predictable cash flows and capital protection (re-purchase mechanism).

[161] It is fundamentally less so in terms of the nature of the financial obligation as a conventional bond is a pure debt obligation where returns are derived strictly from the lending money with the investors being the lender — whilst in comparison — the Sukuk *Al-Ijarah* represents direct, proportional ownership of an underlying Shariah-compliant physical asset or its *usufruct*, with the Sukuk returns such as rentals being derived from real, underlying economic activity such as leasing of properties.

The Malaysian Accounting Standards Board Discussion Paper

[162] Reverting to the instant case, it is imperative to acknowledge that there are no complaints or challenges to the financial statements of any of the entities. In any event, Courts do not usually discuss the differences in accounting treatment, what more on which standards should apply.

[163] Now, despite our determination on the legal position of the ownership of Wisma Talam — it being beneficially owned by the Sukuk holders, we are not unmindful that a significant militating factor against that would be how PIMM itself had been treating this property in its own accounts.

[164] Far from recognising that PIMM had nothing to do with Wisma Talam (say, because of an absolute true sale under the APA) or that it was a mere bare trustee of the property (after that sale), the audited financial statements of PIMM, from FY2002 to FY2006 clearly included Wisma Talam as its investment property under the item on non-current asset (despite the sale under the APA during FY2006) but which was instead also described as being pledged for the Sukuk *Al-Ijarah* arrangement.

[165] In FY2007, just before the execution of the SPA, it was classified as a current asset "*held for sale*". Additionally, the accounts of PIMM in FY2008 recognised the disposal gain of the sale to Hospital Pantai Indah as an income item.

[166] However, it must also be affirmed that accounting treatment of a company's transactions and events does not necessarily reflect the true legal position. A crucial point of emphasis is that financial statements record such transactions and events in order to reflect economic substance or reality instead of merely their strict legal form.

[167] Fundamentally, accounting treatment and legal ownership are not necessarily the same. Shariah jurisprudence may also view the matter differently.

[168] In this regard, in our view, it would be beneficial to note that parties in this appeal had made references to and submitted on the Malaysian Accounting Standards Board (MASB) Discussion Paper i-2 Sukuk.

[169] It is a discussion paper, released on 16 December 2011, which invited comments by 16 March 2012. It also contained recommendations.

[170] We find this document useful. It underscores the approach taken in entries made to financial statements, which emphasises economic substance.

Not a strict legal position. The document also identifies specific features of Sukuk that have a determining influence on accounting treatment.

[171] Notably, in its section on Background, the Discussion Paper states -

> "Sukuk has become part and parcel of the Malaysian capital market. **Although in many material aspects sukuk can be compared to a conventional bond**, there are some aspects of it which warrant further guidance from a financial reporting perspective.
>
> Among these are classification of sukuk in the statement of financial position, **derecognition of the asset transferred by an originator to a special purpose entity (SPE)**, consolidation of the SPE with the originator, and whether sukuk should be measured at amortised cost or at fair value.
>
> [Emphasis added]

[172] We now make two short points. First, as mentioned earlier, a Sukuk instrument, specifically Sukuk *Al-Ijarah* is generally recognised as a principal form of Shariah-compliant financing as it functions as the Islamic equivalent to a conventional lease-backed bond. Thus, instead of borrowing money and paying interest (which is forbidden in Islam), the issuer raises funds by leasing a tangible asset, and correspondingly investors (or Sukuk certificate holders) earn returns through rental income. Secondly, in this context, derecognition, or the removal of a previously recognised asset or liability from an entity's statement of financial position, has always been a matter for debate.

[173] This Discussion Paper raised nine questions, one of which concerned derecognition. The following statements on this one point are pertinent:

> 39. Here, it is vital to emphasise that the concept of a 'true sale' in accounting is distinct from a 'true sale' from both Shariah and legal perspectives. Generally, in an accounting framework, an asset transfer becomes an accounting 'true sale' when the transfer meets derecognition criteria for that particular type of asset. The focus is on whether risks and rewards are transferred, what continuing involvement the transferor has, and which entity has control of the MASB DP i-2 31 transferred asset............
>
> ....
>
> 41. Transfers of rights or interests to fixed/tangible assets should generally be analysed under MFRS 116 Property, Plant and Equipment and MFRS 118 Revenue to determine whether the fixed asset needs to be derecognised.
>
> 42. MFRS 116 states that fixed assets should be derecognised when the transfer meets the 'sale of goods' criteria in MFRS 118.
>
> ....

44. In looking at the 'sale of goods' criteria in MFRS 118, the sukuk originator (asset transferor) would need to determine whether "the entity has transferred to the buyer the significant risks and rewards of ownership of the goods." Paragraph 17 of MFRS 118 clarifies that 'true sale' would not be prohibited if the transferor retains an 'insignificant risk of ownership'.

....

48. Under the proposals in the exposure draft, a sale occurs (and thus the transferred assets can be derecognised) when all performance obligations related to the asset transfer are satisfied.

49. If the originator (asset transferor) has the right to repurchase the assets out of the SPE or from the trustee at the termination of the sukuk (or at the occurrence of any other trigger event), paras B47 — B53, Sale and repurchase of an asset would apply. This proposed guidance states that if the transferor has an unconditional obligation to repurchase (a forward) or an unconditional right to repurchase (a call option) the transferred assets, then the transferee is not considered to obtain control of the transferred assets.

....

Tentative conclusions on the transfer of fixed assets

52. In a transfer of rights or interests over a fixed asset, if the 'sale of goods' criteria in MFRS 118 are met, the originator can derecognise the fixed asset. If, however, these criteria are not met, such as when the originator is still exposed to more than an insignificant amount of risks of ownership, then the assets transferred cannot be derecognised and the transfer would have to be accounted for similarly to a secured borrowing.

[174] Doubtless an interesting read, it is less than clear whether this Discussion Paper has since in fact been concretised in any new standards or rules.

[175] Based on another, subsequent document issued in 2012, though — the Malaysian Accounting Standards Board Feedback Statement on MASB Discussion Papers on Takaful, Sukuk and Shariah Compliant Profit-sharing Contracts, it appears that the MASB decided not to proceed with its earlier intention to develop Technical Releases (TRs) based on the Discussion Paper and the public comments received.

[176] Nevertheless this Feedback Statement usefully summarised the comments received, and the relevant parts on derecognition are as follows:

Derecognition

88. A central feature of a sukuk issuance is the transfer of an underlying asset or beneficial interest to a SPE or trustee. If the transferor does not consolidate the SPE, it needs to assess whether it should derecognise the transferred asset. Derecognition would depend on the type of asset transferred, e.g.:

- MFRS 116 Property, Plant and Equipment. An item of PPE is derecognised if the 'sale of goods' criteria in MFRS 118 Revenue is met. The criteria focus on if the significant risks and rewards of the fixed assets have been transferred.

......

89. MASB DP i-2 tentatively concluded that if a transfer does not meet the relevant derecognition criteria, then the transferor cannot derecognise the asset, even if the transfer is deemed a true sale under Shariah. The transfer would instead be accounted for similar to a secured borrowing — the transferor would continue to recognise the asset and recognise a corresponding liability for the expected future outflow of benefits.

90. Three respondents — two Governmental bodies and a bank — agreed that asset-specific derecognition criteria should apply to an asset transfer. The bank plainly stated "the asset transfer needs to satisfy the true sale criteria from the accounting point of view in order for any particular asset to be derecognised". One of the Governmental bodies voiced a similar opinion: "Yes, we agree that the accounting derecognition criteria is contingent on the type of assets transferred."

....

93. Three respondents — a professional body, a bank and a Governmental body — agreed with the DP's tentative conclusion that the existence of an option to repurchase a transferred asset would make it more difficult to justify asset derecognition.

[177] As such, a key conclusion, albeit non-definitive, that could be fairly derived from this literature — the Discussion Paper and the Feedback Statement — is that in accordance with the applicable Malaysian Financial Reporting Standards (MFRS), the underlying fixed assets of a Sukuk *Al-Ijarah* (such as Wisma Talam) are generally not derecognised by the originator/seller (such as PIMM) from their accounts, unless there is sale in an accounting sense which principally involves considerations whether the originator retains the economic risks and rewards of ownership over the assets. The transaction must constitute a genuine (economic) sale under MFRS 15 Revenue from Contracts with Customers.

[178] Now, we must stress that despite the general understanding of what it means, the concept of true sale is not defined in identical terms when applied in the different spheres of accounting standards, legal definition or in Shariah jurisprudence. That much is true, as highlighted in the MASB Discussion Paper and Feedback Statement as set out earlier. Here in the instant case, all three perspectives converge. But we are not called upon to determine what its definition ought to be in strict law. We do not have to because it is unnecessary for present purposes. We need only, in the main, to examine the legal documents to ascertain the status of the property sold under the APA and the sale proceeds of its sale pursuant to the SPA, as well as the impact of the accounting entries, without having to make a finding whether there was a legal true sale.

[179] The Discussion Paper states that "true sale" in accounting is distinct from a "true sale" in the legal sense and that the criteria for accounting recognition of assets are risks and rewards, continuing involvement of the transferor and control, all of which are also construed as the economic substance of the sale.

[180] In the instant case, therefore, there is merit in the 4th Respondent's stance that PIMM's audited accounts captured the economic effect of the sale under the APA in an economic, not legal sense, which thus explained PIMM's continued recognition of Wisma Talam in its books notwithstanding what may be accepted as a true sale under Shariah principles. Indeed, as noted above, the Discussion Paper did tentatively conclude that if a transfer does not meet the relevant derecognition criteria, then the transferor cannot derecognize the asset, even if the transfer is deemed the true sale under Shariah.

[181] This is not difficult to comprehend because subsequent to the sale to Ample Zone, Ample Zone had then leased the property back to PIMM under the IRA, which allowed PIMM's rental of the same (to Hospital Pantai Indah) to continue. In that accounting context, PIMM continued to control the property and to receive the economic benefits by way of the rentals. On top of that, another aspect of economic substance over the property was the fact that, in conjunction with the IRA, the Sellers of the assets (PIMM, in respect of Wisma Talam) had also entered into Service Agency Agreements with Ample Zone to provide the latter with major maintenance and to undertake the responsibility of effecting and maintaining insurances for the respective assets.

[182] As such, whilst these MASB papers offered much clarity on the approach reflected in the accounting treatment in the financial statements of PIMM and the 4th Respondent in the relevant FYs, they also made the vital point that the concept of a true sale in accounting is distinct from a true sale from both Shariah and legal perspectives. Thus, even if a transfer is deemed a true sale under Shariah or strict law, the seller of the asset might still not be required under the accounting standards to derecognise the asset from its financial statements.

[183] The Discussion Paper and the Feedback Statement appear to suggest that retention of risks and rewards of ownership by the originator could include a purchase or sale undertaking with the issuer where the originator would purchase the relevant underlying asset back at a fixed price, which meant that the transaction is construed not as a sale but as a collateralized financing instead.

The Purchase And Sale Undertakings

[184] We have mentioned about the Purchase and Sale Undertakings above. Here, we reiterate that each of the Sellers had given Ample Zone an unconditional and irrevocable purchase undertaking to purchase the relevant assets at the exercise price upon the happening of any event of default, a trigger event or upon maturity of the IRA. The exercise price is all the amount outstanding under the Sukuk, but in the case of its maturity, a nominal sum of RM100.00 per asset.

[185] Conversely, Ample Zone, as the issuer, had also given an unconditional and irrevocable sale undertaking to sell the relevant assets to the respective Sellers for the same reasons. And as noted earlier, should the Seller fail to purchase, the 4th Respondent would be compelled to do so by the Sukuk Trustee pursuant to the Option Agreement executed by the two.

[186] However, the point to be made is that the existence of this mechanism threatens to confuse the true nature of the sale under the APA somewhat because it is often not associated with a true sale. The Discussion Paper is quite clear in stating that the undertakings would likely not lead to derecognition of the subject assets.

[187] This is thus one key aspect about the Sukuk *Al-Ijarah* in this case that might not fully accord with the concept of true sale. Specifically, pursuant to the Sale Undertaking Deed dated 28 January 2005 (in s 1.3 of the Information Memorandum, as mentioned above), Ample Zone, as the purchaser in the APA, granted the Sellers, PIMM included, to right to require Ample Zone to sell the assets back to the Sellers on maturity of the IRA, or on the occurrence of a default or a trigger event. And correspondingly, there was also the Purchase Undertaking Deed of even date, giving Ample Zone the right to require the Sellers to purchase back the assets on similar terms. And as mentioned earlier too, there is the Option Agreement which compels the 4th Respondent to make the purchase of the assets in the event the Sellers failed to do so pursuant to either of the Deeds.

[188] The important point about the Purchase Undertaking Deed and the Option Agreement is that the Sukuk *Al-Ijarah* transaction in fact envisaged that the assets sold to Ample Zone under APA and beneficially owned by the Sukuk holders would eventually be repurchased by the Sellers at maturity of the IRA. Pursuant to the Sale Undertaking Deed, it would be entirely for the Sellers to determine whether they wish to exercise the undertaking to compel Ample Zone to sell the assets back.

[189] This element of re-purchase was already in-built into the overall Sukuk structure because as stated above — in s 1.3 of the Information Memorandum, the source of payment for the Sukuk is not only the periodic rental payments made to Ample Zone by the Sellers pursuant to the IRA but also from the disposal of the assets pursuant to the aforesaid Purchase and Sale Undertakings given by Ample Zone and the Sellers respectively. In other words, this undertaking mechanism would ensure payments were made to the Sukuk holders.

[190] As such, there may be a suggestion that this vital element of re-purchase in the Sukuk *Al-Ijarah* transaction is not in consonance with the idea of a true sale, as the Sellers had agreed — as did all the parties — from the start that they would be in a position to have the assets that had been "sold" earlier to be "purchased back" at the end of the tenure of the Sukuk programme.

[191] Moreover, in terms of accounting treatment, this undertaking mechanism for the re-purchase of the assets is a factor singularly pointed out in the abovementioned MASB Discussion Paper, where at the risk of repetition, it is suggested (in paragraph 49 therein) that if the seller has an unconditional obligation to repurchase or an unconditional right to repurchase the transferred assets, the transferee is not considered to have obtained control of the transferred assets.

[192] Similarly, also as mentioned above, the subsequent MASB Feedback Statement reiterated this proposition (in its para 93) that the existence of an option to repurchase a transferred asset would make it more difficult to justify asset derecognition. This suggests that in terms of economic reality the assets remain in the books of the seller/originator, at the same time implicitly recognising there is no true sale. We must however repeat the *caveat* here that this is in the context of accounting treatment of financial statements, not Shariah or strict legal position.

[193] Not only that. It is equally noteworthy that the SC's ABS Guidelines, and the present SC's Guidelines on Unlisted Capital Market Products under the Lodge and Launch Framework — which set out the true sale criteria for such issuance of securities make no reference to this purchase undertaking mechanism. Although as discussed earlier, they do provide for a re-purchase situation, it is self-explanatory in para 2.14 of the SC's Guidelines on Unlisted Capital Market Products under the Lodge and Launch Framework that the asset repurchase would only be permitted in circumstances where either such assets have declined to a level that renders the asset securitisation transaction uneconomical to carry on or the seller is obliged to do so following its breach of any conditions, representation or warranty in respect of the securitisation transaction.

[194] As such, whilst the transfer of Wisma Talam pursuant to the APA did not appear to be entirely in keeping with the requirement for a true sale in the ABS Guidelines, the presence of the purchase mechanism would be another reason for the contention that the instant Sukuk *Al-Ijarah* did not appear to be in the nature of an asset-backed transaction.

Asset Backed & Asset Based Sukuk

[195] In other words, this purchase mechanism also appears to be a feature more comfortably found in an asset-based Sukuk (as opposed to asset-backed Sukuk) where literature suggests the sukuk holders (investors) only hold beneficial ownership, but not the legal title which remains with the originator, and where the originator guarantees a buy-back at par value upon maturity or default.

[196] More critically, the distinction in terms of the recourse of the Sukuk holders distinguishes an asset-backed sukuk from asset-based sukuk. Fundamentally, in an asset-backed structure, Sukuk holders have direct recourse only to the underlying assets. If the asset underperforms, the holders bear the loss and have no legal claim against the originator to make up the shortfall. The sukuk is also bankruptcy-remote *vis-à-vis* the originator.

[197] In contrast, in an asset-based Sukuk, the holders have recourse against the originator/issuer. The originator typically guarantees payment, and this is often precisely via a purchase undertaking where the originator can be sued to compel the originator/seller to buy back the beneficial interest in the asset at the agreed formula price. This seems to be the case in the instant Sukuk *Al-Ijarah*, as stated in the section on Risk Factors & Investment Considerations found in para 12.2.1 of the Information Memorandum. This makes the holder an unsecured creditor in the originator's bankruptcy process.

[198] In other words, the undertakings act as a debt-like payment guarantee. They guarantee the buyback of the asset at a predetermined price at maturity or in the event of default. As such, the presence of the Purchase and Sale Undertakings as well as the Option Agreement in the instant Sukuk *Al-Ijarah* suggests that the structure was more asset-based, and not asset-backed. This also suggests that since it was not asset-backed, the ABS Guidelines would by definition not have been applicable.

[199] In our view however, in the context of the instant case, whether the Purchase and Sale Undertakings meant that the Sukuk was asset based would be more an ancillary consideration, very much like our view that it was not necessary to determine whether there was a true sale in this case or indeed whether the Sukuk *Al-Ijarah* here was an asset based or an asset backed structure in the first place. We say this because what truly matters would clearly be what had been agreed in the terms and conditions in other key governing documents like the APA, the IRA, the Trust Deed, and the Declaration of Trust which we have shown to be unmistakably manifest in describing the transfer of the entire beneficial ownership of the property pursuant to the APA, albeit in undivided form, to the Sukuk holders via the Sukuk Trustee.

[200] Furthermore, it is also important to note that in terms of the key transaction of the sale pursuant to the SPA to Hospital Pantai Indah, the pre-sale was also specifically governed by the SC approval as accepted by the Sukuk holders, and detailed out in the SPA and the Supplemental Trust Deed. The undertaking mechanism in fact had no application whatsoever in the pre-sale scenario that had actually taken place.

Redemption & Status of Proceeds

[201] As has been determined here, pursuant to the APA, even though Wisma Talam remained on PIMM/the seller's balance sheet, the entire beneficial ownership was transferred, the seller became a bare trustee and only retained legal title as directed by the Sukuk Trustee, and there was a purchase and sale undertaking requiring the seller to repurchase the asset at maturity of the IRA.

[202] In terms of the sale of Wisma Talam under the SPA to Hospital Pantai Indah, the legal basis for the utilisation of the sales proceeds was undoubtedly governed by the SC's approval and the Supplemental Trust Deed, which patently arose from the Sukuk *Al-Ijarah* transaction. The terms of the SC's approval were manifested into the Supplemental Trust Deed and the relevant clause would be as follows:

> 3. APPLICATION OF SALE PROCEEDS OF PRE-SALE
>
>> 3.1. On a Pre-Sale of any Asset, the holders of class A Sukuk shall have first priority over the net sale proceeds (i.e. after payment of taxes...), followed by class B Sukuk and finally class C Sukuk."

[203] Both the SC's approval and the Supplemental Trust Deed were the legally governing directives on the utilisation of the sales proceeds. In actuality and consistent with these contractual stipulations, the sales proceeds went straight into the Collection Account controlled by the Facility Agent and the Sukuk Trustee and were, from there, paid out to the Sukuk holders. At no point did the money ever enter PIMM's banking account in the process.

[204] Now, if we accept (which we should) the foundational point that there was a transfer of beneficial ownership of Wisma Talam to Ample Zone (and then to the Sukuk Trustee on behalf of the Sukuk holders/investors), it must follow that the economic benefits of the assets including the proceeds of sale of Wisma Talam following the SPA belonged to the beneficial owners — in other words, the Sukuk holders.

[205] However, having regard to the SC approval of the pre-sale and the consequential amendments in the Supplemental Trust Deed which as mentioned much earlier (when we discussed the pre-sale of Wisma Talam prior to maturity) clearly provided for any surplus after use of proceeds for the partial redemption of the Sukuk to be gifted to PIMM, it could, in our view be argued that even though the SPA and the redemption mechanics including the usual undertakings protected the investors' principal, they may never have acquired the full economic upside of beneficial ownership since any surplus value belonged to the seller.

[206] In other words, it could be posited that since any surplus proceeds would revert to the originator, this is telling evidence that the rights of the Sukuk holders are limited to the amount necessary to redeem the Sukuk, instead of extending to the full ownership of the value of the asset. What would effectively be a reversion of surplus proceeds to the originator/seller is arguably nothing less than a confirmation that investors' rights are limited to the redemption amount.

[207] We do not accept this theory. In our view, the stipulation that any surplus of the sale proceeds would be gifted to the original seller would only be triggered upon the termination of the trust arrangement, which would be after the payment of the redemption of the Sukuk. As stated in that letter dated 19 April 2007 to PIMM, the Sukuk Trustee clearly mentioned that it would discharge and disclaim all rights to the property upon receipt of payment from the purchaser. It makes no difference to the status of the property and the sale proceeds that certain announcements and circulars of the 4th Respondent represented that Wisma Talam continued to be owned by PIMM in the Sukuk *Al-Ijarah* programme. Thus, in the announcement by the 4th Respondent on 19 April 2007 to the stock exchange on the sale of Wisma Talam (by PIMM) to Hospital Pantai Indah, it was also mentioned that the directors of the 4th Respondent were of the opinion that the sale was in the best interest of Talam as it would reduce the borrowings of the Group.

[208] The SPA itself in cl 7.1.3 states that the obligation to redeem the property from the Sukuk Trustee is PIMM's whilst in cl 7.1.4 it is made plain that until and unless the property has been redeemed, "*PIMM shall comply with its obligation in connection with the terms and conditions of the Sukuk Al-Ijarah Financing*." And at the risk of repetition, it has been mentioned earlier that under cl 7.1.1, PIMM was to procure from the Sukuk Trustee a statement as to the amount to be paid to redeem the Sukuk (for payment by the purchaser).

[209] In fact in cl 4, PIMM was stated as the beneficial owner of Wisma Talam. And whilst recital 6 acknowledged that PIMM had sold its beneficial interest pursuant to the Sukuk, it was also mentioned that the sale was subject to the right of PIMM to repurchase Wisma Talam. It is also to be noted that the terms on the 4th Respondent's Proposed Debt Settlement as detailed out in its Circular to shareholders dated 22 August 2008 also included the Proposed Divestment Programme which latter term was defined as "a divestment programme of the Group's assets, the proceeds of which shall be utilised to pare down the Group's borrowings and to raise funds for working capital purposes".

[210] Significantly, in s 2.5 of the Circular, the divestments which had since been completed were also listed, including the sale of Wisma Talam where Maxisegar was noted as the registered owner and the Sukuk Trustee holding the same in trust for the Sukuk holders. Crucially, the point here is that the sale of Wisma Talam to Hospital Pantai Indah pursuant to the SPA was disclosed as being part of the Talam Group's divestment programme to reduce the Group's borrowings. The purpose of the sale, completed on 9 January 2008, was specifically stated "to partially redeem the Sukuk and finance the expenses relating to the sale".

[211] In s 2.4.1 of the Circular, on the details of the Proposed Debt Settlement, disclosure was made of the fact that as at 31 July 2008, approximately RM924,800,000.00 or 78.1% of the Group's total borrowings were in default.

[212] Interestingly, a list of the debts of the Group which were not in default was also provided whereby the largest sum outstanding as at 31 July 2008 was about RM88,300,000.00 in respect of which the facility was identified as PDS — we surmise this would be private debt securities, with Ample Zone identified as the borrower and the Sukuk holders as the lender.

[213] It is demonstrably clear therefore that the 4th Respondent regarded the Sukuk facility as a debt that it owed via the SPV issuer/Ample Zone to the Sukuk holder/investors. Equally significantly, it also treated Wisma Talam as the group's asset which it could, and according to the Circular did sell to a third party in order to partially redeem the Sukuk and thus pared down the group's borrowings.

[214] And it is noteworthy that the only mention of the Sukuk in the announcement was that the disposal required the consent of the Sukuk Trustee as trustee for the Sukuk holders.

[215] However, and this is crucial — as we have determined earlier, such statements and descriptions, as they appeared in the Circular or even the SPA — to the extent that they suggested that Wisma Talam continued to be owned by PIMM — are not reflective of the strict legal position of the Sukuk transactions and that of the status of the property and the parties in question.

[216] The applicable legal documents for the Sukuk Al-Ijarah in this case, we reiterate, are unequivocal in providing for the sale of the entire beneficial ownership of the property to Ample Zone (and thereafter, the Sukuk Trustee for the Sukuk holders/investors), which left PIMM as its bare trustee only.

[217] Thus, the subsequent pre-sale of the property could only have occurred with the authorisation of the Sukuk Trustee (for the Sukuk holders) and the additional condition on the approval of the SC — both of which were obtained. The SPA also provided for the discharge of all interests of the Sukuk Trustee in Wisma Talam upon the requisite payment being made towards the partial redemption of the Sukuk.

[218] Moreover, the purchase price was made by the purchaser not to PIMM despite it being named as the vendor under the SPA, but to the Sukuk Trustee who represented the Sukuk holders/investors pursuant to the requisite payment mechanism set out in the SPA. Thus, the balance purchase price of

RM57,150,000.00 was credited into the collection account which had been ring-fenced under the Sukuk, on 12 November 2007, in accordance with the Sukuk Trustee's instruction that the disposal proceeds of Wisma Talam and all profits and income earned thereon were to be paid to the said collection account in the name of the Sukuk Trustee on trust for the Sukuk holders.

[219] Even though the very objective of the partial redemption of the Sukuk by PIMM and the 4th Respondent was to pare down the borrowings of the Talam Group from the proceeds of the sale, it does not mean that the proceeds belonged to them/PIMM. We have shown that the pre-sale of Wisma Talam was only possible upon the Sukuk Trustee having given the requisite consent on behalf of the Sukuk holders (the investors) as beneficial owners of the property who had earlier approved the sale at their EGM.

[220] Since the Sukuk holders were the beneficial owners of Wisma Talam, any money generated from the sale of that property must belong to them, not to the seller/originator (PIMM), with the distribution being governed by the terms of the Sukuk *Al-Ijarah* transaction documents, in particular, the Supplemental Trust Deed.

[221] We would describe the mechanics of the transaction in that context to be like this. Upon completion of the sale pursuant to the SPA, the proceeds legally replaced the physical asset that was Wisma Talam as the new trust property of the Sukuk holders, who as the beneficial owners immediately gained a beneficial right to the cash proceeds generated by the sale, which was then distributed to them as Sukuk holders after which the trust in respect of the asset — Wisma Talam was dissolved. The order of distribution followed the 'waterfall provision' as approved by the SC, and as reflected in the SPA and the Supplemental Trust Deed.

[222] In chronological order, while the Sukuk holders would remain the beneficial owners of the entire pool of proceeds when the asset was sold, the originator/seller (PIMM) would only gain ownership of the surplus (if any) after the trust obligations have been fully satisfied and the investors' ownership rights have come to an end *vis-à-vis* Wisma Talam (and only because the matter of the surplus to be gifted to PIMM was expressly set out in the SC approval of the pre-sale).

[223] Once the partial redemption of the Sukuk was completed upon the investors receiving their contractually agreed amount in full, their beneficial interest in the trust property would cease and therefore be dissolved. In this case, the letter from the Sukuk Trustee to PIMM dated 19 April 2007 referred to earlier had undertaken that upon its receipt of 90% of the purchase price in the relevant collections account, it and the Sukuk holders would disclaim and discharge all rights in the Trust Assets.

[224] The issue on the ownership of the surplus would therefore only have mattered upon the dissolution of the trust over the property, and provided there was a surplus in the first place. As such, it is only after the trust was dissolved that any cash surplus ceased to be encumbered or subject to the trust of the Sukuk holders' beneficial ownership. This has no relevance to the Sukuk holders being the beneficial owners of Wisma Talam before the sale. Only at that point would the term that any such surplus proceeds be gifted to the seller/ originator be triggered. However, in this case, as it turned out, there was no surplus. There was none here.

[225] We therefore find it difficult to agree with any suggestion that the terms concerning the application of balance proceeds from the pre-sale which identified PIMM as the recipient of any final surplus in the context of the use of the sale proceeds of Wisma Talam towards the redemption or the retirement of indebtedness of other entities (the 4th Respondent and the related companies), could be construed as fortifying the Appellant's case that the proceeds were advances made by PIMM to those entities. At the risk of repetition, the proceeds of sale beneficially belonged to the Sukuk holders.

[226] We reiterate therefore that since the proceeds of the pre-sale of Wisma Talam to Hospital Pantai Indah pursuant to the SPA did not belong to PIMM, it follows that it is not correct to say that the proceeds of sale which had been applied towards the partial redemption of the Sukuk facility (attributed to the indebtedness of the 4th Respondent and its related companies in the Sukuk programme) counted as payment of advances by PIMM on behalf of the 4th Respondent and these other related companies.

[227] As such, in respect of the first key issue in this appeal, we conclude that the concurrent findings of the High Court and the Court of Appeal have not been made in error. Since Wisma Talam was beneficially owned by the Sukuk holders, the proceeds from its sale to Hospital Pantai Indah beneficially belonged to the Sukuk holders too, until completion of the redemption payment to the Sukuk holders. Only then did the trust over the property come to an end, with the consequence that any surplus proceeds would be gifted to PIMM (there was none).

[228] We must therefore defer to the primary documents that in the first place established the sale of Wisma Talam to Ample Zone, specifically the APA, the Trust Deed, the IRA, the Declaration of Trust and the Deed of Conveyance, in favour of the Sukuk Trustee. These clearly made the Sukuk holders via the Sukuk Trustee the ultimate beneficial owners of the rights and interests in Wisma Talam, with PIMM only as a bare trustee *vis-à-vis* the property. This is also in keeping with the position as represented in the aforesaid Information Memorandum.

[229] This crucially means that there could not have been any proceeds from this sale that constituted advances from PIMM in favour of the 4th Respondent and the other related companies.

[230] In light of the above, our answers to the three questions of law are as follows:

Question 5

Whether the reasoning and approach by the Federal Court in *Maple Amalgamated Sdn Bhd & Anor v. Bank Pertanian Malaysia Berhad* [2021] 5 MLRA 337 towards a "*Bai Bithaman Ajil*" Islamic financing facility equally applies to an Islamic "*Sukuk Al-Ijarah*" financing facility?

Answer — Our answer is that whilst the general approach to uphold Shariah-compliant financial instruments and commercial transactions is always relevant, its application must be subject to the agreed terms and conditions of the facility as contained in the legal documentation of the differently structured Sukuk *Al-Ijarah*. The BBA and the Sukuk *Al-Ijarah* are clearly distinct facilities. We further state that the legal construction of any Islamic transaction should be made on a case-to-case basis and has no general application across the Board as the intention of the parties would have to be determined according to the specific structure of the facility and the terms and conditions set out in the individual transactional documents.

Question 6

Whether a "seller" who has "sold" an asset to a financier pursuant to a "*Sukuk Al-Ijarah*" Islamic financing facility can nevertheless:

(a) redeem that asset prior to maturity of that facility; and

(b) own any excess of the purchase price less the redemption sum?

Answer — We answer this by stating that much would depend on whether the situations raised in this question are envisaged and authorised as part of the agreed terms and conditions of the facility as contained in the transaction document of the Sukuk *Al-Ijarah*.

In this case, the sale of the asset, the utilisation of its sale proceeds, including the gifting of any surplus to the originator/seller, were made part of the terms and conditions of the Sukuk in the SPA and the Supplemental Trust Deed upon approval by the SC for the pre-sale.

However, this question is not only ambiguous but also raises a hypothetical scenario where the facts of the case plainly differ from the facts assumed in the question. This necessarily means that any answer would be of no consequence and would not be able to affect, let alone reverse, the decision of the Court of Appeal. At the same time, since much depends on the specific terms of the facility, the question and its answer would have no general application and not be of public interest.

Question 7

Whether a "seller" who has "sold" an asset to a financier pursuant to a "*Sukuk Al-Ijarah*" Islamic financing facility and has therefore parted with beneficial interest in that asset can nevertheless sell that asset to a third party during the period of the facility?

Answer — Similar to our answer to Question 6, whether the matters raised by the Appellant in this Question 7 could be pursued would depend on whether they were authorised by the agreed terms and conditions of the facility as contained in the transaction document of the Sukuk *Al-Ijarah*. In this case, the seller sold the asset (beneficially owned by the Sukuk Trustee under a trust for the Sukuk holders) to a third party during the period of the facility in its capacity as a bare trustee for the Sukuk holders.

However, this question, like the previous Question 6, is not only ambiguous but also raises a hypothetical scenario where the facts of the case plainly differ from the facts assumed in the question. This necessarily means that any answer would be of no consequence and would not be able to affect, let alone reverse, the decision of the Court of Appeal. At the same time, since all depends on the specific terms of the facility, the question and its answer would have no general application and not be of public interest.

The 2nd Key Issue — Whether the entries on advances from PIMM to the 4th Respondent And Other Related Companies As Recorded In The Relevant Audited Financial Statements Constituted Legal And Enforceable Debts Owing To PIMM.

The Accounting Entries On Assets And Debts In PIMM's Financial Statements

[231] In light of the above analysis, it was the 4th Respondent's position, as affirmed by the Courts below, that the Appellant was wrong in failing to appreciate that PIMM's recognition of Wisma Talam in its accounts post Sukuk was based on economic principles, not legal principles which led the Appellant and in particular its expert witness, Jayasangar Baliah, a chartered accountant (SP2) into reaching a flawed conclusion that recognition in the accounts equalled ownership.

[232] It was further asserted that the reason why PIMM continued to recognise Wisma Talam in its books was that from an economic standpoint, the said property satisfied the definition of an asset which PIMM then controlled and from which future economic benefits flowed to PIMM, since Ample Zone had, after the APA, leased back Wisma Talam to PIMM under the IRA which enabled PIMM's rental to continue.

[233] In other words, Wisma Talam continued to be recognised in PIMM's accounts because PIMM obtained the usufruct right, which was a right to use the asset in exchange for lease rental that it paid to Ample Zone. The 4th Respondent stressed that this was the underlying economic theme behind the recognition. The Appellant's position that equated 'economic' recognition with legal ownership was submitted to be fundamentally wrong.

[234] In our view, whilst the originator/seller received the initial funding or capital from selling the *usufruct*, the seller was obliged under the IRA to pay the rentals. This meant that the Sukuk holders were the ones who received the rental payments as the rightful owners of the *usufruct*.

[235] We understand the Appellant's riposte to the 4th Respondent's submission to be that such difference between accounting / economic and legal concepts *vis-à-vis* the effects of first, *Romalpa* or retention of title clauses (by making reference to Thomson Reuters and Roy Goode-Goode on *Principles of Corporate Insolvency* (2018), p 162) which distinguishes legal form from economic substance, and secondly on leases are matters not relevant here. The Appellant's stance is that on the present facts, the Court is concerned with the effect of an Islamic transaction *vis-à-vis* the concept of 'debts'.

[236] It is in our view fair to state that the existence and prevalence of the distinction between economic substance in accounting treatment and the strict legal concept of sale or transfer is not disputed by the parties before us. The 4th Respondent too recognised the distinction.

[237] We agree that proper regard ought to be had to the true legal position of the assets and the debts, and not how the financial statements recorded them.

[238] We should nonetheless first demonstrate the extent of the disclosures in the financial statements in respect of the debt in contention *vis-à-vis* the Sukuk redemption which appears to support the case of the Appellant. Here, the evidence of the 4th Respondent's witness Chua Kim Lan (SD1), who was an executive director of the 4th Respondent at the material period, when questioned on the audited financial statements of PIMM for FY 2008 by counsel for the Appellant in cross-examination (Encl 96 Jilid 7(2) pdf, p 319 of the Appeal Records) is of interest. We wish to highlight a number of points which she appeared to have agreed to.

[239] First, the cash flow statement in reference to Wisma Talam recorded net proceeds from the disposal of the investment property of slightly more than RM62,000,000.00. It was also stated that this represented just over RM22,000,000.00 gain on the said disposal (being the difference between the purchase price and the book value).

[240] Secondly, the cash flow statement stated that the Facility Agent (also the Lead Arranger) for the Sukuk had "utilised partial sales proceeds to redeem partial face value of primary Sukuk".

[241] Thirdly, the accounts showed an increase in the amounts owing to PIMM by both the holding company (the 4th Respondent/Talam) and the other related companies by about RM11,800,000.00 and RM19,800,000.00, respectively.

[242] Fourthly, although initially disputed by the witness, these were real entries which showed partial redemption of Sukuk and that the increase in amounts owing by them to PIMM meant that part of the sale proceeds went to redeem part of the Sukuk for the benefit of the 4th Respondent and its related companies.

[243] Fifthly, correspondingly, in the balance sheet for the same audited financial statements of PIMM FY 2008, in respect of Non-Current Assets, the amount owing by holding company increased from RM4,300,000.00 in FY 2007 to about RM16,200,000.00 in FY2008. The increase therefore totalled approximately RM11,800,000.00, which was exactly the aforementioned sum recorded in the cash flow statement as the increase in the amount owing by the holding company.

[244] Similarly, in respect of the amount owing by related companies to PIMM, the same increase of RM19,800,000.00 which appeared in the cash flow statement could also be found as exhibited in the balance sheet. These could be considered as inter-company loans whereby debts owing by the holding company and its related companies to PIMM were reflected as assets under the item on Non-Current Assets in PIMM's balance sheet.

[245] Sixthly, as for the effects of the redemption payments, in respect of the item Non-Current Liabilities, the assets owing to other related companies decreased from RM36,300,000.00 in FY2007 to RM1,800,000.00 in FY2008, which represented payment of redemption and to Ample Zone. The accompanying note 12 to the accounts stated that the amount owing by the holding company represented advances which are unsecured, interest-free and have no fixed term of repayment. The sum of RM16,200,000.00 therefore constituted an inter-company advance from PIMM to the 4th Respondent.

[246] But despite the above entries, in our view, it should be highlighted that nowhere in these financial statements was it mentioned that the relevant property was in the Sukuk structure beneficially owned by the Sukuk holders. Yet, in sharp contrast, legal documentation in the Sukuk facility — the APA, the IRA, the Trust Deed, the Subscription Agreement, the Declaration of Trust and the Deed of Conveyance, among others — however, clearly highlighted exactly that as a key term and condition of the Sukuk arrangement.

[247] Importantly too, as stated earlier, the pre-sale of Wisma Talam for the purpose of the partial redemption of the Sukuk had been implemented in accordance with the SPA and the Supplemental Trust Deed that the property was beneficially owned by the Sukuk holders who must give their consent before the pre-sale could proceed. The proceeds had to be paid to the Sukuk Trustee and distributed as agreed, essentially to partially redeem the Sukuk, after which the trust over the same was dissolved and the surplus, if any (there was none), be gifted to the original owner, PIMM.

[248] In this connection, we find the explanation of the 4th Respondent's key witness — expert witness Brian Wong, a chartered accountant (SD2) in his examination-in-chief, which made reference to the above-stated MASB Discussion Paper, especially useful:

> "Brian: Can I then direct you respectfully to p 169. Para 89 of p 169 sets out the conclusion from the discussion paper that MASB has put out. 'MASB discussion paper (03:04:07PM inaudible) tentatively concluded that if a transfer does not meet the relevant derecognition criteria, then the transferor cannot derecognise the asset, even if the transfer is deemed the true sale under Shariah.
>
> DC1: I see. So if you apply what is discussed in this paper to our case, the assets, Wisma Talam, am I correct to say was not derecognised as an asset of PIMM in this book, in this account.
>
> Brian: Correct. It continued to be recognised as an investment property in PIMM's account.
>
> DC1: Right. Even though it may be deemed to be a true sale under the Shariah principle. Am I correct? Did I get that correct?
>
> Brian: Yes, correct".
>
> ....

[249] No less significant is his explanation on why Wisma Talam still appeared in the financial statements of PIMM despite PIMM having sold the same to Ample Zone pursuant to the APA-

> "DC1 ... Now, from a layman's perspective, if the property, Wisma Talam had already been sold to Ample Zone, the SPV, why did it still appear in the accounts of PIMM after the Sukuk was issued. Can you explain that?
>
> Brian: I think we need to be very clear on the accounting concept behind recognition of assets and liabilities. What you see from a legal perspective may not necessarily translate in an accounting perspective. Because accountants look at things from economic standpoint. The reason why PIMM continued to recognise the asset in its books is because from an economic standpoint, it satisfies the definition of an asset being resource that is controlled from which future economic benefits are expected to flow. Also the fact surrounding the circumstances is that a true sale occurred under Shariah and this is Ijarah arrangement. And because it's Ijarah arrangement, the originator or in this

> case, PIMM, would obtain the usufruct right which is the right to use the asset in exchange for lease rental that it pays to the Special Purpose Vehicle. Because of this right to use the asset from an economic perspective, you treat it as an asset. And you continue to recognise it as an asset and you don't derecognise it in accordance with the accounting principles".

[250] As discussed earlier, as reflected in the audited financial statements of both PIMM and the 4th Respondent, the sale of Wisma Talam resulted in the amounts stated to be advanced by PIMM to the 4th Respondent and other related companies increasing. The Appellant's argument was that this increase was due to the use of the proceeds from the sale of Wisma Talam under the SPA to partially redeem the Sukuk.

Section 34 Of The Evidence Act 1950

[251] The 4th Respondent, however, contended that the Appellant was prevented from relying only on these accounts to establish the debt owed by the 4th Respondent and its subsidiaries to PIMM by reason of s 34 of the Evidence Act 1950. This section reads as follows:

> Entries in books of account when relevant.
>
> Entries in books of account regularly kept in the course of business are relevant whenever they refer to a matter into which the court has to inquire, but the entries shall not alone be sufficient evidence to charge any person with liability.

[252] This led the Appellant to describe the situation as the 4th Respondent disavowing its own accounts. In reply the latter submitted that there was no factual disavowal of accounts in the trial as both sides accepted the audited accounts into evidence and the dispute was about interpretation of the accounting entries, not their correctness.

[253] It is not easy to see how this section assisted the parties. What s 34 says is essentially that a party cannot rely on its own entries in its accounting records alone to charge or sue another party. Thus, if X sues Y for non-payment in respect of goods already delivered, it is insufficient for X to merely show its own accounting entries to establish that Y owes X such indebtedness. Other evidence would be necessary, such as documents on the purchase order, delivery order and invoice.

[254] Here, however, the Appellant, who was suing the 4th Respondent, was relying not on its own accounts, but those of the 4th Respondent and PIMM's. There is thus patently nothing self-serving about the Appellant wanting to rely on the accounts of other companies like PIMM and the 4th Respondent.

[255] In any event, we shall not dwell any further on this issue as the 4th Respondent in its written submissions plainly stated that the proper treatment in law towards an accounting entry under s 34 of the Evidence Act 1950 is that any accounting entries are merely relevant evidence of a debt, but shall not alone be sufficient evidence of the liability towards a debt.

[256] This, we agree, is the correct statement of the law.

[257] This is also entirely consistent with the decisions in the three cases mentioned in Question 2 *vis-à-vis* s 34 that a debt or damage must be proved by primary evidence — namely *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1989] 2 MLRH 705, *Lam Eng Rubber Factory (M) v. Lim Beng Yew & Ors* [1994] 2 MLRH 564 and *TKM (Singapore) Pte Ltd v. Export Credit Insurance Corporation of Singapore Ltd* [1992] SGHC 240.

[258] The 4th Respondent contended, in our view correctly, that the accounting entry by itself cannot be interpreted at face value to infer a legal liability, unless further supported by underlying legal documents, as the 4th Respondent maintained had correctly been done by its expert witness SD2 in this case since here, it said that accounting entries were made based on economic principles, not legal principles. What was in dispute was the interpretation and conceptions behind the accounting entries.

[259] It is noteworthy that the Appellant raised the question of law concerning s 34 of the Evidence Act 1950. The firm notion that the accounts are not conclusive and require substantiation weakens the case of the Appellant, which relied heavily on the accounting entries in the audited financial statements of PIMM and the 4th Respondent.

[260] In this respect, we would readily approve the following observation made by the Court of Appeal on the legal status of audited accounts which had been challenged in the case of *Soo Boon Siong v. Saw Fatt Seong & Ors* [2007] 2 MLRA 784:

> "AUDITED ACCOUNTS
>
> ...
>
> ....In the light of the clear objection on pleadings and in evidence, the learned judge is therefore wrong to say that the audited accounts of the partnership and of the companies had not been challenged. The audited accounts are indeed inadmissible considering that the accounts had not only been challenged but that the auditors had not been called to verify the contents, whether for purposes of proving the ownership of the properties or for the purposes of determining the nature of the businesses carried out by the companies. The conclusiveness or otherwise of statements of account, whether audited or otherwise, had been addressed by this court and also by the Federal Court on a number of occasions. The Federal Court in *KPM Khidmat Sendirian Berhad v. Tey Kim Suie* held as follows:
>
>> The summary of accounts does not prove the facts and particulars stated therein. The mere fact that the summary of the particulars were made could never be taken as providing that the contents were correct. It has to be proved by calling the maker to explain the facts and the basis of

> the calculation of the amount claimed. Moreover, the record book upon which the maker based her summary must be in evidence.

> The fact that the appellant had signed most, if not all, of the documents relating to the audited accounts of the partnership or the companies, including the directors' reports, is similarly not conclusive of the validity or the truthfulness of the accounts. Contrary to the learned judge's finding, the statutory confirmation signed by the appellant that the audited accounts were a true and fair view of the results of the business pursuant to s 169(5) and (16) of the Companies Act 1965 is not conclusive of ownership of the properties nor is it an indication of any intention on the part of the appellant and the 1st respondent to treat the properties as belonging to the companies. The issue of whether the books or accounts are indeed conclusive of ownership of the properties or binding on the partners had been addressed in *Lindley & Banks on Partnership*, (18th Ed 2002) at p 188 para 10-74:

>> Although an account, once signed and approved, may be binding on the partners, it does not follow that it will be binding for all purposes. Thus, unless the agreement provides otherwise, annual accounts prepared for the purposes of calculating the firm's divisible profits may be of no relevance when calculating the financial entitlement of an outgoing partner. In particular, the fact that goodwill or work in progress has been treated as valueless in such accounts or that other assets have consistently appeared therein at their original or depreciated book value will not, of itself, necessarily justify the adoption of those accounting practices on the death, retirement or expulsion of a partner; *a fortiori* in the case of a general dissolution. ... Equally, the fact that an asset is included in the firm's accounts is not conclusive of its status as a partnership asset".

[261] We also need to highlight the following pertinent observation made by Zainun Ali JCA (later FCJ) in *Sony Electronics (M) Sdn Bhd v. Direct Interest Sdn Bhd* [2006] 2 MLRA 583 where the audited accounts were treated as summaries of the source documents. This further fortifies the point that the accounts can never be read in isolation.

> "[74] The respondent was at pains to distinguish the authorities relied upon by the appellant (ie, *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1989] 2 MLRH 705 and *KPM Khidmat Sendirian Berhad v. Tey Kim Suie* [1994] 1 MLRA 195) on the grounds that the said cases do not involve audited accounts being tendered as evidence.

> [75] However it is our view that this distinction has no basis since the nature of an audited account in the instant case, is no different from the "sheet of calculations" tendered in the *Popular* case, or the "summary of accounts" tendered in the *KPM Khidmat* case, as these documents are nothing more than general conclusions or results from the books of account or record books."

[262] Equally relevant, in *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1989] 2 MLRH 705, Edgar Joseph Jnr J (later FCJ) had this to say on the same issue:

"I would go further and say that even had the accounts books been in evidence they could not by themselves have been sufficient to charge the defendants with liability having regard to the provisions of s 34 of the Evidence Act so that the entries themselves would have had to be proved by someone having personal knowledge of the transactions reflected in such entries. The accountant and auditor Mr So, despite what he might say, was not such a person as he, like any accountant, would of necessity have to rely upon information derived from documentary sources and explanations provided by his clients when preparing the accounts. To emphasize the point I would add that it is common knowledge that when accountants prepare accounts for their clients for submission to the Inland Revenue Department they so certify in the accounts.

Upon this subject, I find the following passage in the judgment of Wadegaonkar J in *Beni v. Bisan Dayal Anor AIR* (1925) Nag 445 at p 446 precisely in point:

> ... Mere entries in books of account are not by themselves sufficient to charge any person with liability (vide s 34 of the Evidence Act). The reason is that a man cannot be allowed to make evidence for himself by what he chooses to write in his own books behind the back of third parties. There must be independent evidence of the transaction to which the entries relate and as no such evidence has been adduced in this case the court below was wrong in holding that defendant no I had paid the money to plaintiff for payment of the kist for January 1921 ...."

[263] We add that this position also aligns with the long-established English common law principle that entries in books of account are merely *prima facie* evidence and are never conclusive evidence of a debt (see *Blackburn Building Society v. Cunliffe, Brooks & Co* [1882] 22 Ch. D. 61). A party cannot conclude the existence of a debt simply by reading the accounts. The underlying commercial transactions must be established first.

[264] After all, the statutory duty to keep records and documents that explain the company's transactions to ensure the preparation of a true and fair financial statement is already basic, as set out in s 245 of the Companies Act 2016. The relevant parts of this section read as follows:

Accounts to be kept

245.(1) A company, the directors and managers of a company shall-

(a) cause to be kept the accounting and other records to sufficiently explain the transactions and financial position of the company and enable true and fair profit and loss accounts and balance sheets and any documents required to be attached thereto to be prepared; and

(b) cause the accounting and other records to be kept in a manner as to enable the accounting and other records to be conveniently and properly audited.

(2) A company, the directors and managers of a company shall cause appropriate entries to be made in the accounting and other records within

sixty days of the completion of the transactions to which the entries relate.

(3) The company shall retain the records referred to in subsection (1) for seven years after the completion of the transactions or operations to which the entries relate.

...

(9) The company and every officer who contravene this section commit an offence and shall, on conviction, be liable to a fine not exceeding RM500,000.00 or to imprisonment for a term not exceeding three years or to both.

Accounting Entries Must Be supported By Underlying Legal Documents

[265] Nonetheless, as stated earlier, although the 4th Respondent attempted to argue on examples where the entries based on accounting standards could show a different position as compared to the legal liabilities — specifically in *Romalpa* clauses and lease situations, the instant case presented a more direct question — in terms of the accounting entries on indebtedness in the context of a Sukuk *Al-Ijarah* transaction.

[266] It is our view that reliance on the approach on economic substance behind accounting entries is insufficient under strict law to explain the nature and status of the relevant items in the Sukuk transactions — such as on the ownership of the property and the indebtedness of the relevant entities. In this context of Sukuk *Al-Ijarah*, in the absence of any specific governing statutory requirements, the legal status of any items of transactions ought predominantly to be dictated by the terms and conditions of the various contract and legal documentation constituting the Sukuk *Al-Ijarah*.

[267] We further find it difficult to resist the conclusion that when the economic substance of accounting entries largely does not correspond to or, like in this case, appears to diverge from the terms and conditions of these documents, the Courts must enforce the strict legal position as contained in the various legal documentation under the Sukuk *Al-Ijarah* transaction structure.

[268] It might also be argued whether the economic substance in the accounting context is of the same sense as the commercial reality or substance over form approach enunciated in *Maple Amalgamated,* considering that in both these Islamic facilities of BBA and Sukuk *Al-Ijarah* — a *sine qua non* is a sale or transfer of asset to the SPV/financier.

[269] We do not think so. It is certainly not in this case, for the reasons stated earlier, especially when the documents on the transactions and structure of this Sukuk *Al-Ijarah* are specific on the ownership of the property and when the sale of the property for Sukuk redemption too proceeded on the documented basis that the same was beneficially owned by the Sukuk Trustee on behalf of the

Sukuk holders or investors. These aspects are quite unlike those features found in a BBA facility, as discussed earlier.

[270] As such, we again reiterate that it is correct for the Court of Appeal and the High Court to have determined that the sale proceeds of the Wisma Talam pursuant to the SPA with Hospital Pantai Indah did not belong to PIMM, that the sale proceeds never went to PIMM, but to the Sukuk holders, and that PIMM was not in a position to advance, and never advanced, the sale proceeds to the 4th Respondent and the other related companies.

[271] This was despite what was stated in the relevant accounts in terms of the increase in indebtedness by the 4th Respondent and the other related companies to PIMM by virtue of the sale of Wisma Talam by PIMM pursuant to the SPA, and the subsequent partial redemption of the Sukuk.

[272] We are in agreement with the stance that despite the economic substance approach captured by the accounting entries, these are not based on legal principles since the true legal position is that the Sukuk documentation provided for the transfer of beneficial ownership in Wisma Talam to Ample Zone under the APA (and later to the Sukuk Trustee), although some of the documents did not make this position consistently clear (such as in the true sale clause in the APA and statements made in the Circular of the 4th Respondent, as highlighted earlier).

[273] Legally, the Sukuk holders, post Sukuk, were the beneficial owners of all the assets subject to the APA and therefore the sale proceeds of Wisma Talam under the SPA belonged to them, and that was why those sale proceeds were never paid to PIMM, but utilised for the partial redemption (which was also authorised by the Sukuk holders) to the Sukuk holders through the Sukuk Trustee.

The Default Accounting Entries To Record Transactions In Sukuk

[274] Next, there is also this question as to whether there exists in law the concept of a "default accounting entry" in the context where an accounting entry showing a debt owed by Party A to Party B in Party A's accounts can be disregarded by Party A.

[275] The 4th Respondent, especially its two key witnesses (as mentioned, Brian Wong, a chartered accountant appointed by the 4th Respondent as an independent expert and Madam Chua Kim Lan, an executive director of the 4th Respondent) testified to the effect that the accounting entries on the debts did not actually exist or had no effect because they were merely "default accounting entries". This testimony that there was no advance from PIMM was rooted in the stance that the property — Wisma Talam — was then not owned by PIMM following its sale under the APA to Ample Zone, and therefore the items on advances as they appeared in the financial statements were mere "default" accounting entries.

[276] Given the centrality of this issue to the case of the 4th Respondent, the entire s 2 on Advances of Proceeds from the Sale of the Property found in Brian Wong's Second Report on Findings dated 5 January 2017 is reproduced hereunder:

> "2. **ADVANCES OF PROCEEDS FROM THE SALE OF THE PROPERTY**
>
> 2.1 In para 2.0(iv) of the Second Jayasangar Report, Jayasangar claimed that "*as the sale proceeds were used for the redemption of the Sukuk, Talam and its related companies would receive the money as advances from PIMM as the sale proceeds belong to PIMM*". This statement is factually incorrect on several grounds, as follows:
>
> (a) The proceeds from the disposal of the Property in 2007 did not belong to PIMM. This is because under the Sukuk arrangement, the Property had already been sold to Ample Zone for the Sukuk issuance which effectively conveyed ownership rights to the Sukuk holders upon issuance of the Sukuk. (See CBD/B-8B/pp 243-248 and pp 303-314).
>
> (b) Further, the proceeds from the disposal of the Property were deposited into the Ample Zone collection account, which is operated jointly by the Facility Agent (i.e. Malaysian International Merchant Bankers Berhad) ("the Facility Agent") and Ample Zone, for the purpose of redemption of the Sukuk for the benefit of the Sukuk holders, and does not belong to PIMM. (See CBD/B-8A/pp 398-419 and CBD/B-8C/pp 230-244).
>
> (c) Talam and its related companies did not receive money as advances from PIMM because the sale proceeds were applied by the Facility Agent for the redemption of the Sukuk as approved by the SC and Sukuk Trustee. Under the Supplemental Trust Deed dated 12 September 2007 between Ample Zone and the Sukuk Trustee, the application of the sale proceeds was determined solely by the Facility Agent and not PIMM (See CBD/B-8C/pp 230-244). **The accounting entries are made to reflect the default descriptions in PIMM's financial statements to merely record the application of the sale proceeds by the Facility Agent pursuant to the terms of the Sukuk. PIMM was not in any position to make any advances of the sale proceeds.**
>
> (d) I want to reiterate that the disposal of the Assets, including the Property, was subject to the approval of *inter alia*, the Sukuk holders, the Sukuk Trustee and the SC, which all gave their approvals subject to the proceeds from the disposal of the Assets being utilised for the settlement of the Sukuk, before the surplus, if any, is made available to the original vendors. As there was no surplus from the disposal of the Property after the redemption payments to Sukuk holders (See CBD/B-8B/pp 90-91 & CBD/B-8C/pp 167-170), there were no proceeds available to PIMM, and for PIMM to advance to Talam and/or its subsidiaries".
>
> [Emphasis added]

[277] At this juncture, we should remind ourselves that the Court of Appeal did echo the findings of the High Court and as stated above, held that "*The accounting entries are made to reflect the default descriptions in PIMM's financial statements to merely record the application of the sale proceeds by the Facility Agent pursuant to the terms of the Sukuk*." In fact, this statement was taken from the above- stated Brian Wong's Second Report.

[278] Here, SD2 was doubting the statement in the Appellant's expert witness report — the Second Report by Jayasangar Baliah (SP2) who had stated that since the sale proceeds went to redeem the Sukuk, the 4th Respondent and the related companies had received advances from PIMM because the proceeds belonged to PIMM.

[279] SD2's disagreement stemmed from the 4th Respondent's now-familiar argument that Wisma Talam did not belong to PIMM at that time, hence the proceeds were never due to PIMM and that, as a matter of fact, the 4th Respondent and the related companies never received any advance from the proceeds.

[280] As discussed earlier, we agree with this position. Further, SD2, when answering counsel for the Appellant's query on the meaning of the item on net proceeds of RM62,000,000.00 from the disposal of investment property in PIMM's cash flow statement for FY 2008 said-

> BRIAN OK, so, this RM62,000,000.00 is a corresponding entry that ties with the derecognition of the investment property from the accounts. To begin with, the investment property via the Sukuk, because it was a true sale, beneficial interest reverted to the Sukuk holders, right. But as far as the accounting is concerned, because the economic benefits continue to reside in PIMM, the investment property continues to reside...the account balance continues to reside in PIMM's account. **Once the asset, although it has already been sold, because it's in the books, it gets reversed out, the corresponding entry that needs to come into the accounts to reverse its balance is this**.
>
> [Emphasis added]

[281] The Appellant contended that SD2, when cross-examined, accepted the Appellant's version especially in respect of PIMM's right to early redemption, and the use of proceeds of the sale to redeem indebtedness of others which were treated as amounts owing by the others to PIMM.

[282] However, we do not think this is an accurate reading of SD2's testimony in this context. SD2 did indeed agree with a number of suggestions made by the counsel for the Appellant, but SD2 had consistently emphasised that his answers were based on accounting treatment of the financial statements, in dealing with transactions related to the Sukuk — in particular relevant to the initial sale of Wisma Talam to Ample Zone, and its subsequent pre-sale to Hospital Pantai Indah.

[283] After all, he was extensively cross-examined principally on the financial statements, not the legal documentation governing the Sukuk Al-Ijarah.

[284] We show one example of such an exchange:

> PC2: Correct. Thank you. Which is why, finally, if you look at the balance sheet at p 193, because of the increases, look at Note 12, asset, amount owing by holding company is RM16,000,000.00 plus, amount owing by related companies is RM32,000,000.00 plus, because of the redemption issue. Correct?
>
> BRIAN: Correct.
>
> PC2: In fact, the holding company is Talam, the other related companies would be Abra and Inti Johan. Correct?
>
> BRIAN: Correct.
>
> PC2: Correct. Because they were part of the -
>
> BRIAN: Sukuk.
>
> PC2: ...Sukuk exercise. Correct. The redemption went, proceeds went, to redeem what they should have redeemed, for their benefit. Correct?
>
> BRIAN: For the accounts, yes.
>
> PC2: Yes. So therefore, because it's their benefit, you owe me the corresponding figure, owe PIMM the corresponding figure. Correct? Yes. You can't nod, you must say yes.
>
> BRIAN: Accounting, yes.
>
> PC2: Yes, accounting. What else are we talking about?
>
> BRIAN: Not legal.
>
> PC2: I'm not talking about legal.
>
> BRIAN: Sure. Ok, ok.

[285] SD2 in his Second Report had stated that the entries were made to reflect the default descriptions in PIMM's financial statements "to merely record the application of the sale proceeds by the Facility Agent pursuant to the terms of the Sukuk".

[286] In further cross-examination, SD2 repeatedly testified thus:

> BRIAN: To begin with, as I mentioned before, these are default accounting entries. So whether they owe or not -
>
> PC2: So you are saying that a default accounting entry is not a true entry?
>
> BRIAN: **Because of the Sukuk**.
>
> [Emphasis added]

[287] And crucially, SD2 explained the entries reflected the Sukuk structure, including in particular agreeing with Appellant's counsel's description of the use of proceeds of property sale which benefitted other entities, as follows:

> PC2: Can you explain how, **why these entries would come about because of Sukuk**?
>
> BRIAN: From the Sukuk, the amount that was raised and accounted for in PIMM amounted to RM36,000,000.00 which is a portion of the Sukuk. Out of the RM36,000,000.00 million that was accounted for under PIMM, approximately RM8,200,000.00 was utilised to repay down the HSBC loan. **And the balance was used to the account of the other Sukuk entities in accordance with the Sukuk arrangement.**
>
> PC2: So if put it simply, when my property is Sukuk, so to speak, charged, pledged or sold and through... and **I receive a certain amount of money attributed towards my property, once I redeem that property, that balance, if used for the benefit of other companies in the group, either to redeem their properties, then the accounting entry will suggest that therefore you now owe me this amount of money. Would that be correct**?
>
> BRIAN: Correct.
>
> [Emphasis added]

[288] Furthermore, in his testimony, SD2 accepted that the term "default accounting entry" is not an accounting expression and is a term he used to explain entries, and there would have to be corresponding entries in the financial statements of the 4th Respondent and its related companies.

[289] However, this should not be construed negatively because in his cross-examination SD2 agreed that his "*default accounting entry*" would have to be "*true and fair*" and must be "*correct*" such that all the Sukuk entries in PIMM's accounts which he described as "*default accounting entries*" must be true, fair and correct. He also accepted that if it were otherwise, the accounts would have been false.

[290] Among others, he said this:

> PC2: So a default accounting entry, no matter what you call it, default or whatever, because, agree, there's no such terminology as default accounting entry?
>
> BRIAN: Alright.
>
> PC2: Agree?
>
> BRIAN: No, it's not an accounting expression.

[291] SD2 provided further clarity on this term *vis-à-vis* the Sukuk:

> PC2: So you are saying that a default accounting entry has to be true and fair?
>
> BRIAN: From an accounting perspective? Yes.
>
> PC2: Yes. You are also saying that a default accounting entry must be correct. Has to be.
>
> BRIAN: Has to be.

[292] After all, the concept of true and fair view in corporate accounting is the ultimate legal standard for corporate financial reporting in Malaysia under the Companies Act 2016. Section 249(1) reads as follows:

> General requirements for financial statements
>
> 249. (1) The annual financial statements for a financial year shall give a true and fair view of the financial position as at the end of the financial year and the financial performance for the financial year of the company.

[293] The law provides that a company's financial statements must accurately reflect its financial position, performance, and cash flows, comply with approved accounting standards, and be free from material misstatement.

[294] SD2 did not disagree with this.

> PC: Yes. Thank you. So now, all these Sukuk entries that you say are default accounting entry, you agree with me, from your own evidence just now, they are true and fair?
>
> BRIAN: Yes.
>
> PC2: Irrespective of whether you call it default or otherwise.
>
> BRIAN: Yes.
>
> PC2: Am I right?
>
> BRIAN: Yes.
>
> PC2: And they are also correct. Am I right?
>
> BRIAN: They could be explained further.
>
> PC2: Yes, they can explain further, but they are correct.
>
> BRIAN: Yes.

[295] It is therefore a correct finding of the Courts below that neither PIMM nor the 4th Respondent had the right to sell Wisma Talam, because it beneficially belonged to the Sukuk holders, and it could not have been sold without the Sukuk holders' approval via the control by the Sukuk Trustee.

[296] As the source of the sale proceeds was the property which was then beneficially owned by the Sukuk holders, there were no advances either from PIMM or to the 4th Respondent or to the related companies. The sale proceeds were applied by the Facility Agent for the partial redemption of the Sukuk as approved by the Sukuk Trustee and the SC, all in accordance with the Sukuk documentation.

[297] Thus the accounting entries were merely made to reflect the application of the sale proceeds by the Facility Agent pursuant to the terms of the Sukuk by way of default descriptions in PIMM's financial statements.

[298] Accordingly, in our view, it must be properly appreciated that while financial statements may well and should present a true and fair view, individual entries are not determinative of specific liabilities, and which do not obviate the need to establish specific transactional facts. In other words, audited accuracy does not render the individual accounting entries legally incontrovertible. Primary evidence and the actual facts as contained in the underlying and source documents such as contracts and deeds prevail over what are merely captured and recorded in the financial statements.

[299] Furthermore, unlike the treatment of the law on contracts, which under s 92 Evidence Act 1950 primarily states that once proven, no evidence shall be given in proof of the terms of the contract except the document itself (unless any of the six stated exceptions applies), s 34 mandates that entries, whilst may be relevant, shall not alone be sufficient evidence to fasten any liability on any person. The bookkeeping entries cannot be taken at face value as they are uncorroborated by underlying delivery orders, invoices, or written acknowledgements.

[300] In this case what it simply means is that it is critical that the Courts look at direct evidence and hence turn to the primary documents — the Sukuk legal documentation, specifically the APA, the IRA, the SPA, the Trust Deed, the Supplemental Trust Deed, the Declaration of Trust, the Deed of Conveyance, the Sukuk Certificate, the Purchase and Sale Undertakings and the SC approval letter. Not only the audited financial statements.

[301] We stress that the accounting entries were made to merely record the application of the sale proceeds in terms stipulated in the documents by way of default descriptions. This is because it was not possible for the 4th Respondent and its related companies to receive the sale proceeds as advances since the proceeds were applied towards the partial redemption of the Sukuk. And neither was there any surplus post-redemption to be gifted to PIMM.

[302] More sophisticatedly, SD2 in his evidence explained that in order to ascertain whether the inter-company balances were collectable, one has to see how the balances were actually reflected in the accounts. He concluded the balances are not debts *per se*, and that the intercompany entries were to address the "imbalances" arising due to the unequal net contribution to the Sukuk by the Sellers who sold the assets under the APA.

[303] SD2 said:

> BRIAN: I think it is important to first find out what these balances represent. A large portion of these balances represent account balances arising from the Sukuk, determined by the Sukuk trustee and as advised by Crossworld to Talam. Talam exercise no discretion over the entries passed by Crossworld which was then taken up and assumed in PIMM's books. **Just to explain how these balances arise and why they are not debts, these balances, at the onset, they arise because the utilisation of proceeds by the Sukuk entities were different from the value of the liabilities assumed by the Sukuk entities. The original liabilities assumed by the Sukuk entities was determined by the value that the book value of assets that were contributed into the Sukuk and therefore there is an imbalance. That is why you have this intercompany account balances sitting in the books**...
>
> [Emphasis added]

[304] These intercompany entries could not be debts *per se* because, according to SD2, they were not finalised, fluctuating on the movement of income and expense and that the final amounts would only be seen at the end of the Sukuk tenure. SD2 said:

> BRIAN: These are not debts *per se*, these are balances in relation to the Sukuk. They are not finalized, they are fluctuating, you can only arrive at a final figure at the end of the Sukuk, which is 7 years, but in this instance, the Sukuk was extended for another 2. So effectively, you will only be able to arrive at a final amount that would have to be cleared from the accounts after 9 years.

[305] In our view, these default entries (on the said 'advances') may be said to have been made in accordance with accounting standards to resolve an accounting issue rather than to reflect a legal position. It goes without saying that there are no underlying documents or other evidence to show that these entries were made pursuant to any legally binding obligations.

[306] There was also no agreement between the Sellers of the assets under the APA as to how any imbalance of contribution to the Sukuk was to be addressed. SD1 gave evidence that any imbalance would only be set off at the end of the Sukuk, and that the various amounts recorded in the respective accounts of the four Sellers had been entirely determined by the Transaction Administrator under the Sukuk appointed by the Sukuk Trustee.

[307] It is clear that the legal basis for the utilisation of the sales proceeds — towards partial redemption of the Sukuk — was governed by the SC's approval (which approved the pre-sale of the property), the SPA and the consequential Supplemental Trust Deed, as mentioned earlier. It is also not disputed, as seen earlier, that the sales proceeds never entered PIMM's banking account in the sale and redemption process, for even the deposit under the SPA went straight into the collections account controlled by the Facility Agent and the Sukuk Trustee and was, from there, subsequently paid out to the Sukuk holders. We cannot emphasise enough that since Wisma Talam and its sale proceeds were not the property of PIMM, there was manifestly no legally enforceable debt owed to PIMM. Therefore, there could not have been any depletion of PIMM's assets attributable to the write-off or waiver of such an alleged debt.

[308] Yet, despite this, the accounting treatment construed and recorded the utilisation of the proceeds differently — as "advances" and to the extent that there are no underlying contracts to support them (the advances), we agree with the contention that this is another reason to hold that these advances are not legally enforceable debts.

[309] Further, we cannot disagree with the contention of the 4th Respondent that the absence of such underlying contracts is somewhat acknowledged by the accounts, given the qualifying reference therein to such advances being "unsecured, interest free and have no fixed terms of repayment". We are of the view that this supports the position that they did not arise from legal or contractual obligations, and were not legal debts.

[310] In order to claim legally binding obligations, the existence of agreements upon which the default entries were made must be demonstrated. However, we stress that there were no such documents. Yet, the Appellant's counsel's cross-examination of SD2 was very much focused on the financial statements — particularly on what they stated, but without establishing any legal foundation for those default entries, despite SD2's explanation that the accounts are based on economic considerations, not strict legal principles.

[311] Related to this is that a plain reading of the accounts had also given the Appellant the impression — plainly erroneous in our view — that the default entries are due and payable within "the next 12 months" because the balance sheet reflected it as "current assets" to the effect that PIMM could therefore sue for those amounts.

[312] SD1, for the 4th Respondent, debunked this theory and explained that there was no such agreement and if parties started to sue each other, the Sukuk would collapse. She further testified as follows:

> CHUA: Ok Yang Arif, because when all the four parties in the beginning in 2005 agree to enter into this Sukuk and this amount, but not exact figure because in between there is a rental that because just I mentioned about the debit thing. So there is already a figure close to this amount already being debited down because of the apportionment of the loans. So if let's say we take this stand from day one once this amount is captured in the account as the creditor after one year, PIMM have to demand Intelbest to pay that means the entire Sukuk will collapse. Then what is the purpose of from day one entering into a Sukuk. Because the figure will not be fixed until the end of the Sukuk where parties may have to sell their property and our intention from day one when we enter into the Sukuk is not to sell the building. It's actually

to have time then from there when the Sukuk is pay off as per original plan, then the building will go back to the respective company but unfortunately it was not as what it is plans. So certainly if it is demand, entire Sukuk will collapse. That's mean Intelbest will go into, they are not able to pay because that is their only assets which in the Sukuk pool. And if the demand if they are being wound up then the Sukuk will collapse.

[313] SD2's explanation was that the 'advances' were default descriptions, and that the amounts are recorded as 'advances' in PIMM's accounts for these reasons:

DC1: ...Ok, now going back to your reply report, Encl 98, page 17, para 2.1. We have covered para (a). Can you turn to page 18, the next page, para (b). Now, you said 'Further, the proceeds from the disposal of the Property were deposited into the Ample Zone collection account, which is operated jointly by the Facility Agent (i.e. Malaysian International Merchant Bankers Berhad) ("the Facility Agent") and Ample Zone, for the purpose of redemption of the Sukuk for the benefit of the Sukukholders, and does not belong to PIMM.' **But, now, you said sale proceeds do not belong to PIMM. But we also see that accounting entries are made in PIMM's records or PIMM's accounts and they are recorded as advances. You have reviewed the account. Can you explain this accounting entries?**

BRIAN: From accounting perspective, **because the asset continues to be recognised in the books of PIMM from an economic perspective, there's also an underlying liability that supports an asset. The liability in this case would be the amount owing from the Sukuk to Ample Zone.** Because the asset has been subsequently sold, this book entry in the books will need to actually reflect the difference between the reduction in the original liability and how much has actually been benefited by PIMM. **Therefore, you actually recognise again on disposal of the investment property in PIMM's books**.

[Emphasis added]

[314] As such, given that under the Sukuk arrangement, it was not possible for the 4th Respondent and its related companies to receive the sale proceeds as advances since the proceeds were applied towards redemption of the Sukuk as directed by the SC, the accounting entries were made to merely record the application of the sale proceeds by the Facility Agent by way of default descriptions.

[315] As explained by SD2, whether the intercompany balances were collectable, how the balances were actually reflected in the accounts must be understood, and that here, the balances were not debts *per se* and that the intercompany entries were designed to address the "imbalances" arising due to the unequal net contribution to the Sukuk by the four Sellers in respect of the APA.

[316] We therefore conclude on this aspect that based on these documents, as concurrently found by both courts below, the sale proceeds of Wisma Talam under the SPA did not belong to PIMM, and never went to PIMM, but instead to the Sukuk holders, and that PIMM was not in a position to advance, and in fact and in law never advanced the sale proceeds to the 4th Respondent and the other related companies, despite the suggestion to the contrary in the financial statements.

[317] It is in our view safe to conclude that the default entries reflecting the said advances were made to address an accounting issue, and not intended to reflect a legal position. This explains the absence of any underlying documents or other evidence to show that the entries were made pursuant to legally binding obligations.

[318] In any event, it is telling to note that despite the overarching contention of the 4th Respondent that the Appellant failed to consider the underlying legal documents when reading the financial statements, or that it had omitted to consider the legal effects of the Sukuk structure and transaction which were said to be different from the accounting sense, before us, the Appellant still chose not to highlight any deficiencies or flaws in the various terms and conditions in the relevant Sukuk documentation to help advance its narrative on the ownership of Wisma Talam, its sale proceeds or the existence of the debts owing to PIMM. Much reliance was instead made by the Appellant on the accounting treatment.

[319] At the risk of repetition, the Appellant's position was that the entries in Talam and PIMM's financial statements reflected the true position. We have seen that they — the financial statements — demonstrated that first, PIMM 'owned' Wisma Talam since this property was classified as an investment asset. Secondly, when PIMM sold Wisma Talam pursuant to the SPA, the same was reclassified as an asset held for sale, and then the sale was noted under "subsequent events" and eventually the disposal gain was recognized in its income statement.

[320] Thirdly, the 4th Respondent and its related companies were indebted to PIMM. This was recorded as advances described as unsecured, interest free and with no fixed terms of repayment. Fourthly, amounts owing to PIMM in FY 2009 were in excess of RM48,000,000.00 but in FY 2010 the amounts owing were written off by PIMM and waived by the 4th Respondent.

[321] On the other hand, despite the accounting entries in the financial statements, the 4th Respondent instead contended as follows. First, PIMM did not own Wisma Talam or pledge the same as it had earlier been sold pursuant to the APA under the Sukuk transaction. Secondly, it follows that PIMM did not sell Wisma Talam such that it did not receive any sale proceeds.

[322] Thirdly, the proceeds were used to redeem the Sukuk and there was no surplus to advance to Talam such that the amounts reflected as advances to the 4th Respondent and the related companies are not debts *per se* but are merely default accounting entries.

[323] The Appellant argued that if the primary evidence does not support the accounting entries, then the 4th Respondent should correct the entries — but instead, the latter accept its correctness while relegating them to mere "*default accounting entries*" that can be ignored. We do not think this is a fair view of the position taken by the 4th Respondent. The 4th Respondent denied the entries were false but insisted that they could be explained by reference to the relevant legal documents.

[324] Whilst we take cognisance of the fact that audited financial statements of companies are of great interest to the accounting profession, the income tax department, banks and financial institutions, capital markets, rating agencies and the general business and investment communities, we do not believe that any of these stakeholders would accept audited accounting entries without further independent examination and analysis. Neither does this mean that companies can record anything in their accounts without being held accountable for it.

[325] For we again emphasise that it is already well-settled that accounts and balance sheets are merely secondary, evidentiary records of a transaction, but they do not create or conclusively prove a debt obligation. We stress that in order to conclusively establish whether a debt is legally owed, Courts must look past the accounting entries to the underlying legal documents — such as sale and purchase agreements, undertakings as well as trust and conveyance deeds.

[326] This crucial qualification was wholly ignored by SP2 in his interpretation of the advances. On the other hand, all these documents and that qualification were rightly referred to by SD2 when he explained how the default entries arose and correctly identified the sales proceeds according to the underlying documents. The Courts below were thus correct in having found that SD2 had provided the more reasonable explanation of the advances from the sales proceeds as a default description.

Courts' Acceptance Of Expert Witness's Opinion Over Another Expert Witness's

[327] In the final analysis, it is clear from the records of appeal that the Courts below preferred the expert evidence of SD2 over that of SP2, for good reasons, in light of the agreed terms and conditions embodied in the Sukuk legal documentation.

[328] We agree that SP2 did not get the underlying facts on the SPA sale correct because he was merely testifying on the basis of the accounting entries without regard to the underlying Sukuk transaction documents. At the time of his first report, SP2 did not even know that the property was involved in the Sukuk and, from his cross-examination, was completely unaware of the fact that neither the 4th Respondent nor PIMM had any control of the disposal of Wisma Talam and the application of the sale proceeds until he read SD2's Second Report.

[329] We therefore find that the acceptance of SD2's expert opinion by the High Court and the Court of Appeal is also entirely warranted because of the problems with the opinion rendered by the expert witness of the Appellant, SP2. SP2 agreed when asked that his conclusion in his first report that PIMM had received the sale proceeds and used the same to give out loans was based entirely on the accounts without reference to any other documents.

[330] Only after having read the 4th Respondent's SD2's first report did SP2 become aware that Wisma Talam was involved in the Sukuk *Al-Ijarah* transaction and that neither the 4th Respondent nor PIMM had any control over the disposal of the property and the utilisation of the sale proceeds. In fact, this also led to the Appellant amending its statement of claim. But SP2 then still insisted — without clear grounds — that the proceeds of sale nevertheless still belonged to PIMM to "advance" to the 4th Respondent and its related companies.

[331] The 4th Respondent was also correct in highlighting one example of SP2's lack of knowledge of the underlying Sukuk transactions when the latter erroneously insisted in open court that the 2% earnest deposit on the sale of the property under the SPA was received by PIMM, until having to admit to the contrary when shown the relevant documents to confirm the actual money trail that it went to the account controlled by the Sukuk Trustee.

[332] We must stress that an appellate court should be slow to interfere with the findings of the trial court in this respect, which were subsequently affirmed by the Court of Appeal. We therefore have no hesitation in associating ourselves with the observations made by the Court of Appeal in the following passages in its grounds of judgment:

> "[84] Based on the above, it is clear that SD2, unlike SP2, has fully comprehended and considered all the relevant transactions and factual matrix surrounding the transactions, including the Sukuk transactions. As such, SD2's evidence and expert reports would be of great assistance to the learned HCJ in determining whether or not there was any fraud on the part of the 4th Respondent and/or 1st to 3rd Respondents respectively.
>
> [85] It is settled law that an appellate court should be slow to disturb the findings by the trial judge on expert evidence (See Federal Court and Privy Council decided cases in *Seong Fatt Sawmills Sdn Bhd v. Dunlop Malaysia Industries Sdn Bhd* [1983] 1 MLRA 483, *Antonio Dias Caldeira v. Frederick Augustus Gray* [1934] 1 MLRA 19, *Collector Of Land Revenue v. Alagappa Chettiar And Collector Of Land Revenue v. Ong Thye Eng And Cross Appeals* [1968] 1 MLRA 696).
>
> [86] It is apparent that the learned HCJ heard evidence from both experts, weighed each one's opinions and made a reasoned decision. The learned HCJ formed the view that SD2 evidence was credible and reliable so far as material particulars were concerned. The learned HCJ accepted the opinion of SD2 over SP2".

[333] In a more recent pronouncement of the Federal Court in *Teoh Kiang Hong v. Theow Say Kow @ Teoh Kiang Seng Henry & Other Appeals* [2025] 2 MLRA 504, this important rule was reaffirmed, in the following terms:

> [142] However, when there exist opposing opinions between experts, the Court has the discretion to prefer one expert's opinion to the other. And the trial judge's preference for one expert's opinion over the other is an aspect to which the appellate court ought to have given considerable weight or deference unless a clear error is manifested. In the Privy Council case of *Collector Of Land Revenue v. Alagappa Chettiar And Collector Of Land Revenue v. Ong Thye Eng And Cross Appeals* [1968] 1 MLRA 696, Lord Diplock has this to say:
>
> > "Where expert oral evidence of valuers has been called at the trial and disclosed a conflict of opinion between them, the judge's finding as to which he regarded as most reliable was entitled to considerable weight though it was less sacrosanct than his findings of pure fact; a finding that the opinion of one expert witness was to be preferred to that of another, was also one which was not lightly to be disturbed by an appellate court unless it could be demonstrated that the judge who heard and saw them give their evidence had misunderstood it or that his reasons for preferring one to the other were clearly unsound."

[334] No less pertinently, in that same case, the Federal Court also highlighted the principle of non-interference on concurrent findings, as follows:

> "[18] That said, we are mindful of the trite position of non-intervention taken by this Court in relation to where there are concurrent findings of the courts below. In *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v. Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 1 MLRA 317, this Court stated that "there is no room for this court to reverse the concurrent finding of fact made by the High Court and the Court of Appeal that the appellants were the guilty party in breach of the agreements since it is trite that the appellate court is not prepared to interfere with the concurrent finding of fact made by the courts below". (Similar approach taken in *Batu Kemas, Spind Malaysia* and *Ho Tack Sien*). However, where there exist conflicting findings of fact by the High Court and the Court of Appeal, it is imperative for us to look, in order to see how and why the Court of Appeal had reversed or set aside the trial judge's findings of fact within the parameters permitted by the extent of the QOLs granted".

[335] It is therefore a fallacy to state that the effect of the decisions of the High Court and the Court of Appeal in this case renders the entries in PIMM and the 4th Respondent's audited financial statements worthless, let alone false. There is nothing on the evidence to show that these entries constituted an infringement of the then s 169 of the Companies Act 1965 (now s 251 of the Companies Act 2016) which essentially requires that all accounting entries to be true and fair.

[336] Accordingly, our answers to Questions 1 to 4 are as follows:

Question 1

Whether s 34 of the Evidence Act 1950 can be invoked by a party to proceedings to disavow its and/or its subsidiary's audited accounts?

Answer -

We find that this Question 1 is equivocal in its use of certain terms such as disavow and which in any event have no clear nexus to the matters decided by the Courts below.

However, it is clear that s 34 stands as an evidential rule that entries in audited accounts are merely relevant, but not sufficient by itself to prove legal liability or legal debt.

Question 2

Whether the cases of *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1989] 2 MLRH 705, *Lam Eng Rubber Factory (M) v. Lim Beng Yew & Ors* [1994] 2 MLRH 564, *TKM (Singapore) Pte Ltd v. Export Credit Insurance Corporation of Singapore Ltd* [1992] SGHC 240 and the like which held that loss or damage or a debt must be proved by primary evidence can be invoked by a party to proceedings to disavow its and/or its subsidiary's audited accounts?

Answer -

We reiterate that the requirement for primary evidence to substantiate the audited accounts complements and is consistent with the rule in s 34 that an accounting entry is merely relevant, but not sufficient by itself to prove legal liability or legal debt.

Question 3

Whether a party to proceedings is bound by accounting entries in its and/or its subsidiary's audited accounts? If not, in what cases are parties to proceedings not bound by its and/or its subsidiary's audited accounts?

Answer -

Consistent with our answers to Questions 1 and 2, we state that the accounts are reflective of economic substance and therefore not determinative of the legal rights of the parties, which rights are to be sought in the primary documents.

Question 4

Whether there exists in law the concept of a "default accounting entry" in that an accounting entry showing a debt owed by Party A to Party B in Party A's accounts can be disavowed by Party A?

Answer -

We do not find it appropriate to answer this question because it relates to an accounting issue. It is not strictly a legal issue but more a factual construct which is not suitable as a general question of law. We nevertheless hold that Courts may rely on concepts or terminologies such as "default accounting entry" if only to assist in the understanding of the issue in the case, which explanation for the entries would require regard be had to primary evidence.

The 3rd Key Issue — Whether There Was Any Writing Off Or Waiver Of The Debts Owing To PIMM From The 4th Respondent

The Complaint About the Waiver, Write-Off & Assignment

[337] These questions embody the key complaint of the Appellant, which it described as the single most fraudulent act committed by Talam/the 4th Respondent, because — with a stroke of a pen, this assignment, write-off and waiver exercise of the 4th Respondent by way of PIMM's directors' circular resolution dated 24 January 2010 wiped out the debts said to be due to PIMM in the sum of RM52,500,000.00.

[338] Taking into consideration the accounting entries in PIMM's audited financial statements which recorded the said debts that were due and owing by the 4th Respondent and its related companies to PIMM, the Appellant asserted that PIMM in this exercise had first, by way of an assignment resulted in the 4th Respondent owing RM52,500,000.00, but that this entire amount was subsequently written off by PIMM and waived by the 4th Respondent. Prior to this assignment, write-off and waiver exercise, PIMM's balance sheet showed that it had debts in the sum of RM48,000,000.00 due to it. This debt was included in the balance sheet as a 'non-current asset' which was eliminated as a consequence of the assignment, write-off and waiver exercise.

[339] The reason why this — the writing off of the (alleged) debts due to PIMM from the 4th Respondent — was asserted to be fraudulent was that PIMM knew that the company (PIMM) was indebted to the Appellant on account of the Consent Judgment which had been entered into between PIMM and the Appellant on 16 November 2009, a mere two months before the assignment, write-off and waiver exercise.

[340] Notably, these debts were a substantial part of PIMM's assets and the only means PIMM had to satisfy the judgment sum as parties had acknowledged in the Consent Judgment. Directors of PIMM must therefore be held responsible, as must the 4th Respondent as the sole shareholder, which was argued by the Appellant to be PIMM's shadow director responsible for the decision to undertake the said assignment, write-off and waiver exercise.

[341] It is observed that pursuant to the resolution of its directors, PIMM assigned debts owing to and owing by various parties to the 4th Respondent, followed by the waiver of the waived debts against the 4th Respondent. On the same date, the 4th Respondent passed its own directors' circular resolution, and as the shareholder of PIMM approved PIMM's shareholders' resolution to approve the assignment of debts and waiver.

[342] Now, we must state that given our finding that references to advances in the financial statements of PIMM in the relevant FYs did not constitute real or legally enforceable debts, this grievance of the Appellant about the assignment, waiver and write-off exercise *vis-à-vis* the same alleged debts has as a result become a non-issue. It is no longer necessary to examine this issue any further. The Appellant's case has failed. Nevertheless, for completeness we shall address the main concerns raised by the Appellant.

Waiver Was Part Of An Internal Plan

[343] It will be recalled that the 4th Respondent had to formulate a Restructuring Plan to have its status as a PN17 listed company lifted and removed (which it did succeed). The Appellant pointed out that in the Proposed Regularisation Plan of the 4th Respondent, there was, however, no mention of any plan for such assignment, write-off or waiver of indebtedness between PIMM and the 4th Respondent. And in the 4th Respondent's announcement to the stock exchange dated 2 May 2008 on its Proposed Regularisation Plan (which had been approved by the SC on 29 April 2008), one of the components of the overall Proposed Restructuring Plan was the Proposed Restructuring and Settlement of Debts which referred to the "*restructuring and settlement of debts due and owing to the lenders of the Talam Group of Companies*".

[344] PIMM, as a wholly owned subsidiary, was clearly a member of the 4th Respondent's own group of companies. Thus, it could not have been included in this settlement of debts plan. Similarly, in its Circular to shareholders dated 22 August 2008 the Proposed Debt Settlement of the 4th Respondent again concerned "the Group's defaulted debts", with no reference to any inter-company debts and certainly not any debt owing to or by PIMM.

[345] It is observed that the Court of Appeal nevertheless accepted the expert evidence of SD2 (Brian Wong) that the assignment, write-off and waiver exercise appeared to be part of an internal settlement plan, even though it should equally be acknowledged that SD2 agreed that he did not know if it was in fact part of an internal settlement plan, especially since he had not been supplied with any document on any such internal settlement plan.

[346] We find nothing objectionable in the testimony of SD2 who suggested that the plan on the waiver and write-off was internal and more informal in nature.

> PC2: ...The question is was the assignment and waiver of debts actually part of this internal settlement plan mentioned in these accounts. Was it?
>
> BRIAN: The internal settlement plan is not a formal or official programmed by the Holding Company to settle the debts of the subsidiaries. Right. It is a generic term if you look at the timing of the preparation of the accounts and when the assignment and waiver was done, and when the asset was disposed of it points to the directions that the Company was in fact cleaning up its books.

[347] In our view, this would not have been unlikely, especially when the plan was internally placed within the more complex Restructuring Plan which involved many transactions with third party creditors.

Waiver & Write Off

[348] Referring specifically to the questions, we agree that there is a difference between a write-off and a waiver. A write-off is an action that formally recognizes that an asset no longer holds value or that a debt is uncollectible. It removes an item from a company's financial records, reclassifying it as a loss or bad debt. Once written off, the amount is allowed as a deduction for tax purposes. *The Oxford Dictionary of Economics* (2nd Edn, 2003) defines write-off as -

> "To reduce the value put on an asset in a company's account".

[349] In contrast, a waiver forgives any debt owing such that it is not due anymore. It is defined by *The Oxford Dictionary of Law* (7th Edn, 2013) as-

> "The act of abandoning or refraining from asserting a legal right".

[350] It is, however, too rudimentary for us to state the basic and general rule that a debtor cannot assign his debt obligation to a third party without the creditor's explicit consent. Nor can a debtor unilaterally waive his own debt, for the right of waiver belongs only to the creditor. No further elaboration, we think, is necessary.

[351] In any event, to emphasise the context, we say again that the key issues in this appeal, such as on the sale proceeds, the advances and the waiver, are all intertwined and reflected in varying degrees in the financial statements which had called for the necessity for expert evidence by the accountants made available by the Appellant and the 4th Respondent, *vis-à-vis* SP2 and SD2, respectively. And we have already found, and as stated earlier, that there were no reasons to disagree with the relevant concurrent findings made by the High Court and the Court of Appeal which preferred to accept the evidence of SD2 over that of SP2.

[352] We observe, nevertheless, that both the High Court and the Court of Appeal did not find the use of the different terms — waiver and write-off — to be of significance. It is equally indisputable that the Appellant did not contend that the said grievance on the different terminology meant that the financial statements did not conform with the statutory requirement of the true and fair view. The findings represented the Courts' acceptance of the expert opinion of SD2.

[353] Again, we do not see any reason to interfere with the concurrent findings of the Courts below, especially after having considered the expert opinion as contained in the report by SD2 which stated that the underlying documents resolved the matter with certainty, that the net effect of the exercise was that the amounts were taken off the balance sheet and had no impact on the final accounts, and that almost the entirety of the amounts in the said exercise were not actual debts (as discussed earlier), but arose from the Sukuk transaction.

[354] In any event, as correctly stated by the Courts below, the assignment, write-off and waiver exercise did not affect, and any internal settlement plan could not have affected the Appellant's right under Consent Judgment. The Appellant still had the right to enforce the same. The problem, however, is that it was submitted by the Appellant that the only 'real' source of any repayment pursuant to the Consent Judgment had now disappeared.

[355] The amount of RM16,000,000.00 said to have been owing by the 4th Respondent to PIMM as debts or "advances" — which crucially resulted from the Sukuk *Al-Ijarah* transaction — was waived. Conversely, the amount of RM2,500,000.00 owed by PIMM to other creditors was assigned to the 4th Respondent — in the sense that the latter, in pursuance of its letter of financial support, assumed responsibility for PIMM's outstanding debts to third-party creditors. And for completeness it should be added that the total amount of RM38,000,000.00 owing to PIMM by Maxisegar as well as by the other companies involved in the Sukuk — which significantly were also the "advances" resulting from the Sukuk transaction — had been assigned to the 4th Respondent, and waived by PIMM.

[356] In our view, the Court of Appeal and the High Court were correct in accepting SD2's expert opinion that the net accounting effect of the assignment, write-off and waiver exercise was to remove intercompany imbalances created by the sale within the Sukuk structure. For all intents and purposes, the assignment, write-off and waiver exercise concerned sums recorded as debt, which in fact were merely accounting entries arising from such sale.

[357] In other words, almost all amounts arose from the Sukuk mechanics. They were not separate legal debts. We therefore agree with the following findings made by the Court of Appeal:

> "[83] Ultimately, the difference in terminology is also irrelevant because almost 99% of the amounts in the A&W were not debts *per se*, as they arose

from the Sukuk sale. Further, it is not the Appellant's case that the accounts are rendered not 'true and fair' because of the discrepancy in terminology. There is no necessity to call the auditor to explain the discrepancy on such a minor issue, as the same can be resolved by recourse to the directors' circular resolutions referred to above."

[358] The assignment, write-off and waiver exercise could legitimately be said to document an internal settlement consistent with the internal settlement plan as contemplated in PIMM's financial statements for FY 2009 (ended 31 January 2009), which was significantly some ten months prior to the recording of the Consent Judgment on 16 November 2009. In its note 18 to the financial statements, it was stated that the directors of PIMM were confident that the implementation of the Restructuring Plan for the Group would enable the 4th Respondent, as the parent company, to provide financial support to its subsidiaries. Indeed, earlier, in note 21 to the financial statements for FY 2008 (ended 31 January 2008) it had already been stated that the successful implementation of the Restructuring Plan would enable the 4th Respondent to settle all inter-company debts owing to PIMM.

[359] The exercise, we accept, is not uncommon in corporate business, especially in a conglomerate and group of companies. There is no lack of authority on this point. The Court of Appeal had made the general observation to such effect in the following self-explanatory passage in its judgment in the case of *Formis Resources & Ors v. Risk Management And Safety System Pty Ltd & Ors And Other Appeals* [2017] 4 MLRA 28:

"[37] ... The events complained of including the acquisition of the 12th defendant, the subsequent disposal of the 12th defendant to the 13th defendant, the inter-company borrowings, the decisions to cease operations, the writing off of debts, the running and management of business operations, announcements at Bursa Malaysia, are all events and matters which routinely occur in the corporate world and in the general scheme of doing business or running a corporation."

Expert Evidence Of SD2 Preferred To SP2's

[360] It cannot be gainsaid that the appeal records disclosed that SD2's evidence in his two reports was very ably and extensively cross-examined by counsel for the Appellant. However we agree with the decisions of the Courts below which had accepted his expert opinion not only on the key issues of sales proceeds *vis-à-vis* the advances stated in the financial statements and in respect of the waiver and write off exercise, but also the conclusion of the Courts that there was accordingly no proof of any act of dishonesty on the part of PIMM's directors and the 4th Respondent, which therefore absolutely demolished the case of the Appellant — of both fraudulent trading and conspiracy to defraud against the Respondents — on the balance of probabilities.

[361] We find that the decision to accept SD2's explanation challenging the Appellant's assertion of the absence of justification for the waiver to be well-founded by reason that the amounts reflected as due from related companies in PIMM's financial statement had been found to have arisen from mere accounting entries and not from actual cash advances of the sale proceeds. Further, we stress that the waivers of debts were a commonly adopted internal settlement exercise between holding company and subsidiary and between subsidiaries and related companies, and that the waiver appeared reasonable as evidence showed that the 4th Respondent, as its parent company had provided financial support both before and after the waiver.

[362] Nor could we disagree with the finding of the Courts below that if PIMM had properly estimated the general damages arising from the Consent Judgment, the sum would likely have been zero, and that only the amount of RM821,145.00 already ordered under the Consent Judgment would be payable.

[363] As we have stated earlier in this judgment, in the Consent Judgment, PIMM had agreed to pay the Appellant the security and earnest deposits of RM821,145.00, and for general damages to be assessed for breach of the Tenancy Agreement. In this regard the Appellant had sought to argue that it would have been entitled to a very considerable amount of such general damages. Its expert, SP2 in his report expressed the view that a reliable estimate could be made on the general damages agreed to be assessed under the Consent Judgment.

[364] In fortifying the argument that the waiver and assignment exercise was undertaken with a dishonest intention, the Appellant alleged that the amount due to the Appellant under the Consent Judgment was about RM21,000,000.00. This was the evidence given by SP2 but SD2 disputed this and maintained that the agreed sum of RM821,145.00 in the Consent Judgment — being the refund of the earnest and security deposit was the only sum the Appellant would be entitled to, as the assessment of general damages, had it been properly done would have arrived at the sum of zero.

[365] However, whilst this estimate was made by reference to publicly available audited financial statements of three private hospitals in Klang Valley, namely Gleneagles Hospital Kuala Lumpur, Puteri Specialist Hospital and Sentosa Medical Centre for the period between 2002 and 2009 to obtain an indication of the damages pursuant to the Consent Judgment, all three of which had in fact recorded losses during the early years of their operations, which was described as a common industry trend. By around 2002 when the Tenancy Agreement with PIMM was terminated — which gave rise to the claim for damages, the three hospitals had already started operations way back in 1997, 1986 and 1972 respectively.

[366] At the same time, the Appellant did not in its estimate take into account Hospital Pantai Indah itself despite its location which was near Wisma Talam and even though Hospital Pantai Indah was in fact the actual tenant operating the hospital on the very property. Hospital Pantai Indah too incurred losses in the first six years of its operation at the property.

[367] Thus the financial history of the said four hospitals exhibited they all recorded losses within the early years of their operation, in line with industry and market conditions that it would invariably take time for a new hospital to gain traction amongst consumers.

[368] SP2's reliance on the financials of Gleneagles, Puteri and Sentosa was also flawed for one other reason — these are established luxury hospitals — which would not be comparable to Wisma Talam as the latter was designed as a budget hospital. This is not to mention that whilst the Appellant specifically pleaded for loss of profit for three years only, SP2 estimated damages under the Consent Judgment for eight years, exceeding the Appellant's own pleaded period by five years.

[369] The High Court, as affirmed by the Court of Appeal accepted the findings and opinions of SD2 as contained in his reports (specifically paragraph 5 of his First Report) as an explanation for the waiver exercise and the related internal settlement plan. We reproduce the relevant parts.

> 5.6 I noted that the Waived Debts are mainly in respect of debtor companies which were directly involved in the Sukuk i.e. Talam, ISB, IJSB and ADSB, which debts assigned to Talam to be waived amounted to RM54,581,478.16, and exceeds the total amount of the Waived Debts of RM52,535,869.11. This means that the remaining debts assigned and waived by PIMM was less than the debt waived in favour of PIMM of RM2,542,371.10 (i.e. from companies owed by PIMM).
>
> 5.7 Notwithstanding the above, I note the following:
>
> (a) PIMM was funded almost entirely by Talam and/or the Talam Group, and at the time of the assignment of debts and waiver, was a wholly-owned subsidiary company of the Group.
>
> (b) PIMM had benefitted from the Sukuk, as part of the proceeds from the issuances of the Sukuk was applied for the settlement of PIMM's loan from HSBC;
>
> (c) In its financial statements for the FYE 31 January 2007 and 2008, PIMM's directors have expressed their confidence that upon implementation of the Regularisation Plan, Talam would be able to settle all the intercompany debts owing to the Company. This was not similarly expressed by the directors of Talam in Talam's financial statements for the same periods;
>
> (d) In its financial statements for the FYE 31 January 2008, PIMM's directors then made reference to an internal settlement plan among Talam and its subsidiaries settle the amount owing to the Company. Hence, the assignment of

debts and waiver of the Waived Debts appear to be part of such internal supplement plan;

(e) After the assignment of debts and waiver of the Waived Debts, PIMM's financial statements for the FYE 31 January 2010 to 2012 continued to make reference to a letter of financial support by Talam to settle the obligations of PIMM. This would not be unreasonable given that the assignment of debts and waiver of the Waived Debts would have reduced the net assets of the Company by the amount of the Waived Debts; and

(f) It would also be reasonable to expect that Talam would cease to undertake to settle the obligations of PIMM after the disposal of PIMM to Plenitude, given that PIMM had ceased being a subsidiary company of the Talam Group.

5.8 As MSB was the registered owner of the Land and PIMM was merely a lessee, it is not unreasonable to expect that MSB is entitled to a portion of the proceeds from the disposal of the Property, in view of its residual rights to the Land.

[370] In our view, SD2's opinions and testimony were not only plausible but also credible and entirely in keeping with the factual matrix of the case. This, we note, was attributed in large measure to SD2's more comprehensive assessment of all the pertinent aspects of the waiver and assignment exercise, including its background history, as well as his examination of all key aspects of the underlying Sukuk *Al-Ijarah* and the subsequent sale of Wisma Talam.

[371] Accordingly, the waiver and assignment exercise could be said to have been in contemplation in PIMM's FY 2008 (ended 31 January 2008) since the internal settlement plan among the holding company and its subsidiaries to settle the amounts owing to PIMM had already been mentioned in its financial statements for that FY 2008.

[372] This, for all intents and purposes puts paid to the argument advanced by the Appellant that the waiver and assignment exercise was designed to defeat the Consent Judgment which had been recorded only later in November 2009. There was no valid nexus between the waived debts and the Consent Judgment. And we also find the narrative of the Appellant that PIMM deliberately entered into the Consent Judgment with no real intention to honour its terms, incredible. In fact, the Appellant's own expert, SP2 himself conceded during cross-examination that there was no fraud on the part of PIMM and/or the 4th Respondent in its entering into the Consent Judgment.

No Concerns With Letters Of Financial Support

[373] The Appellant's attack on the letter of financial support issued by the 4th Respondent too was misconceived, since among others, first, the letter of financial support helped explain the financial position of PIMM upon the waiver of the debts; secondly, PIMM's financial statements showed that it had always received financial support from its own parent and the Group (which we must add is a very common and logical corporate behaviour); and thirdly these letters of financial support had been accepted by PIMM's auditors Messrs Baker Tilly Monteiro and Heng in FYs 2010 to 2012 which avoided the auditors from having to issue a "qualified opinion" that there was doubt that PIMM (and many of the other subsidiaries of the 4th Respondent involved in the internal settlement plan) could carry on as a going concern. The argument that the letter of financial support was not a legal guarantee is given the circumstances irrelevant.

[374] In light of the reliance on the said letters of financial support by the auditors in their audit of the financial statements, it would not be correct to describe them as "completely worthless" as alleged by the Appellant. Especially not when we take cognisance that subsequently, in FY 2011 and FY 2012 the 4th Respondent continued to issue letters of financial support to meet the financial commitments of its subsidiaries, including PIMM. It did not continue in its FY 2013 accounts and thereafter, since PIMM had been sold on 31 October 2012 to Plenitude Silver. It is therefore untenable for the Appellant to claim that PIMM never intended to pay its creditors.

[375] And this should also be looked at in the larger context that the 4th Respondent had in fact been providing financial support to its subsidiaries over the years, from Day 1. PIMM's financial statements — year in, year out — had always stated that it depended on its parent for financial support (as mentioned, this is very common and only to be expected anyway).

[376] The 4th Respondent also in this case submitted that the free lease of the property to Wisma Talam granted to PIMM in 1998 and the financial assistance rendered to PIMM to pay down the HSBC loan was worth around RM40,000,000.00. In fact, SD1 gave evidence that the 4th Respondent had paid out around RM750,000,000.00 to support its subsidiaries.

[377] For completeness, we should add that the witness statement of SD1 also stated that the financial crisis faced by the 4th Respondent led it to undertake a downsizing and restructuring of its internal group structure, among others, to strike out, voluntarily wind up and dispose dormant subsidiaries companies including PIMM. The headcount of the staff force during its peak was more than 1,000 and was later left with about 100. The total subsidiary companies post-merger exercise in 2004 was 109 and by 2016, it dwindled down to 49. It further stated — "The balance sheet had to be tidied up before all the process mentioned above. The process may involve assignment, waiver, and/or writing off receivables and payables within the group".

Long Delay In Appellant's Action Re The Consent Judgment

[378] Now, as stated earlier, damages were on 27 April 2015 assessed at RM23,824,939.51 together with interest at the rate of 8% per annum from the date of the writ of summons until the date of full settlement. As at 12 October 2015, the Appellant claimed that PIMM owed the Appellant the sum of RM49,233,505.15 under the Consent Judgment. This sum remained unpaid.

[379] Notably however, it was only close to five years after the date of the Consent Judgment dated 16 November 2009 and about five months after PIMM was wound up on 29 May 2014, did the Appellant on 13 October 2014 apply for an assessment of damages pursuant to the Consent Judgment.

[380] Despite the Consent Judgment having already embodied a crystallised sum of RM821,145.00, the Appellant never took steps to execute the same earlier. In fact, there was no evidence that the sealed Consent Judgment had even been properly served on PIMM.

[381] Significantly, neither PIMM nor the 4th Respondent recognised the liability arising from the Consent Judgment in their respective audited financial statements. This was also used as an argument that it was deliberate concealment on the part of PIMM and the 4th Respondent, and implied a dishonest intention. In truth we say that such non-disclosure plainly did in any way nothing to deprive the Appellant from its rights to claim for its judgment sum as recorded in the Consent Judgment.

[382] The 4th Respondent's position on this, which we find to be reasonable was that it was not involved in and had not been informed of the said assessment of damages proceeding by the Appellant. PIMM's directors also had not participated in the assessment of damages since the Appellant only applied for assessment after PIMM had been wound up. At the same time, the representatives from the office of the Official Receiver who represented PIMM at the hearing of the assessment of damages (before the change to private liquidators) never opposed the Appellant's application.

[383] But no less significantly, neither did the accounts of the Appellant disclose the Consent Judgment. The Appellant only for the first time recorded the existence of the Consent Judgment in its accounts for FY 2015, some six years after the date of the judgment, whereby the said financial statements were signed off on 4 February 2016, a mere few months after the instant suit was filed by the Appellant on 16 October 2015. The contention of the 4th Respondent that this suggested an afterthought on the part of the Appellant to buttress its claim is definitely not devoid of merit.

[384] As SD1 testified, during the pertinent period, the Group was in the midst of '*fire-fighting*' to rescue itself from financial difficulty and had to focus its attention on more crucial issues with the correct priorities, which was part of the reason PIMM entered into the Consent Judgment. If PIMM and the 4th

Respondent were not serious, or worse had intended to defraud the Appellant, the decision would not have been taken to enter into the Consent Judgment but instead they could have conveniently delayed everything and dragged the proceedings into the appeal process.

[385] This led to the claim by the 4th Respondent that the Appellant's raising the waiver and assignment exercise as a concern was a mere pretext relied on by the Appellant to divert the Court's attention from the Appellant's own indolence to act promptly in 2009 and execute the Consent Judgment, where the allegation was instead made that the waiver and assignment exercise had somehow defeated the rights of the Appellant under the Consent Judgment.

[386] In light of the analysis and above discussion, it is difficult not to agree with the 4th Respondent.

[387] Accordingly, our answers to questions 8 and 9 are as follows:

> **Question 8**
>
> Whether in law there is a difference between the "writing off" of a debt and a "waiver" of a debt?
>
> **Answer -**
>
> We note that this Question 8 is, for all intents and purposes, a challenge to the concurrent findings of fact by Courts below in respect of the waiver, write-off and assignment exercise, which were ruled by both the Court of Appeal and the High Court not to be fraudulent. These findings should not be re-opened. This Question 8 should not be answered.
>
> In any event, the distinction between these two concepts is already well-settled and cannot be in dispute. Nonetheless, when examining the legal rights and liability of the parties, regard must be had not to mere labels or terminologies employed, but to a proper scrutiny of the documentary evidence to be interpreted in context with the factual matrix which the trial court has the discretion to determine based on the evidence presented at trial. Thus, a reference to a waiver or write-off or assignment can never be determinative without the Courts performing such curial scrutiny.
>
> **Question 9**
>
> Whether as a matter of law a debtor can:
>
> (i) assign a debt it owes to a creditor to a third party? And
>
> (ii) waive a debt it owes to a creditor?

Answer:

We note that this Question 9, like Question 8, is for all intents and purposes also challenging the concurrent findings of fact by Courts below in respect of the waiver, write-off and assignment exercise, which were ruled by both the Court of Appeal and the High Court not to be fraudulent. These findings should not be re-opened. This Question 9 should also not be answered.

In any event, it is also plain that one cannot assign to a third party an obligation such as a debt owing to a creditor without the consent of the creditor. Neither can the person waive a debt it owes to a creditor in favour of the third party without the consent of the creditor. Similarly, here, the legal effect of terminologies used must be interpreted in context with the factual matrix which the trial court has the discretion to determine based on the evidence presented at trial.

The 4th Key Issue — Whether The Case Of The 4th Respondent Was Different From As Pleaded

[388] This is the one other main complaint of the Appellant. The Appellant submitted that both the High Court and the Court of Appeal did not observe the established principles on pleadings.

[389] The crux of its complaint was that the defence statement of the 4th Respondent did not plead that PIMM did not sell Wisma Talam or that the accounting entries reflecting a debt were mere default entries (there were no real debts).

[390] The argument was that since the 4th Respondent did not plead that PIMM did not sell the property, the Appellant argued that this meant that the 4th Respondent suggested that it was PIMM (not the Sukuk holders) that sold Wisma Talam to Hospital Pantai Indah such that the sale proceeds should thus belong to PIMM. There was also no pleading in respect of the entries on advances and debts merely being default accounting entries.

[391] Yet the Courts below decided in favour of the 4th Respondent, first in that PIMM did not sell Wisma Talam because it was already beneficially owned by the Sukuk holders, which meant that the sale proceeds could not have belonged to PIMM. Secondly the Courts accepted the evidence of the witnesses of the 4th Respondent on default accounting entries such that there were no actual debts or advances allegedly owed to PIMM by the 4th Respondent.

[392] Because these were not pleaded, the decisions represented a radical departure from the pleaded case of the 4th Respondent.

[393] In our view this question does not strictly arise from the decisions of the Courts below. On this ground alone, we should not entertain it any further. Secondly, the answer to this question is plain and obvious. It is well-settled that the Court cannot make out a case for the party which is different to what is pleaded as the Court will only grant relief on a party's pleaded case. The basic and long-standing principle that a litigant may win or lose on pleadings holds true.

[394] Nevertheless, for completeness, we agree with the submission of the 4th Respondent that the Courts below could not have made out a case which was different from what had been pleaded by the Appellant as plaintiff because the Courts had merely dismissed its claim, and in the process accepted the defence of the 4th Respondent. The Courts below did not make out any case contrary to parties' pleadings because the Courts unmistakably dismissed the claim instituted by the Appellant.

[395] The case of the defence was — we reiterate — essentially that there was a sale of the entire beneficial ownership of Wisma Talam under the APA by PIMM to Ample Zone/Sukuk Trustee which meant that the sale proceeds from the subsequent sale to Hospital Pantai Indah under the SPA did not belong to PIMM. The decisions of the Courts below did not deviate from this fundamental mainstay in the case of the 4th Respondent.

[396] In contradistinction, the Appellant's pleaded case was based on fraudulent trading under s 304 of the Companies Act 1965, and for conspiracy to defraud, but in respect of the latter, the Courts below correctly found the pleadings of the Appellant to be defective since the Appellant failed to plead any agreement or the requisite particulars of such conspiracy to defraud.

[397] As correctly determined by the Court of Appeal, the authorities on conspiracy to defraud are settled (see for example *Datuk Ishak Ismail v. Kenanga Investment Bank Berhad & Ors* [2012] 1 MLRH 446 and *Renault SA v. Inokom Corporation Sdn Bhd & Anor And Other Applications* [2008] 3 MLRA 504). This means that in this case any failure of the Appellant to plead any agreement or the particulars of the agreement, or to plead with clarity of the alleged overt acts of each of the Respondents in committing the alleged conspiracy in pursuance of their agreement is fatal to the said allegation.

[398] As such, our answer to this final question in this appeal is as follows:

> **Question 10**
>
> Whether the Court of Appeal decision of *Sinar Mudah Sdn Bhd & Anor v. Ramasamy Muthusamy & Anor* [2020] 1 MLRA 577 that it is not open to a Court to make out a case for a party which is different to what is pleaded is the correct statement of the law in Malaysia?
>
> **Answer**
>
> Affirmative. However, this question is a settled point of law that requires no further clarification. It is not even relevant to this appeal because the matter did not arise from the decisions of the High Court

or the Court of Appeal, and in any event the Courts below had merely dismissed the claim of the Appellant as plaintiff based on the pleaded issues and evidentiary record.

Concluding Observations On The Claim Of The Appellant

[399] We must emphasise that the foundational validity, commercial functionality, and legal structure of the Sukuk *Al-Ijarah* in this case remain robust and undisturbed. The focus of this decision is on the narrow proprietary and contractual boundary governing the sales proceeds *vis-à-vis* the advances recorded in the financial statements.

[400] By virtue of the sale of Wisma Talam pursuant to the APA into the Sukuk structure, the property no longer beneficially belonged to PIMM. As such, it follows that the sale proceeds of Wisma Talam under the SPA belonged to the Sukuk holders and were used to partially redeem Sukuk. PIMM rightly never owned those proceeds, so there was no value available to be owed to PIMM or transferred away.

[401] In our view, the accounting balance did not represent a recoverable debt, but merely an internal group balance that was restructured as part of a broader arrangement. The recorded "receivable" only arose by virtue of the Sukuk mechanics. The Sukuk redemption could be said to be relevant mainly as evidence of where value flowed, rather than the origin of the debt.

[402] The items on advances in the financial statements was merely a consolidation or accounting allocation entry which arose from the Sukuk transaction and the pre-sale. It did not reflect an actual transaction between separate legal entities.

[403] Ownership was transferred to the Sukuk holders, but the parties were free to contractually allocate disposal proceeds and residual value. The existence of a residual entitlement in favour of the originator (where the surplus from the sales proceeds, if any, was agreed to be gifted to the Sellers such as PIMM) does not negate the transfer itself.

[404] As the proceeds are contractually bound to the mechanism of early redemption and facility reduction, where the pre-maturity disposal proceeds must be paid directly into a ring-fenced collection account for the explicit purpose of early redemption, they are also legally applied to the credit and benefit of the Sellers including PIMM for that specific debt-extinguishing purpose, leaving the core Sukuk structure and the underlying true sale fully intact and undisturbed.

[405] We accept that the default description is a mere terminology which formed part of the accounting opinion used by SD2 when explaining its rebuttal to SP2's report in respect of the advances in PIMM's financial statements. In that context it can certainly be said that this is an accounting issue which is a factual issue peculiar to this case. This also means that construing default accounting entry in isolation without regard to the underlying legal documentation would have no generic application to any other case. And neither would documentation in any other case be the same as presently. It is neither a legal issue, generic in nature nor an issue of public interest.

[406] In light of our findings in respect of the accounting entries in the financial statements of PIMM in the relevant FYs, and in that context, having examined the underlying legal documentation of the Sukuk *Al-Ijarah*, especially concerning the sale of Wisma Talam to Hospital Pantai Indah, to the effect that there was no real and enforceable debts owing by the 4th Respondent and its related companies to PIMM, the attack by the Appellant on the assignment, write off and waiver exercise undertaken by PIMM and the 4th Respondent, which exercise concerned these debts is plainly untenable.

[407] The act of writing off debts could amount to fraudulent trading (see *LMW Electronics Pte Ltd v. Ang Chuang Juay & Ors* [2009] 5 MLRH 39) but here, real debts recorded in the financial statements of PIMM and the 4th Respondent did not exist, let alone enforceable. These were merely intercompany accounting entries. Similarly, the act of issuing letters of comfort could also amount to fraudulent trading (see *Re Augustus Barnett & Son Ltd* [1986] BCLC 170) but evidence in this case demonstrates that the issuance of letters of financial support by the 4th Respondent to its subsidiaries was commercially and financially warranted. These — especially the waiver and the letters of financial support, we agree, were legitimate group restructuring initiatives, not instruments of fraud. As such, nor can the claim predicated on fraudulent trading and conspiracy to defraud be sustained.

[408] In any event, as highlighted above, the Appellant's pleadings on conspiracy were patently defective and more fundamentally, the element of dishonesty to sustain its case of fraudulent trading is totally absent.

[409] And for the latter — on fraudulent trading, the Federal Court in *Dato' Prem Krishna Sahgal v. Muniandy Nadasan & Ors* [2017] 6 MLRA 1 already held that for the purpose of establishing an "*intent to defraud*" creditors in s 304 of the CA 1965, the element of dishonesty is an essential ingredient. More recently, this Court in *Lai Fee & Anor v. Wong Yu Vee & Ors* [2023] 3 MLRA 495 restated the principles in respect of fraudulent trading under s 540 of the Companies Act 2016 (formerly s 304 of the CA 1965) which included the following:

> "[24] ....
>
> i. The existence of fraud is a question of fact. It is dependent on the circumstances of each particular case. Fraud must mean actual fraud, ie, dishonesty of some sort (*PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd* [1980] 1 MLRA 562);
>
> ii. In order to establish dishonesty under s 304 of the Companies Act 1965, it must be shown that firstly, what was done was dishonest according to the ordinary standard of reasonable and honest people,

> and secondly that the actor himself must have realised that the act was by those standards dishonest (*Tradewinds (supra)*);...

[410] As recently emphasised by the Court of Appeal in *Tay Keong Kok & Ors v. Eastmont Sdn Bhd & Another Appeal* [2025] 1 MLRA 85 the true context of fraudulent trading is loss to creditors, in the following terms:

> "[124] We cannot stress enough that fraudulent trading against creditors of the company under s 540 of the CA concerns not just fraud involving the incurring of debts knowing they could not be repaid such as in *R v. Grantham (supra)* and *Chin Chee Keong (supra)* but as the cases have more than amply shown, also fraud in the avoidance of the payments of such debts such as in *Tradewinds Properties (supra)*, and more particularly, the instant case before us. These are all part of the rubric of the fraudulent intention to deprive creditors of an economic advantage or inflict upon them some economic loss, as stated earlier (see *Coleman v. The Queen (supra)*)."

[411] Now, on the factual matrix of the case before us it is difficult to see how a case of fraudulent trading could be established when the element of dishonesty is clearly missing. Other than the pivotal finding on the non-existence of a debt that was owing to PIMM in the first place, the one aspect that we wish to touch on concerns the argument of the Appellant that one of the key ingredients of this fraud was the resignation of professional directors in PIMM and their replacement with persons who were effectively security staff or guards with absolutely no qualifications needed to be a director of a subsidiary of a public listed company.

[412] Thus the 1st, 2nd and 3rd Respondents were all named directors of PIMM at various dates between 24 September 2007 and 19 February 2009, not long after the sale of Wisma Talam on 19 April 2007, and after the resignation of both Ng Lai Tin (Senior General Manager in charge of Corporate Finance) and Mohd Salleh bin Daud (Land Manager in charge of titles and authority approval) as directors of PIMM on 24 September 2007.

[413] And evidence, we agree with the Appellant, shows that the three directors could not understand financial statements but had signed documents because of instructions by the management of the 4th Respondent.

[414] No less significant was the fact that the 1st and 3rd Respondents were directors of PIMM between 24 September 2007 and 19 February 2009. However, it was Ng Lai Tin and Mohd Salleh bin Daud, who were former directors of PIMM who had already resigned on 24 September 2007 who signed a series of Sukuk documents dated 8 January 2008, representing themselves as directors of PIMM.

[415] The argument that the 4th Respondent was a shadow director of PIMM given its control over PIMM and the fact that the named directors were accustomed to acting on its instructions cannot be said to be entirely without merit. Correspondingly, neither could it be outrightly dismissed that the 1st, 2nd and 3rd Respondents might be construed as nominee directors of the 4th Respondent.

[416] It cannot be denied, based on the evidence of SD1 among others, that it was the 4th Respondent who decided that PIMM should enter into the Consent Judgment with the Appellant and who also decided to undertake the assignment, write off and waiver exercise, amongst other actions. After all, the 4th Respondent as the parent/holding entity of the group had formulated and driven the Restructuring Plan for the entire group to get itself out of the PN17 status.

[417] In other words, there might be some basis to conclude that the affairs of PIMM were being carried out by the three respondents as directors on the instructions of the 4th Respondent, as its shadow director. However given our other findings, we do not have to make a determination whether the 4th Respondent was in fact under the law the shadow director of PIMM.

[418] We are mindful of the argument of the Appellant that the appointments of the three respondents ought to be seen in the context of the prevailing circumstances then, when PIMM had become dormant and the 4th Respondent was in financial distress. According to the 4th Respondent the only duty to be performed by the directors was the signing off of the financial statements which entire preparation and process were overseen by the Chief Financial Officer of the group.

[419] We wish to make two important points. First, we have already stated that there was no dishonesty to show that the business of PIMM had been carried on with the intention to defraud its creditors.

[420] Secondly, we cannot however, at the same time accept that there was absolutely nothing irregular about the 4th Respondent's contention that it was not realistic for it to appoint 'high-powered' directors to merely warm the directors' chairs of a dormant company whilst staving off a financial crisis. We reiterate that the issue is not dishonesty or fraud — fraudulent trading or conspiracy to defraud — but a palpable and material deficiency in sound corporate governance on the part of PIMM (the board) and the 4th Respondent (the shareholder) in having appointed the three.

[421] In other words, whilst the facts might suggest that the purpose behind the appointments was innocuous and more consistent with the prevailing factual matrix confronted by the 4th Respondent and its group of companies, it is certainly questionable whether the 1st, 2nd and 3rd Respondents could comfortably satisfy their overriding duties under the provisions of s 213(2) of the Companies Act 2016 which require directors to exercise reasonable care, skill, and diligence.

[422] We stress that this standard incorporates both objective and subjective elements. As for the former, every director must meet the minimum standard of a reasonably diligent person with the general knowledge, skill, and experience that may reasonably be expected of someone carrying out the same functions. Could the three directors have fulfilled this? As for the latter, if a director possesses specialist qualifications or experience, they will be held to that higher standard.

[423] Pertinently here, this means that under the objective test, ignorance is definitely not a defence. For example, directors cannot claim they did not read or understand board papers or financial statements. The assertion that the statutorily enforced audit requirements under the Companies Act 2016 would safeguard PIMM is irrelevant to the statutory obligation of company directors to ensure they individually exercise reasonable care, skill, and diligence.

[424] It must be appreciated that conglomerates or group structures routinely appoint parent-company management or middle-management officers often without extra pay to subsidiary boards, including or especially dormant ones, to streamline control. However, extending this practice to frontline, non-management staff — such as security guards — constitutes a fundamental failure of corporate governance.

[425] Under the Companies Act 2016, a dormant company and its directors are not exempt from legal obligations; its directors remain personally liable for compliance, statutory declarations, and financial integrity. Appointing such individuals of a dormant subsidiary also risks the creation of a shadow directorship and that even if dishonesty or fraudulent trading is not proven, establishing a board of convenient nominees who cannot independently discharge their statutory duties is patently an unacceptable and irresponsible governance failure.

[426] It must also be appreciated that a failure to adhere to s 213 is an offence, where under s 213(3), upon conviction, the director in default can be liable to five years imprisonment or a maximum fine of RM3,000,000.00, or to both.

The Answers To The 10 Questions Of Law

[427] Even if the answers to all 10 questions favoured the Appellant (which is not the case), it is difficult to see how they could advance the case of the Appellant when none of the 10 meaningfully touched on either fraudulent trading or conspiracy. This is especially so given the concurrent findings of the High Court and the Court of Appeal in their dismissal of the Appellant's claim. We need only refer to the following observation by the Federal Court in the recent case of *Teoh Kiang Hong v. Theow Say Kow @ Teoh Kiang Seng, Henry & Other Appeals* [2025] 2 MLRA 504:

> "[18] That said, we are mindful of the trite position of non-intervention taken by this Court in relation to where there are concurrent findings of the courts below. In *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v. Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 1 MLRA 317, this Court stated that "there is no room for this court to reverse the concurrent finding of fact made by

the High Court and the Court of Appeal that the appellants were the guilty party in breach of the agreements since it is trite that the appellate court is not prepared to interfere with the concurrent finding of fact made by the courts below". (similar approach taken in *Batu Kemas, Spind Malaysia and Ho Tack Sien*).

[428] At the same time we are also fully cognisant of the rule that leave having been granted is no bar to the panel hearing the substantive appeal refusing to answer the questions posed, such as when the questions are not properly framed under s 96(a) of the Courts of Judicature Act 1964 (see the decisions of the Federal Court in *Dataran Rentas Sdn Bhd v. BMC Construction Sdn Bhd* [2009] 1 MLRA 163 and in *Tan Heng Chew & Ors v. Tan Kim Hor & Ors* [2006] 1 MLRA 786).

[429] This Court in the case of *Yong Tshu Khin & Anor v. Dahan Cipta Sdn Bhd & Anor And Other Appeals* [2021] 1 MLRA 1 has also held in no uncertain terms that even where this Court had granted leave, a subsequent panel of this Court need not answer the leave question or questions posed if the circumstances do not require it.

[430] We now state again the answers to all the questions raised in this appeal.

Question 1 - Whether s 34 of the Evidence Act 1950 can be invoked by a party to proceedings to disavow its and/or its subsidiary's audited accounts?

Answer — We find that this Question 1 is equivocal in its use of certain terms such as disavow, which in any event have no clear nexus to the matters decided by the Courts below.

However, it is clear that s 34 stands as an evidential rule that an entry in the financial statements is merely relevant, but not sufficient by itself to prove legal liability or legal debt.

Question 2 - Whether the cases of *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1989] 2 MLRH 705, *Lam Eng Rubber Factory (M) v. Lim Beng Yew & Ors* [1994] 2 MLRH 564, *TKM (Singapore) Pte Ltd v. Export Credit Insurance Corporation of Singapore Ltd* [1992] SGHC 240 and the like which held that loss or damage or a debt must be proved by primary evidence can be invoked by a party to proceedings to disavow its and/or its subsidiary's audited accounts?

Answer - We reiterate that the requirement for primary evidence to substantiate the audited accounts complements and is consistent with the rule in s 34 that an accounting entry is merely relevant, but not sufficient by itself to prove legal liability or legal debt.

Question 3 - Whether a party to proceedings is bound by accounting entries in its and/or its subsidiary's audited accounts? If not, in what cases are parties to proceedings not bound by its and/or its subsidiary's audited accounts?

Answer - Consistent with our answers to Questions 1 and 2, we state that accounts are reflective of economic substance and therefore not determinative of the legal rights of the parties, which rights are to be sought in the primary documents.

Question 4 - Whether there exists in law the concept of a "default accounting entry" in that an accounting entry showing a debt owed by Party A to Party B in Party A's accounts can be disavowed by Party A?

Answer - We do not find it appropriate to answer this question because it relates to an accounting issue. It is not strictly a legal issue but more a factual construct which is not suitable as a general question of law. We nevertheless hold that courts may rely on concepts or terminology, such as a default accounting entry, merely to clarify the issues, provided such explanations are supported by primary evidence.

Question 5 - Whether the reasoning and approach by the Federal Court in *Maple Amalgamated Sdn Bhd & Anor v. Bank Pertanian Malaysia Berhad* [2021] 5 MLRA 337 towards a "*Bai Bithaman Ajil*" Islamic financing facility equally applies to an Islamic "*Sukuk Al-Ijarah*" financing facility?

Answer - Our answer is whilst the general approach to uphold Shariah-compliant financial instruments and commercial transactions is always relevant, its application must be subject to the agreed terms and conditions of the facility as contained in the legal documentation of the differently structured Sukuk *Al-Ijarah*. The BBA and the Sukuk *Al-Ijarah* are clearly distinct facilities.

We further state that the legal construction of any Islamic transaction should be made on a case-to-case basis and has no general application across the board as the intention of the parties would have to be determined according to the specific structure of the facility and the terms and conditions set out in the individual transactional documents.

Question 6 - Whether a "seller" who has "sold" an asset to a financier pursuant to a "*Sukuk Al-Ijarah*" Islamic financing facility can nevertheless:

(a) redeem that asset prior to maturity of that facility; and

(b) own any excess of the purchase price less the redemption sum?

Answer — We answer this by stating that much would depend on whether the situations raised in this question are envisaged and authorised as part of the agreed terms and conditions of the facility as contained in the transaction document of the Sukuk *Al-Ijarah*.

In this case, the sale of the asset, the utilisation of its sale proceeds, including the gifting of any surplus to the originator/seller were made part of the terms and conditions of the Sukuk in the SPA and the Supplemental Trust Deed upon approval by the SC for the pre-sale.

However, this Question 6 is not only ambiguous but also raises a hypothetical scenario where the facts established in the case plainly differ from the facts assumed in this Question 6. This necessarily means that any answer would be of no consequence and would not be able to affect let alone reverse the decision of the Court of Appeal. At the same time, since much depends on the specific terms of the facility, the question and its answer would have no general application and would not be of public interest.

Question 7 - Whether a "seller" who has "sold" an asset to a financier pursuant to a "*Sukuk Al-Ijarah*" Islamic financing facility and has therefore parted with beneficial interest in that asset can nevertheless sell that asset to a third party during the period of the facility?

Answer — Similar to our answer to Question 6, whether the matters raised by the Appellant in this Question 7 could be pursued would depend on whether they were authorised by the agreed terms and conditions of the facility as contained in the transaction document of the Sukuk *Al-Ijarah*. In this case, the seller sold the asset (beneficially owned by the Sukuk Trustee under a trust for the Sukuk holders) to a third party during the period of the facility, in its capacity as a bare trustee for the Sukuk Trustee/holders.

However, this Question 7, like the previous Question 6, is not only equivocal but also raises a hypothetical scenario where the facts established in the case plainly differ from the facts assumed in this Question 7. This necessarily means that any answer would be of no consequence and would not be able to affect, let alone reverse, the decision of the Court of Appeal. At the same time, since much depends on the specific terms of the facility, the question and its answer would have no general application and would not be of public interest.

Question 8 - Whether in law there is a difference between the "writing off" of a debt and a "waiver" of a debt?

Answer - We note that for all intents and purposes this Question 8 challenges the concurrent findings of fact by the High Court and the Court of Appeal in respect of the waiver, write-off and assignment exercise, which were ruled by both Courts not to be fraudulent. These findings should not be re-opened. This Question 8 ought not to be entertained.

In any event, the distinction between these two concepts is already well-settled and cannot be in dispute. Nonetheless, when examining the legal rights and liability of the parties, regard must be had not to mere labels or terminologies employed, but to a proper scrutiny of the documentary evidence to be interpreted in the context of the factual matrix of the case which the trial court has the discretion to determine based on the evidence presented. Thus, a reference to a waiver, write-off or assignment can never be determinative without the Courts performing such curial scrutiny.

Question 9 - Whether as a matter of law a debtor can:

(i) assign a debt it owes to a creditor to a third party? And

(ii) waive a debt it owes to a creditor?

Answer - We note that this Question 9, like Question 8 is for all intents and purposes also challenges the concurrent findings of fact by the Courts below in respect of the waiver, write-off and assignment exercise, which were ruled by both the Court of Appeal and the High Court not to be fraudulent. These findings should not be re-opened. This Question 9 should also not be answered.

In any event, it is also plain that one cannot assign to a third party an obligation such as a debt owing to a creditor without the consent of the creditor. Neither can the person waive a debt it owes to a creditor in favour of the third party without the consent of the creditor. Similarly, here, the legal effect of terminologies used must be interpreted in the context of the factual matrix of the case, which the trial court has the discretion to determine, based on the evidence presented.

Question 10 - Whether the Court of Appeal decision of *Sinar Mudah Sdn Bhd & Anor v. Ramasamy Muthusamy & Anor* [2020] 1 MLRA 577 that it is not open to a Court to make out a case for a party which is different to what is pleaded is the correct statement of the law in Malaysia?

Answer - Affirmative. However this question is a settled point of law that requires no further clarification. It is not even relevant to this appeal because the matter did not arise from the decisions of the High Court or the Court of Appeal, and in any event the Courts below had merely dismissed the claim of the Appellant as plaintiff based on the pleaded issues and evidentiary record — and it was the Appellant who failed to ensure clarity and specificity in its pleadings.

Conclusion

[431] In light of the foregoing, we are of the unanimous view that this appeal cannot succeed. We conclude that the many arguments of the Appellant, whilst attractive, lend no merit to the appeal. The Appellant had clearly failed to prove its case on a balance of probabilities. Any appellate intervention into the decision of the Court of Appeal is therefore entirely unwarranted.

[432] As such, the decision of the Court of Appeal is affirmed. This appeal is accordingly dismissed, with costs to the 4th Respondent, subject to payment of allocatur.