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**Citranet Sdn Bhd v Kuwait Finance House (M) Bhd**

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HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO  
WA-24M-1-01 OF 2016  
AZIZAH NAWAWI J  
13 JULY 2016

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*Contract — Declaration — Application for — Plaintiff paid redemption sum for facility granted by defendant based on redemption statement — Defendant set off exit fee from plaintiff's Escrow and GIA accounts — Defendants demanded return of exit fee — Whether amount stated in redemption statement constituted full and final settlement — Whether set off of exit fees void as amount not stated in redemption statement — Whether defendant entitled to exit fees — Specific Relief Act 1950 s 41*

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The plaintiff and the defendant had entered into a facility agreement under Islamic banking facilities known as *Ijarah Muntabiyah bil-Tamlik Asset Acquisition Financing-I* ('the facility') whereby a facility amounting to RM40m was granted to the plaintiff. Nevertheless, the plaintiff later obtained financing from Malaysian Debt Ventures Bhd ('MDV') and requested redemption statement from the defendant for them to redeem the facility. The defendant issued the redemption statement and MDV paid the sum of RM27,738,301.43 pursuant to the redemption statement. The defendant further set off the sum of RM4,388,581.08 from the plaintiff's Escrow and GIA accounts with defendant. Subsequently, the plaintiff demanded for the return of the amount of RM623,328.93 being the exit fee from the defendant as the said amount was not stated in the redemption statement and that the plaintiff had made the redemption for a period more than three months from the date of notice of redemption dated 16 December 2013. The defendant refused to return the said amount and contended that the 'Early Termination of Lease Term by Customer' under cl X(ii) of the defendant's letter of offer was applicable as the early settlement was made less than three months from the notice of redemption for full settlement. Consequently, the plaintiff brought the present action and sought declarations pursuant to s 41 of the Specific Relief Act 1950 that: (a) the sum of RM27,939,421.17 in the defendant's letter of redemption and undertaking as full and final settlement; and (b) the debiting and/or set off of monies in the sum of RM623,328.93 from the plaintiff's Escrow account was not legal and void.

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**Held**, dismissing the plaintiff's application with costs:

- (1) The sum of RM27,939,421.17 could not be the full and final settlement as MDV had only paid RM27,738,301.43 on 26 February 2014. Further, via a letter dated 4 October 2013, the plaintiff was informed that as at 3 October 2013, the total amount outstanding was RM34,731,037.76. Added to that, the plaintiff had admitted via its affidavit in reply that the defendant could deduct the monies from the plaintiff's Escrow and GIA accounts to settle part of the facility. Thus, there was no legal basis for the first declaratory order (see paras 25–28). A
- (2) The plaintiff had admitted in its affidavit in support that the redemption was short by 11 days of three months, thus, from the plaintiff's notice to redeem dated 16 December 2013 and the date of full redemption on 7 March 2014, the notice was not in accordance with cl X(ii) of the letter of offer and the defendant had the legal right to impose the exit fees (see paras 34–35). B
- (3) The non-disclosure of the exit fee in the redemption letter was a non-issue as s 281 of the Islamic Financial Services Act 2013 ('the IFSA') clearly provides that any contract entered, which is in breach of IFSA shall not be void by reason of such breach (see paras 36–37). C
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**[Bahasa Malaysia summary** E

Plaintif dan defendan telah memeterai satu perjanjian kemudahan di bawah kemudahan perbankan Islam yang dikenali sebagai *Pembiayaan Pengambilan Aset Ijarah Muntahiyah bil-Tamlik* ('kemudahan') di mana perjanjian berjumlah RM40 juta diberikan kepada plaintif. Walau bagaimanapun, plaintif kemudiannya mendapat pembiayaan daripada Malaysian Debt Ventures Bhd ('MDV') dan memohon pernyataan penebusan daripada defendan untuk mereka menebus kemudahan tersebut. Defendan mengeluarkan pernyataan penebusan dan MDV membayar RM27,738,301.43 berikutan pernyataan penebusan tersebut. Defendan seterusnya menolak-selesai jumlah RM4,388,581.08 daripada akaun Escrow dan GIA dengan defendan-defendan. Seterusnya, plaintif menuntut pemulangan jumlah RM623,328.93 sebagai fi penamatan daripada defendan kerana jumlah tersebut tidak dinyatakan dalam pernyataan penebusan dan bahawa plaintif telah membuat penebusan bagi tempoh lebih daripada tiga bulan dari tarikh notis penebusan 16 Disember 2013. Defendan enggan memulangkan jumlah tersebut dan menghujahkan 'Early Termination Lease Term by Customer' di bawah klausa X(ii) surat tawaran defendan terpakai kerana penyelesaian awal dibuat kurang dari tiga bulan dari tarikh penebusan bagi penyelesaian penuh. Seterusnya, plaintif memulakan tindakan ini dan memohon deklarasi-deklarasi di bawah s 41 Akta Relief Spesifik 1950 bahawa: F

(a) jumlah RM27,939,421.17 dalam surat penebusan dan aku janji defendan sebagai penyelesaian penuh dan akhir; dan (b) wang yang didebitkan dan/atau ditolak selesai berjumlah RM623,328.93 daripada akaun Escrow plaintif terbatal dan tidak sah. G

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**A Diputuskan,** menolak permohonan plaintif dengan kos:

- (1) Jumlah RM27,738,301.43 tidak boleh jadi penyelesaian akhir dan penuh kerana MDV telah membayar RM27,738,301.43 pada 26 Februari 2014. Selanjutnya, melalui surat bertarikh 4 Oktober 2013, plaintif telah dimaklumkan bahawa pada 3 Oktober 2013, jumlah terutang adalah RM34,731,037.76. Selain itu, plaintif mengakui melalui affidavit balasannya bahawa defendan boleh menolak wang daripada akaun Escrow dan GIA plaintif untuk menyelesaikan bahagian kemudahan. Oleh itu, tiada asas untuk memerintahkan perintah deklaratori perintah (lihat perenggan 25–28).
- (2) Plaintif mengaku dalam affidavit balasannya bahawa penebusan kurang 11 hari daripada tiga bulan tersebut, oleh itu, berdasarkan notis penebusan bertarikh 16 Disember 2013 dan tarikh penebusan penuh pada 7 Mac 2014, notis tersebut selaras dengan klausa X(ii) surat tawaran dan defendan mempunyai hak yang sah untuk mengenakan fi penamatan (lihat perenggan 34–35).
- (3) Ketidakdedahan fi penamatan dalam surat penebusan tidak menjadi isu kerana s 281 Akta Perkhidmatan Kewangan Islam 2013 ('IFSA') jelas memperuntukkan bahawa jika apa-apa kontrak dimasuki, yang melanggar IFSA, tidak terbatal atas alasan pelanggaran tersebut (lihat perenggan 36–37).]

**Notes**

- F For a case on application for declaration, see 3(3) *Mallal's Digest* (5th Ed, 2015) para 4815.

**Cases referred to**

- G *Jafri Amin & Ors v Persatuan Automobil Malaysia* [1988] 1 MLJ 336 (refd)  
*Ladang Tai Tak (KT) Sdn Bhd v Suppiah all Andy Thavar & Ors* [1999] 5 MLJ 257, HC (refd)

**Legislation referred to**

- H Islamic Financial Services Act 2013 ss 135, 281  
Specific Relief Act 1950 s 41

*Abd Shukor Tokachil (Akram Hizri & Azad) for the plaintiff.*  
*Ramesh Gopal (Rajes Hisham Rahim & Gopal) for the respondent.*

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**Azizah Nawawi J:**

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APPLICATION

[1] The plaintiff's originating summons dated 4 January 2016 seeks the following orders:

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(a) a declaration that the sum of RM27,939,421.17 (as at 31 March 2014) in the defendant's letter of redemption and undertaking (dated 7 January 2014) is the full and final settlement of the financing facility *Ijarah Muntabiyah bil-Tamlik* under account No A00900000090159;

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(b) a declaration that the debiting and/or set off of monies in the sum of RM623,328.97 on 7 March 2014 by the defendant in relation to the plaintiff's escrow account under account No 007105001136 is not legal and void; and

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(c) an order that the defendant return the sum of RM623,328.97 to the plaintiff within 14 days from this order, failing which the defendant is to return the said sum of RM623,328.97 together with interests.

THE SALIENT FACTS

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[2] The defendant is a financial institution whilst the plaintiff is a customer of the defendant.

[3] Vide a letter dated 31 May 2012, the defendant provided the plaintiff with a number of Islamic banking facilities, including a *Ijarah Muntabiyah bil-Tamlik Asset Acquisition Financing-i* for RM40,000,000.

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[4] The defendant and the plaintiff then entered into a facility agreement on 31 July 2012.

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[5] As at 16 April 2013, the defendant has made five disbursements totaling RM37,585,231.80 to the plaintiff under the *Ijarah Muntabiyah bil-Tamlik Asset Acquisition Financing-i* facility.

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[6] At the material time, the plaintiff also maintain an escrow account No 007105001136 with the defendant.

[7] As at 3 October 2013, there was a sum of RM34,731,037.76 (principal amount) due and owing under the *Ijarah Muntabiyah bil-Tamlik Asset Acquisition Financing-i* under account No A00900000090159.

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[8] As at 3 October 2013, there was a sum of RM2,609,271.90 (credit) in

A the plaintiff's escrow account and RM6,035,082.07 (credit) in the plaintiff's seven GIA accounts.

B [9] In a letter dated 16 December 2013, the plaintiff informed the defendant that the plaintiff has obtained financing from Malaysian Debt Ventures Bhd ('MDV'). On 17 December 2013, the plaintiff has authorised Messrs Jeffrey, Wong, Ho & Lim ('MDV lawyers') to request for a redemption statement from the defendant in order for the plaintiff to redeem the *Ijarah Muntahiyah bil-Tamlik Asset Acquisition Financing-i* (A00900000090159).

C [10] The defendant received verbal instructions from the MDV lawyers to issue the statement of redemption after taking into account the credits in both the plaintiff's escrow and GIA accounts.

D [11] On 7 January 2014, the defendant has issued a redemption statement (after taking into account the credits in both the plaintiff's escrow and GIA accounts) to the MDV lawyers, stating the redemption sum for three months to be as follows:

E	On or before 31 January 2014	On or before 28 February 2014	On or before 31 March 2014
	RM27,533,910.85	RM27,738,301.43	RM27,939,421.17

F [12] On 26 February 2014, MDV paid the sum of *RM27,738,301.43*, pursuant to the said redemption statement, which was the redemption figure payable by *28 February 2014*. Added to that, on 7 March 2014, the defendant had also set off/deducted the sum of RM4,388,581.08 from the plaintiff's escrow and GIA accounts with the defendant.

G [13] Therefore the plaintiff's *Ijarah Muntahiyah bil-Tamlik Asset Acquisition Financing-i* account was redeemed for the total sum of RM32,126,882.51, consisting of:

- H (a) RM27,738,301.43 from MDV; and  
(b) RM4,388,581.08 from the plaintiff's escrow and GIA accounts.

I [14] In a letter dated 7 March 2014, the defendant informed the plaintiff that their *Ijarah Muntahiyah bil-Tamlik Asset Acquisition Financing-i* had been fully redeemed.

[15] In a letter dated 14 October 2014, and with reference to the statement of account for March 2014 (in respect of the RM4,388,581.08 deduction from the plaintiff's escrow and GIA accounts), the plaintiff seek the clarification on the exit fee/('exercise fee') of RM623,328.93 charged to the plaintiff, which

was not stated in the redemption statement.

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[16] In their letter in reply dated 11 November 2014, the defendant informed the plaintiff that since the early settlement of the banking facility was made less than three months from the notice of redemption for full settlement, then the ‘Early Termination’ of lease term by customer under cl X(ii) of the defendant’s letter of offer applies.

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[17] In a letter dated 16 June 2015, the plaintiff’s lawyer demanded the return of the sum RM623,328.93.

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[18] When the defendant refused to return the said sum, the plaintiff filed this application seeking a return of the same amount.

#### THE FINDINGS OF THE COURT

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[19] This application seeking declaratory is made pursuant to s 41 of the Specific Relief Act 1950 (‘the SRA 1950’), which reads:

41 Discretion of court as to declaration of status or right.

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Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he so entitled, and the plaintiff need not in that suit ask for any further relief:

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[20] Therefore, under s 41 of the SRA 1950, a declaration can be sought as to the plaintiff’s entitlement to a legal character, status or right to property. In *Jafri Amin & Ors v Persatuan Automobil Malaysia* [1988] 1 MLJ 336, the court held that where an applicant is not entitled to any legal character or to any right as to any property, he cannot invoke s 41 of the SRA 1950.

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[21] In *Ladang Tai Tak (KT) Sdn Bhd v Suppiah all Andy Thavar & Ors* [1999] 5 MLJ 257, the court held that a declaratory may be granted by the court if the following conditions are satisfied:

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- (a) there must exist a controversy between the parties;
- (b) the proceedings must involve a ‘right’;
- (c) the proceedings must be brought by a person who has a proper or tangible interest (ie the locus standi);
- (d) the controversy must be subject to the court’s jurisdiction;
- (e) the defendant must be a person having an interest to oppose the application; and

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- A (f) the issue must be 'ripe', ie, it must not be of academic interest, hypothetical or one whose resolution would be of no practical utility.

[22] The issue then is whether the plaintiff has establish all the above conditions before this court may grant the declaration sought.

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[23] In the first prayer of the originating summons, the plaintiff is seeking a declaration that the sum of *RM27,939,421.17* (as at 31 March 2014) in the defendant's letter of redemption and undertaking (dated 7 January 2014) is the full and final settlement of the financing facility *Ijarah Muntahiyah bil-Tamlik* under account No A00900000090159.

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[24] However, as can be seen from para 10.2 of the defendant's affidavit affirmed on 29 January 2016 and para 4.2.2 of the defendant's second affidavit affirmed on 4 March 2016, MDV had paid *RM27,738,301.43* on 26 February 2014. This corresponds with the redemption sum payable by 28 February 2014. These facts have not been disputed by the plaintiff and are therefore deemed to be admitted.

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- E [25] As such, I am of the considered opinion that there is no basis for the declaration that the sum of *RM27,939,421.17* in the defendant's letter of redemption and undertaking as full and final settlement when MDV only paid *RM27,738,301.43* on 26 February 2014.

- F [26] Added to that, I agree with the defendant that the sum of *RM27,939,421.17* cannot be the full and final settlement sum because the plaintiff was informed vide letter dated 4 October 2013 that as at 3 October 2013, the total amount outstanding under the plaintiff's facility was *RM34,731,037.76*.

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[27] Further, the plaintiff did not dispute the defendant's contention that the MDV lawyers had requested that the defendant is to issue the said redemption statement after taking into account or uplifting the funds in the escrow and GIA accounts. This is supported by the statement of account for March 2014 (exh KFH6) where it is shown that *RM4,388,581.08* was debited from the plaintiff's accounts. Added to that, in para 11.1 of the plaintiff affidavit in reply affirmed on 18 February 2016 (in response to para 10.2 of the defendant's affidavit), the plaintiff has admitted that the defendant can deduct the monies from the plaintiff's escrow and GIA accounts to settle part of the *Ijarah Muntahiah Bitamlik* facility.

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[28] Therefore the plaintiff's *Ijarah Muntahiyah bil-Tamlik Asset Acquisition Financing-i* account was redeemed for the total sum of *RM32,126,882.51*, consisting of the sum of *RM27,738,301.43* from MDV and *RM4,388,581.08*,

which was uplifted from the plaintiff's escrow and GIA accounts. As such, there is no legal basis for the first declaratory order. A

[29] The second prayer of the originating summons is for a declaration that the debiting and/or set off of monies in the sum of RM623,328.97 on 7 March 2014 by the defendant in relation to the plaintiff's escrow account under account No 007105001136 is not legal and void. B

[30] The plaintiff's contention on this is premised on two grounds:

- (a) that the plaintiff had made the redemption for a period more than three months from the date of the notice of redemption dated 16 December 2013; and C
- (b) that the said exit fee was never disclosed in the redemption letter dated 7 January 2014 and therefore renders the redemption letter dated 7 January 2014 as full and final settlement. D

[31] In the letter of offer dated 31 May 2012, cl X(ii) provides for 'Early Termination of Lease Term by Customer', and under sub-cl (e), it provides that: E

In lieu of 3 months in advance written notice by the Customer of KFHMB, a sum equivalent of 1.0% above the BFR p.a. calculated on the amount referred to in (a) above multiplied by three (3).

[32] Therefore under the above provision, the plaintiff will have to pay a sum equivalent of 1% above the BFR calculated on the amount referred to as the outstanding fixed portion (RM32,806,785.64) multiplied by three —  $(RM32,806,785.64 \times 7.60\%/12) \times 3 = RM623,328.93$ . F

[33] The plaintiff did not dispute the above clause but contends that that they had made the redemption for a period more than three months from the date of the notice of redemption dated 16 December 2013. The plaintiff informed the defendant of its intention to redeem the facility in its letter dated 16 December 2013 and the MDV has also issued a letter dated 17 December 2013 requesting for the redemption statement. Based on the redemption letter dated 7 January 2014, the plaintiff contends that MDV has redeemed the outstanding balance calculated on/before 31 March 2014 for the sum of RM27,939,421.17. Thus, the plaintiff submits that since the notice for redemption was given on 16 December 2014 and the plaintiff redeemed the total sum of RM27,939,421.17 calculated on or before 31 March 2014, then the redemption was made three months period after the notice of redemption dated 16 December 2014. G  
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A [34] However, the plaintiff's submission clearly contradicted the admission made by the plaintiff that the redemption was short by 11 days of three months. In para (32) of the affidavit in support affirmed on 4 January 2016, the plaintiff, inter alia, states as follows:

B 32. ... *Hanya di sebabkan wang penebusan dibayar pada 7.3.2014, iaitu 11 hari sebelum tempoh 3 bulan luput pada 18.3.2014*, Defendan secara unilateral menolak wang tersebut sebanyak RM623,328.93 daripada akaun escrow Plaintiff ...

C [35] Therefore, from the plaintiff's notice to redeem dated 16 December 2016 and the date of full redemption on 7 March 2014, the notice was not in accordance with cl X(ii) of the letter of offer and the plaintiff has the legal right to impose the exit fees.

D [36] The next issue raised by the plaintiff is that the said exit fee was never disclosed in the redemption letter dated 7 January 2014, then this is against the guidelines issued by Bank Negara on full and frank disclosure. It is the submission of the plaintiff that the defendant has failed to give notice in respect of the exit fees, and is therefore in breach of the guidelines on product transparency and disclosure issued by Bank Negara pursuant to s 135 of the Islamic Financial Services Act 2013 ('the IFSA 2013').

E [37] However, I am of the considered opinion and I agree with the defendant that this is a non-issue as s 281 of the IFSA 2013 clearly provides that any contract entered, which is in breach of IFSA 2013 shall not be void by reason of such breach. Section 281 reads as follows:

F 281 Except as otherwise provided in this Act, or in pursuance of any provision of this Act, no contract, agreement or arrangement, entered into in breach or contravention of any provision of this Act shall be void solely by reason of such breach or contravention:

G Provided that nothing contained in this section shall affect any liability of any person for any administrative, civil or criminal actions under this Act in respect of such breach or contravention.

H [38] Premised on the reasons enumerated above, I am of the considered opinion that the plaintiff has failed to establish that they have a legal right to the declaration sought and therefore the application is dismissed with costs.

*Plaintiff's application dismissed with costs.*

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Reported by Dzulqarnain Ab Fatar