

Foreclosing on a Loan Agreement cum Deed of Assignment (Completing the Puzzle): A Review of the Federal Court Decision in *Damai Freight v Affin Bank Berhad*

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I. INTRODUCTION

The Federal Court in *Damai Freight v Affin Bank Berhad*¹ (*Damai Freight*) had finally resolved the conundrum surrounding situations where the Issue Document of Title (commonly known as the ‘title’) of a property is issued but is not transferred to the assignor whilst the lender is foreclosing a property secured by a Loan Agreement cum Deed of Assignment (LADA).

A lender (usually the bank) may face various legal challenges which may affect the legality of its foreclosure proceeding if the title is issued before the lender completes the foreclosure under a LADA.² Should the bank complete its foreclosure under the LADA, despite the issuance of the title?³ Will the bank be in breach of the National Land Code (NLC) if it proceeds to foreclose under the original LADA?⁴

If the bank decides to adopt the safer route of registering the Charge and recommencing foreclosure proceedings under the NLC, it would have lost valuable time, money and effort in its original foreclosure proceedings under the LADA. Alternatively, if the bank chooses not to register the Charge, it runs the risk of the court declaring the entire foreclosure proceedings void once the assigned property is issued with a title.

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¹ *Damai Freight v Affin Bank Berhad* [2015] 4 MLJ 149.

² The rationale for having the Deed of Assignment as a form of security was explained by Dr. Wong Kim Fatt in his article entitled “Absolute Assignment: Lender Selling Without Court Order?”, *Malayan Law Journal*, [2002] 3 MLJ, p. cclxix.

³ *Ibid.* The same question was also raised by Dr. Wong Kim Fatt at pp. cclxxxvi where he questioned whether, ‘after default of payment by the borrower/purchaser and the exercise by the lender of its right to sell the assigned property without a court order, must the lender now obtain a court order for sale if the strata title is issued before the sale or after the sale but before its completion?’.

⁴ ‘... the provisions of the Code as to the rights of chargors are designed for their protection and cannot be waived; nor can the chargor contract himself out of the Code. It follows that no power of sale can be conferred by a chargor under the Code on a chargee himself by way of a debenture or power of attorney or otherwise, but proceedings must be brought by the chargee to obtain a judicial sale in accordance with the rigid procedure laid down in the Code. In such circumstances, any power of sale which purports to be conferred on a chargee himself, omitting all mention of notice and periods of default by a debenture or power of attorney and the necessity for obtaining a judicial sale would be invalid and ineffective to entitle a purchaser to be registered as owner. Per his Lordship Edgar Joseph J in *Kimlin Housing Development Sdn Bhd (Appointed Receiver and Manager) (In Liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805, p. 823.

This confusion was further compounded by two High Court decisions;⁵ each case approving two diametrically opposing legal positions of law on this matter.⁶ This legal issue which has been baffling practitioners (i.e. what steps should a lender take when an individual title is issued but is not transferred to the assignor whilst the lender is foreclosing a property secured by a LADA) was finally resolved by the Federal Court in *Damai Freight*.⁷

This article does not intend to discuss the legality of the assignment as opposed to a charge nor does it attempt to critically analyse Section 3 of the Civil Law Act 1956 or the judiciary's recognition of the concept of 'equitable mortgage' in Malaysia. Separate articles should be devoted to these issues. Instead, this article aims to justify the decision of the Federal Court decision in *Damai Freight* from various aspects of the law, particularly from the aspect of land law and the law on assignment.

II. THREE POSSIBLE STAGES WHERE AN INDIVIDUAL TITLE MAY BE ISSUED DURING A FORECLOSURE PROCEEDING.

Throughout a foreclosure proceeding under the LADA, the title of an assigned property may be issued at three different stages: (a) where the title is issued and transferred to the original assignor before foreclosure proceedings under the LADA commences; or (b) where the title is issued during the foreclosure proceedings (i.e. the period between the commencement of the foreclosure proceeding and completion of the auction); or (c) where the title is issued after the completion of the foreclosure proceedings.

This article will focus on the most contentious stage i.e. stage (b) where the title is issued during the period between the commencement of the foreclosure proceeding and completion of the auction.

III. WHERE THE INDIVIDUAL TITLE IS ISSUED DURING FORECLOSURE PROCEEDINGS UNDER THE LADA

In *Damai Freight*, the appellant had obtained the approval of the Selangor State Development Corporation, the *Perbandaran Kemajuan Negeri Selangor* (PKNS) to alienate a piece of land to the appellant. Pending issuance of the individual title to the said land, the appellant entered into a Lease Agreement with PKNS (Lease). The appellant subsequently took a loan totaling RM1.95 million from the respondent bank (which was then known as *Bank Buruh*). The loan was secured by a LADA of the Lease wherein

⁵ *Ooi Chin Nee v Citibank Bhd* [2003] MLJU 5, HC and *Hong Leong Bank Bhd v Goh Sin Khai* [2005] 3 MLJ 154, HC.

⁶ In *Hong Leong Bank Bhd v Goh Sin Khai* [2005] 3 MLJ 154, the High Court held at para 63 that 'there is no statute or rule in common law that once an individual title or strata title is issued, the absolute assignment is extinguished.' Conversely, the High Court in *Ooi Chin Nee v Citibank Bhd* [2003] MLJU 5, p.22 held that 'in pursuance of their contractual rights, when there is an issue document of title as in this case, the plaintiff must get the property transferred to his name and then register a charge in favour of the defendant/bank.'

⁷ *Supra* n1.

the appellant had amongst others “absolutely assigned all its rights, title and interest”⁸ under the Lease to the respondent. Around the time when the appellant had defaulted in its loan agreement, unbeknown to the respondent, the individual title to the said land was also issued. The respondent bank proceeded to sell the lands under the LADA. The respondent objected to the foreclosure, arguing amongst others that “the respondent bank had no right to enforce the LACA (LADA) and that the sale by the [respondent] bank was *ultra vires* the National Land Code 1965.”⁹ The sole issue of law which the Federal Court had to answer was this:

Could a lender having an absolute assignment of rights over the land continue to realise his security under the LACA (LADA) even though the title to the said land was subsequently issued?

IV. THE LEGAL POSITION OF AN ASSIGNMENT IN A LADA

Before deciding on the appropriate steps which a lender should adopt, the Federal Court had to first consider the legal position of an assignment under a LADA.

After referring to Section 4(3) of the Civil Law Act 1956¹⁰ and Mozley & Whiteley’s¹¹ definition of a ‘chose in action’, his lordship Abdul Hamid Embong had rightly concluded that an assignment being a ‘chose in action’ is a personal right to sue.¹² The same view was also expressed by the court in *Bachan Singh v Mahinder Kaur & Ors*¹³ where the court had observed that in a sale and purchase of land, the purchaser was only entitled to a right in *personam* in a nature of a chose in action when the contract was made.¹⁴

In the English case of *Torkington v Magee*¹⁵ his lordship Channell J held that the expression ‘chose in action’ clearly describes “a known legal expression used to describe

⁸ *Supra* n1, para 4.

⁹ *Supra* n1, para 10. Loan Agreement cum Assignment (LACA) was cited verbatim from the decision.

¹⁰ “Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.” Section 4(3) Civil Law Act 1956 (Malaysia).

¹¹ See also *Hong Leong Bank Bhd v Sum-Projects (Brothers) Sdn Bhd* [2010] 7 CLJ 1010, at para 19.

¹² See also Dr. Wong Kim Fatt, “Absolute Assignment: Lender Selling Without Court Order?”, *Malayan Law Journal*, [2002] 3 MLJ p. cclxix.

¹³ *Bachan Singh v Mahinder Kaur & Ors* [1956] 1 MLJ 97.

¹⁴ “...the point is that when that contract was made the purchasers acquired a right *ad rem* and in *personam* to the land which so far as the vendor was concerned they were entitled to have erected into a real right. I am not prepared to say that that amounted to an equitable right. I prefer to regard it as a legal right of the nature of a chose in action”. *Bachan Singh v Mahinder Kaur & Ors* [1956] 1 MLJ 97, 98.

¹⁵ *Torkington v Magee* [1902] 2 K.B. 427.

all personal rights of property which can only be claimed or enforced by action and not by taking physical possession".¹⁶

Adopting the descriptions above, it therefore follows that the assignment which a purchaser has assigned to the bank under the LADA as security for the bank's loan is not an interest in land but merely a chose in action or a bundle of rights in the contract.¹⁷ As a right in *personam*, the court observed that it "is [a] contractual right or benefit accruing under the Principal Agreement [the main Sale and Purchase Agreement]."¹⁸ An assignment merely transfers the chose in action to the banker.¹⁹ These contractual rights collectively amounts to a legal chose in action. They cannot and must not be equated to *ownership* in immovable property.²⁰ Once the loan has been fully repaid, that chose in action is capable of being retransferred or reassigned to the borrower."²¹

This leads us to the next question; what are the legal effect(s) which flows from the fact that an assignment is only a personal right but not a right *in rem*?

V. THE EFFECT OF AN INDIVIDUAL TITLE ON A FORECLOSURE PROCEEDING UNDER THE LADA

As a chose in action, the assignment of rights by the assignor to the lender (usually the bank) is not considered as 'dealings' within the National Land Code. Hence, it does not come within the purview and control of the National Land Code nor the Strata Titles Act 1985.²² Instead, the assignment is a contract entered between the lender and the assignor. This view was fortified by the Court of Appeal in *Hong Leong Bank Bhd v Tan Siew Nam & Anor*²³ where it was decided that the LADA is essentially "a contract between the [parties] where the [lender had] agreed to grant to the [borrower/assignor]

¹⁶ *Supra* n 14, at p. 430.

¹⁷ See S.Y. Kok, "A Review of Loan Agreements and Deed of Assignment (Absolute) under the Malaysian Torrens System", *Current Law Journal*, [1994] 2 CLJ p xxxv.

¹⁸ "Where there is a valid binding contract for the sale of land, the purchaser, when he has performed his side of the contract, acquires a right ad rem which is also a right in personam. In other words, he acquires a right to the land as against the vendor personally but not good against the world as a whole and, in due course, that right can become a real right good against the world as a whole on registration in accordance with the Land Code..." *Bachan Singh v Mahinder Kaur & Ors* [1956] 1 MLJ 97, p. 98.

¹⁹ "... it must be clearly understood that what is capable of being assigned under the deed of assignment absolute ... is only a legal right (a right of action at law or a right in rem) to the debt or the chose in action. At the time of giving notice to the other person from whom the assignor could have been entitled to receive the debt or specifically enforce his claim to the chose in action, the legal right of action at law will pass and transfer from the assignor to the assignee absolutely. This is quite different from the transferring of the ownership in immovable property which will require the State's magical act of registration in order to be effective. The assignee practically steps into the shoes of the assignor vis-à-vis the other person from whom the assignor could have been entitled to receive the benefit of and under the antecedent contract." SY Kok, A Review of the Court of Appeal Case of *Phileoallied Bank v Bupinder Singh and the Deed of Assignment* by Way of Charge Only, *Malayan Law Journal*, [2000] 1 MLJ lxxv, p. lxxiv.

²⁰ *Supra*, n18, at p. xc.

²¹ *Hong Leong Bank Bhd v Tan Siew Nam & Anor* [2014] 5 MLJ 34, para 72.

²² *Hong Leong Bank Bhd v Goh Sin Khai* [2005] 3 MLJ 154 was approved by the Federal Court in *Damai Freight v Affin Bank Berhad* [2015] 4 MLJ 149, at para 33.

²³ *Hong Leong Bank Bhd v Tan Siew Nam & Anor* [2014] 5 MLJ 34.

a loan in exchange for the repayment of that loan with interest.” The Court of Appeal rightly observed that “...The root of the loan transaction was not the property itself [as] the property merely served as a security for the repayment of the loan.”²⁴ Thus being a contract, the rights of the assignment are governed solely by the terms which had been agreed between the bank and the borrower.²⁵

One of the common agreed terms found in loan agreements which are commonly drafted to the bank’s advantage would usually state that: ‘Upon issue of a separate document of individual title to the said Land...the Borrower shall... *upon being so required to do by notice in writing from the Bank* take transfer or and execute a charge over the separate document of individual title...’. [emphasis added]

According to the Federal Court in *Damai Freight*, the abovementioned clause (and its variations) amounts to nothing more than a right or privilege that is extended to the lender under a contract.²⁶ Such a clause, as decided by the Federal Court in *Damai Freight*, does not make the creation of a charge a prerequisite (or condition) for the bank to proceed with foreclosure,²⁷ neither can the court compel the bank to register the charge when the court has no power to do so.²⁸ Since the bank cannot be forced to register a charge once the individual title to the land is issued, the bank should therefore (be allowed to) continue with the foreclosure proceedings which it started under the LADA even though the individual title was issued during the foreclosure process.²⁹

Secondly, by affirming various cases,³⁰ the Federal Court in *Damai Freight* had effectively dismissed the argument that an absolute assignment will automatically be

²⁴ *Supra* n1, at para 53. See also the Federal Court decision in *Chuah Eng Khong v Malayan Banking Bhd* [1999] 2 CLJ 917 where it was held that an assignment is no more than a mere security given by the respondents to the appellant for repayment of the loan.

²⁵ See the Federal Court in *PhileoAllied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh* [2002] 2 MLJ 513, where it was held that “All things considered... that in the absence of any statutory provisions or common law requiring the equitable mortgagee to obtain a court order to realize its security under an absolute assignment of rights to land, the court should give effect to and recognise the contractual rights as determined between the vendor and the purchaser.” Affirmed by the Federal Court in *Samuel Naik Siang Ting v Public Bank Bhd* [2015] MLJU 519, at para 44.

²⁶ “On the plain reading of these two clauses, we agree with the submission of learned counsel for the bank that these clauses only confer contractual rights or privileges to the bank in terms of the execution of a charge upon the issuance of the separate document of individual title in respect of the land. In our considered view, the Bank is not, however, obliged to ensure the execution of the charge and thereafter to obtain an order for judicial sale before it could proceed to exercise its rights under the LACA upon the appellant’s default under the loan. The underlined phrases in both sub-clauses above are manifestations of these rights of the bank.” See *DamaiFreight*, n.1, para 30.

²⁷ *Supra* n1, at para 31. See also the High Court in *Ruzain Zainudin & Anor v RHB Bank Berhad* [2011] 1 LNS 1196 where the Court was unable to find in the LADA any provision which makes it a “MUST” for the defendant to issue a notice to the plaintiffs to execute the Memorandum of Transfer and Charge. On the contrary, what the Court observed was an obligation on the plaintiffs themselves to take a transfer of and to execute a first legal charge in favour of the defendant. This they should do at their own cost and expense. They should also do so if so required by the defendant so to do.

²⁸ See *Re Robinson, Pickard v Wheater* [1886] 31 Ch D 247, 249 referred to by the Federal Court in *PhileoAllied Bank (Malaysia) Bhd v Bupinder Singh Avatar Singh & Anor* [2002] 2 MLJ 513.

²⁹ *Supra* n1, at para 32.

³⁰ High Court in *Hong Leong Bank Berhad v Goh Sin Khai* [2005] 3 MLJ 154, para 6; High Court in *Ruzain Zainudin & Anor v RHB Bank Berhad* [2011] 1 LNS 1196, para 45.

extinguished once the document of title is issued.³¹ In fact, the term LADA fortifies the view that the deed and the terms of the loan cannot and should not be extinguished immediately because various negative legal implications may flow from an invalid assignment.

First and foremost, the automatic extinguishment of the assignment will effectively cause the security granted by the assignor to the lender to ‘disappear’ during the period between the creation and the registration of the individual or strata title in the name of the assignor, thereby causing the loan to be temporarily unsecured! The security will only ‘reappear’ or be secured again after the charge is registered in the lenders/bank’s name. During this period, the financier’s security will be at risk. This creates a dangerous lacuna in the law which serves only to benefit the assignor.³² Financial institutions will not be willing to lend money for properties without individual titles, resulting in commerce coming to a grinding halt if this position is adopted. This cannot possibly be the legal position.

Secondly, the extinguishment of the deed of assignment will unjustly enrich the assignor which falls within the law of unjust enrichment. Recognised as an independent branch of law,³³ the law of unjust enrichment is neither “consent based nor wrong based”.³⁴ It aims to restore any enrichment which one party may have obtained against the other. The principle behind unjust enrichment lies in the fact that no one should be made richer through the loss to another.³⁵ Hence, the law of unjust enrichment aims to restore that enrichment back to the claimant. In order to prove unjust enrichment, the Federal Court in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd*³⁶ had establish four elements; they are a) that the party was enriched; b) the enrichment must be gained at the [party’s] expense; c) the retention of the benefit by the party was unjust; and d) there must be no defence available to extinguish or reduce the party’s liability to make restitution.³⁷

In his article entitled “An Introduction to the Law of Unjust Enrichment” by Alvin W-L See, the learned author listed various ways where a party’s benefit may be unjust.³⁸ Amongst others, it includes the (total) failure of consideration and a compulsory discharge of another’s debt.³⁹ Applying these two factors given by the author in the said article, it is submitted that if an assignment is dissolved once an issue document of title is issued, this will automatically cause a (total) failure of consideration and a discharge of the

³¹ *Supra* n1, at para 37.

³² “This leads to a dangerous state of affair that can have far-reaching implications on the bank sector. If the assignment is extinguished by the mere fact that a strata title has been issued, the assignor would be in a position to deal with the property and the financier’s security is at risk”. See *Hong Leong Bank Berhad v Goh Sin Khai* [2005] 3 MLJ 154, at para 21.

³³ *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] MLJU 33 at para 112.

³⁴ Alvin W-L See, “An Introduction to the Law of Unjust Enrichment”, *Malayan Law Journal*, [2013] 5 MLJ, p. xxv.

³⁵ *Supra* n 34 at para 108.

³⁶ *Supra* n 33.

³⁷ *Supra* n 34, para. 117.

³⁸ *Supra* n 34.

³⁹ *Supra* n 34, at p. xxvi.

assignor's debt since the security for the debt is extinguished. As a result, the borrower will be unjustly benefiting from the loan he has obtained from the bank.

In *RHB Bank Bhd v Travelsight (M) Sdn Bhd & Ors and another appeal*,⁴⁰ whilst recognising that the LADA is different and independent from the sale and purchase agreement, the Federal Court had decided that even though the original security of the LADA may be lost or altered, the validity of the assignment remains. Thus, the bank's rights to lay the first claim over the assignor's property continues to remain intact even though the nature of assignor's property may have changed; be it in money or otherwise.

The third effect is highlighted by the case of *Goh Sin Khai*.⁴¹ After conducting an extensive review of the NLC, the High Court decided that the assignor is not compelled by the NLC or the contract to register his name in the title once the individual title is issued.⁴² This observation was duly affirmed by the Federal Court in *Damai Freight*.⁴³ Thence, to impose an obligation on the lender to register its charge when the assignor himself is not obliged to do so would not only be impracticable and unfair for the lender,⁴⁴ it will also create a lacuna in the law which benefits the assignor in a foreclosure proceeding. This view was succinctly stated by Justice Syed Ahmad Helmy in *Goh Sin Khai* when his lordship observed that "creating legal obstacles or unnecessary procedural impediments for an equitable mortgagee to realise the security is...unsound as it only serves to expose both lender and borrower to greater risks rather than bring any commercial benefit to either."⁴⁵

Furthermore, as mentioned above, the rights so assigned under the LADA are not recognised by the NLC as 'dealings'.⁴⁶ Instead, they are contractual rights which though are independent of the NLC are nevertheless recognised under Section 206 (3) of the NLC.⁴⁷ Section 206(3) "serves to remind us that 'nothing in sub-section (1) shall affect

⁴⁰ [2016] 1 MLJ 175.

⁴¹ *Hong Leong Bank Bhd v Goh Sin Khai* [2005] 3 MLJ 154.

⁴² "There is no statute or rule in common law that once an individual title or strata title is issued, the absolute assignment is extinguished. Likewise, there is nothing to say that the assignee must extinguish the assignment by ensuring the assignor takes a transfer of the property and creates a charge in favour of the lender." See *Hong Leong Bank Bhd v Goh Sin Khai* [2005] 3 MLJ 154, at para 63.

⁴³ *Supra* n. 1, para 33.

⁴⁴ "The correct legal position may be stated as follows. When a property is reassigned to a borrower, it means that the bank executes a document relinquishing its security over the property. It cannot be equated with an obligation on the part of the bank to deliver title or possession of the property to the borrower. It is the developer who is obliged to deliver the property to the borrower after construction of the property and issuance of the strata/individual title." Court of Appeal in *Hong Leong Bank Bhd v Tan Siew Nam & Anor* [2014] 5 MLJ 34, para 62.

⁴⁵ *Hong Leong Bank Bhd v Goh Sin Khai* [2005] 3 MLJ 154, para 66.

⁴⁶ See *Chung Khiaw Bank Ltd v Hipparion (M) Sdn Bhd* [1988] 2 MLJ 62, p. 66. "That assignment cannot by any stretch of imagination be termed a 'dealing' with or in respect of land within the meaning of the Code. It only serves to transfer and vest in the second purchaser the rights and interest of the first purchaser under the sale and purchase agreement with the developer." High Court in *Hong Leong Bank Bhd v Goh Sin Khai* [2005] 3 MLJ 154, p. 68 as affirmed by the Federal Court in *Damai Freight (M) Sdn Bhd v Affin Bank Berhad* [2015] 4 MLJ 149, para 36.

⁴⁷ "...our present NLC recognises the contractual operation relating to land as envisaged under Section 206(3) of the NLC, apart from the other dealings mentioned under Sections 206(1) which requires the compliance of instrument in accordance with sections 207 to 212 and registration under Part Eighteen of the NLC." Federal Court in *Damai Freight (M) Sdn Bhd v Affin Bank Berhad* [2015] 4 MLJ 149, para 39.

the contractual operation of any transaction relating to alienated land or any interest therein.”⁴⁸ It therefore follows that until and unless the individual title of the property is registered in the assignor’s name, the security under the LADA will continue to be governed by the contractual terms between the parties⁴⁹ including the sale of the property during a foreclosure proceeding. These rights, labeled as “pre-registration contractual right” or “the unregistered registrable interest”⁵⁰ will remain valid in all aspects even though it does not come within the purview of the NLC.⁵¹

VI. CONCLUDING REMARKS

The Federal Court decision in *Damai Freight* is a landmark decision which has brought much clarity to this area of land law in Malaysia. The judges must be applauded for a well-researched and thoroughly grounded judgment. Although the issuance of land titles is beyond the control of assignees and assignors alike, the case of *Damai Freight* has provided lenders (particularly financial institutions) with clear guidelines on the proper steps the lenders should take if titles are issued during foreclosure proceedings.

⁴⁸ *Chung Khiaw Bank Ltd v Hipparion (M) Sdn Bhd* [1988] 2 MLJ 62, p. 66.

⁴⁹ “Malaysian courts have held that the contractual principles of law will govern the sale and purchase of land transaction until the registration of title, Tan Hooi Ping, “Seeking Specific Performance In Cases of Breach of Sale and Purchase of Land in Malaysia — An Analysis”, *Malayan Law Journal*, [2013] 2 MLJ clv, p. clxiii.

⁵⁰ S.Y. Kok, *The Torrens System and Equitable Principles*, Sweet & Maxwell Asia, Petaling Jaya, 2010, pp 521–523 referred to by Tan Hooi Ping, *Seeking Specific Performance in Cases of Breach of Sale and Purchase of Land in Malaysia — An Analysis*, [2013] 2 MLJ clv, clxiv.

⁵¹ “Section 206 (3) of the NLC, by providing a liberal application of equity, recognises the contractual operation of any transaction relating to alienated land or any interest therein. In this regard, we see no reason as to why a similar recognition could not be accorded to the Bank in exercising its power of sale over the Land in accordance with the contractual provisions under the LACA.” Federal Court in *Damai Freight (M) SdnBhd v Affin Bank Berhad* [2015] 4 MLJ 149, para 41.